

RENDERED: JULY 29, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000567-MR

CITY OF HAZARD, KENTUCKY;  
WILLIAM D. GORMAN, MAYOR

APPELLANTS

v. APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE JOHN D. CAUDILL, JUDGE  
ACTION NO. 03-CI-00298

KENNETH BRYANT

APPELLEE

### OPINION REVERSING AND REMANDING

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BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

HENRY, JUDGE: The City of Hazard appeals from a judgment of the Perry Circuit Court requiring the city to pay retirement pension benefits to an officer of the Hazard City Police Department while the officer continues to remain employed by the city in the same paid position. We reverse.

In 2001, Joe Turner, Chief of the City of Hazard Fire Department, reached the milestone of thirty years' continuous

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<sup>1</sup> Senior Judge John D. Miller, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

service with the Department. Chief Turner realized that the city's pension plan provided that on completion of thirty years' service the pension benefit payable to him on retirement accrued to the maximum level of 75% of his monthly salary.<sup>2</sup> Seeing little economic incentive to continue to work, he applied to begin receiving his pension benefits while continuing his employment, and asked that he be allowed to enroll in the County Employees Retirement System (CERS) and to begin making contributions toward an additional pension benefit under that plan.<sup>3</sup> As the Hazard city officials could find no statute, ordinance or city personnel policy preventing such a practice, and because the city wished to continue to benefit from Chief Turner's training and experience, his request was eventually granted. When it became known that Chief Turner was being allowed to receive pension benefits while continuing to work, other city employees began to inquire about doing the same

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<sup>2</sup>The City of Hazard has a pension plan for police and firefighters originally implemented pursuant to Kentucky Revised Statutes (KRS) 95.621 through 95.629. Under this plan and KRS 95.624(2) the monthly pension benefit payable upon retirement after 20 years' service is 50% of monthly salary; between 20 and 25 years' service the benefit is 50% plus 2% for each year in excess of 20; for 25 years' service the benefit is 60% of monthly salary; between 25 and 30 years the benefit is 60% plus 3% for each year in excess of 25; and the benefit payable after 30 years is 75% of monthly salary at the time of retirement. After 30 years' service there are no additional increases in the benefit as a percentage of monthly salary.

<sup>3</sup>In 1988, KRS 95.621 was amended to require that no new pension funds could be created pursuant to the section, and that police and firefighters hired after August 1, 1988 would be covered by the County Employees Retirement System (CERS). Employees already participating in the plan were given the option of continuing in the plan or changing to CERS.

thing. Kenneth Bryant, the appellee, has more than twenty years' service with the City of Hazard Police Department. It is undisputed that Bryant qualifies to retire and begin receiving retirement benefits.

In October 2002, Bryant wrote to the Mayor and the Pension Board Members, "...requesting retirement from the old City Pension Plan so that [he] might join the County Employee (sic) Retirement System." The city deferred taking any action on Bryant's request partly in order to formulate a new policy to address the issues presented and partly to see whether the General Assembly would enact legislation dealing with the issue of "double dipping" in the 2003 session. When it became obvious that no new legislation was forthcoming the Hazard City Commission approved a policy<sup>4</sup> addressing the issue of employees

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<sup>4</sup>The pertinent provisions of the policy are:

**4-1 Retirement Program**

**4-1.1 County Employees Retirement System-** The City of Hazard participates in the County Employees Retirement System (CERS) pursuant to KRS 78.510 et seq. Membership and participation shall be governed by Chapter 78 of the KRS, including the following provisions:

- a. ...
- b. ...
- c. ...
- d. The mandatory retirement age of classified City employees covered under the CERS shall be age 70 (or at any age with 27 years of service). Classified City employees covered under the CERS may retire after completion of a full 27 years service and receive benefits while continuing in classified employment positions but only if otherwise expressly permitted pursuant to CERS rules and regulations and applicable state and federal law. However, trained public safety employees in the police or fire department under age 70 desiring to continue employment after 27 years may continue to work only based upon a review of their ability to pass the requirements under state or federal law or under any applicable Hazard Code provision or departmental policy for retention of their positions.

