STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK H. BRANDT, JAMES M NOETZEL, PATRICK M. McCARTHY, ROBERT H. EDGE, CYNTHIA J. HOUSE, VITO J. CORACI, ROBERT K. FRENCH, PATRICK M. HENAHAN AND PATRICK E. CARNEY,

Plaintiffs-Appellants,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
January 10, 1997

No. 186223
Wayne Circuit Court
LC No. 94-425348

Before: Markman, P.J., and McDonald and M. J. Matuzak*, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's decision denying their complaint for superintending control. We affirm.

This case arises from a promotion decision made by the City of Detroit chief of police and approved by the Board of Police Commissioners. Plaintiffs are members of the Detroit Police Lieutenants and Sergeants Association (DPLSA), the exclusive bargaining representative of investigators, sergeants and lieutenants. The order in which Detroit Police Department employees are promoted is determined by an eligibility register ranking employees primarily according to competitive examination scores. Pursuant to §7-1114 of the 1974 City of Detroit Charter, however, the chief of police may make an out-of-order promotion as long as he or she provides written reasons acceptable to the board."[1] This process is referred to as a "charter promotion." On appeal, plaintiffs challenge the board's decision to approve seventeen charter promotions recommended by the chief.

First, plaintiffs contend that the decision of the Board of Police Commissioners was contrary to the requirements of the charter. We disagree. Nowhere in the language of § 7-1114 is the board

* Circuit judge, sitting on the Court of Appeals by assignment.

obligated to make factual findings with regard to the chief's recommendations, nor does the charter require the board to indicate what evidence it used to approve the promotion decision.

Plaintiffs also contends that the board should not have accepted the chief's recommendations because the reasons offered in support of the charter promotions emphasized qualities which were already taken into account by the eligibility registers and other performance evaluation standards. § 7-1114 leaves the decision regarding whether promotions should be approved to the sound discretion of the board. Therefore, by asserting that the board should not have approved the promotions, plaintiffs are essentially asking this Court to overturn the board's discretionary decision. Superintending control is not the proper remedy by which to review an alleged abuse of discretion. *In re Wayne County Prosecutor*, 192 Mich App 677; 481 NW2d 733 (1992).

We are troubled by the equal protection implications of the city's substantive decision making in its September 1993 promotions.

In *Detroit Police Officers Association v Young*, 989 F 2d (1993), the Sixth Circuit Court of Appeals determined that the City of Detroit's affirmative action plan for its police department was "no longer narrowly tailored .. . and no longer serves the same compelling state interests as it once did under the changed circumstances of almost two decades." *Id*. at 228. As a consequence, the court struck down as violative the Fourteenth Amendment the plan which mandated a 50/50 black/white police officer promotion ratio.

In our judgment, sufficient evidence has been introduced by plaintiff to raise a question whether the police department employed the out-of-order promotion provisions of the city charter, § 7-114, to circumvent the Sixth Circuit's reversal of its affirmative action plan and, therefore, whether the city acted in violation of the equal protection clauses of either the United States or Michigan constitutions. US Const Am XIV, § 1; Const 1963, Art 1, § 2. In support of their contention, plaintiffs have introduced several items of relevant evidence: (1) first, they have offered a letter from Police Chief Stanley Knox to the Board of Police Commissioners in September 1993 which identified each out-of-order promotion candidate by race; (2) second, they have offered a letter from then-Mayor Coleman Young to the President of the Hispanic Police and Firefighters Association in September 1993 asserting his commitment to a police department "reflective of the citizens it serves" and specifically identifying four police officers of Hispanic background who were among the seventeen out-of-order promotions undertaken in September 1993; (3) third, they have offered evidence indicating that, to a substantial extent, the stated rationale by Chief Knox in support of the individual out-of-order promotions in September 1993 essentially restated the qualifications and skills already taken into consideration in establishing a candidate's merit selection score; (4) fourth there is statistical fact that in September 1993, in the course of the police department's first round of promotions following the Sixth Circuit's decision, nine of seventeen officers benefiting from the out-of-order promotions were black. While such a proportion by itself would not normally give rise to an inference that an equal protection violation has occurred, in the immediate wake of the Sixth Circuit's decision in March 1993 striking down a 50/50 racial promotion plan and in the context of Mayor Young's and Chief Knox' statements, we believe that this is a relevant factor; and (5) fifth, evidence has been offered that, at the time of the September 1993

promotions, the city continued to be of the view that reliance upon strict rank order competitive examination lists had a "discriminatory impact" upon minority police officers and that new selection devices needed to be devised which would avoid an "adverse racial impact" upon minority officers.

We remand this matter to the circuit court for a hearing limited to plaintiffs' equal protection claim. Although all of the evidence cited here in support of this claim was available to the circuit court, it is unclear from the record how explicitly this issue was presented. The court did not address the equal protection issue. In any event, this Court may review newly asserted constitutional issues if our refusal to review would result in a miscarriage of justice. *People v Lumsden*, 168 Mich App 286; 423 NW2d 645 (1988). In our judgment, if plaintiffs were denied a job promotion in September 1993 on account of their pigmentation, such a miscarriage of justice has occurred.

Plaintiffs next contend that § 7-1114 violates substantive due process because it allows the board unfettered discretion in approving charter promotions. Pursuant to decisions rendered by Act 312 arbitration panels, the discretionary promotions procedure embodied within the charter was incorporated into the collective bargaining agreement (CBA) between the DPLSA and the City of Detroit. Therefore, even if we were to strike down § 7-1114 as violative of due process, the CBA would control promotion decisions and, under that agreement, plaintiffs were not entitled to be promoted in rank according to the eligibility registers. Given this conclusion, it is not necessary that we address the merits of plaintiffs' constitutional claim. See *Booth v Univ of Mich Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993).

Next, plaintiffs assert that they were denied procedural due process because the Board of Police Commissioners approved the chief's decision to deviate from the eligibility register and also upheld that decision on appeal. The right to a hearing before an unbiased and impartial decisionmaker is a basic requirement of due process. *Withrow v Larkin*, 421 US 35; 95 S