receiving retirement benefits while continuing in paid employment for the city. Based upon the new policy, Bryant was informed that his request was denied. Bryant then filed a petition for declaration of rights, as provided for in KRS 418.040-418.090, in the Perry Circuit Court. In his petition, Bryant asked that the court determine that he "...is entitled to receive retirement pension benefits from the City of Hazard pursuant to the old City Pension Plan and pursuant to KRS 95.624" and also that "...any attempt to retroactively limit [his] receipt of benefits is void." The parties agreed to submit the matter for judgment on the pleadings after the filing of briefs. On February 19, 2004, the trial court entered its Findings of Fact, Opinion and Judgment in Bryant's favor, holding that Bryant is entitled to receive retirement pension benefits and that "any attempt by the City to retroactively

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e. ...

**4-1.2 Policemen's and Firefighter's Pension Plan-** The City of Hazard maintains a pension plan for eligible policemen and firefighters who elected under the provisions of KRS 95.520 to retain existing pension rights under the pension plan in effect prior to August 1, 1998 (sic) (Note-the correct date is August 1, 1988). Participation in the plan is restricted to employees eligible under the provisions of KRS 95.520, and the plan is maintained pursuant to Section 34.75 of the Hazard Code. Trained public safety employees in the police or fire department under age 70 covered under the Policemen's and Firefighter's Pension Plan created pursuant to KRS 95.520 desiring to continue employment after 30 years may continue to work only based upon a review of their ability to pass the requirements under state or federal law or under any applicable Hazard Code provision or departmental policy for retention of their positions. Policemen and firefighters under this pension plan may retire after completion of a full 30 years of service and receive benefits while continuing in employment positions but only if otherwise expressly permitted pursuant to rules and regulations governing the pension plan and applicable state and federal law.

limit Mr. Bryant's receipt of benefits is void." This appeal followed.

The questions presented for our decision are, first, whether the trial court correctly decided that Bryant is entitled to receive retirement pension benefit payments while continuing his paid employment with the City of Hazard; and second, whether the court was correct in declaring void, the personnel policy adopted by the city limiting the conditions under which city employees may receive retirement pension benefit payments while continuing paid employment in the same position with the city.

Findings of fact and conclusions of law are not required on decisions of motions for judgment on the pleadings. CR<sup>5</sup>52.01; Page v. City of Louisville, 722 S.W.2d 60, 61 (Ky.App. 1986). However, when findings of fact are made, they will not be set aside unless clearly erroneous. CR 52.01. Findings of fact are not clearly erroneous if they are supported by substantial evidence. Owens-Corning Fiberglass Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is "...evidence that, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." Wells v. Sanor, 151 S.W.3d 819, 823 (Ky. 2005). An appellate court reviews the application

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<sup>5</sup> Kentucky Rules of Civil Procedure.

of the law to the facts, and the appropriate legal standard, de novo. Carroll v. Meredith, 59 S.W.3d 484, 489 (Ky. 2001). And because this is an appeal from a declaratory judgment our review is "not...confined to errors alleged or apparent in the record". KRS 418.065; Rea v. Gallatin County Fiscal Court, 422 S.W.2d 134, 138 (Ky. 1967).

As a departure point for our review of this case we must inquire what is required in order for police and firefighters who are employed by the City of Hazard, and are covered by the pension plan implemented pursuant to KRS 95.621 to 95.629, to begin receiving retirement pension benefits.

KRS 95.624(1) says:

- (1) In cities of the third class, any member of the police or fire department having served twenty (20) years or longer in the police or fire department may petition the board of trustees for retirement; and if his petition is granted, the board may order paid to him monthly fifty percent (50%) of this monthly salary at the time of retirement. If this petition for retirement is denied, any policeman or firefighter has the right of appeal in accordance with the Rules of Civil Procedure.

(Emphasis added). KRS 95.624 is entitled "Pensions-Service retirement-Disability pensions-Survivor's benefits-Increase in benefits-Health insurance for retirees."

It would seem obvious that in order to receive retirement pension benefits, one must "retire". The terms "retire", "retirement" and "pension" are not defined in KRS Chapter 95. "[I]n the interpretation and construction of statutes, words and phrases employed by the lawmaking body must be given their plain and ordinary meaning according to popular usage,...unless they have acquired a technical sense, in which event, they will be given such accepted technical meaning." KRS 446.080(4); Alderman v. Bradley, 957 S.W.2d 264, 266 (Ky.App. 1997). As defined in the 1977 edition of Webster's New Collegiate Dictionary, "retire" means "to withdraw from one's position or occupation: conclude one's working or professional career"; "retirement" means "withdrawal from one's position or occupation or from active working life"; and "pension" means "a fixed sum paid regularly to a person: one paid under given conditions to a person following his retirement from service or to his surviving dependents." The city does not dispute that Bryant is entitled to retire and begin receiving benefits. The question is whether he has a right to begin receiving his benefits without retiring. Without legislative action there is no such right. "[T]he right of a public officer or employee to a pension depends entirely upon the statute; therefore, the right to a pension is determinable from the terms of the statute

and from such conditions as the grantor may see fit to prescribe". Maybury v. Coyne, 312 S.W.2d 455, 457 (Ky. 1958).

The trial court's Finding of Fact Number Six (6) states in part that "...the [Hazard City] Commission approved an amendment to the manual governing pension benefits which would in effect prohibit Mr. Bryant from receiving his benefits." The record does not indicate that Bryant applied to retire from his job as a Hazard City Police Officer and was denied retirement benefits. Instead, Bryant attempted to "retire" from the "old" city pension plan, keep his job, and receive his benefit payment and his paycheck. To the extent that it indicates that the city policy prohibited Bryant from receiving his benefits, the finding is clearly erroneous. Finding of Fact Number Nine (9) refers to Fire Chief Joe Turner as "[a] similarly situated employee with at least 20 years of service..." Turner's and Bryant's length of employment and retirement situations are substantially different. Bryant has more than 20 years' service credit in the city pension plan; Turner has more than 30. Bryant's pension benefits under the city plan are still increasing as a percentage of his salary with each additional year of service; Turner's have reached their limit. To the extent that the trial court may have relied on this finding to conclude that Bryant and Turner received disparate treatment, it is clearly erroneous as well. Finding of Fact Number Twelve

(12) concludes with the sentence: "As of October 2002, when Kenneth Bryant requested benefits, there were no restrictions denying any individual accepting retirement under the law from continuing in his or her employment." The statement is a non sequitur. If "retirement" is given its ordinary meaning, one cannot both retire and continue in employment.

Of course, we appreciate the fact that from Bryant's viewpoint Turner has been allowed by the City of Hazard to do exactly that—"retire" and continue in his employment. Accepting that characterization as true arguendo, we must ask under what authority Bryant, whose benefit at retirement has not yet accrued to the maximum amount, claims entitlement to the same treatment as Turner. Pension plans for public employees are creatures of statute. Features of plans may vary widely, but unless prohibited by the state or federal Constitution or by statute or ordinance, pension plans may contain whatever provisions regarding reemployment that the legislative body chooses. For example, KRS 61.637 sets out conditions under which participating members of the Kentucky Employees Retirement System (KERS) may return to employment while still receiving benefits after retirement. Employees of CERS, and the State Police Retirement System (SPRS) may also receive benefits after

reemployment, but in all cases one must meet the definition of a "retired member" found at KRS 61.510(24).<sup>6</sup>

The policy enacted by the city has no retroactive effect. The policy establishes an opportunity for employees who attain thirty years' service with the city, such as Turner, to apply to receive pension benefit payments and continue employment in the same job as long as they meet certain requirements. Bryant has not yet attained 30 years' service with the city. When he does, he will be entitled to apply just as Turner did.

The city's establishment of a policy permitting employees with not less than 30 years' service under the "old" pension plan to apply to begin receiving retirement benefits while continuing employment in the same position did not deny Bryant due process or equal protection under the state or federal Constitution. "A classification does not violate the principle of uniformity or of equal protection of the laws, if it has a reasonable basis or a rational justification".

Estridge v. Stovall, 704 S.W.2d 653, 655 (Ky.App. 1985), citing Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

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<sup>6</sup> See Kentucky Retirement Systems, Summary Plan Description (Amended July 2004), P. 39, available at <http://www.kret.com/publications/sumpln.pdf>.

The judgment of the Perry Circuit Court is reversed  
and the case is remanded for entry of a judgment consistent with  
this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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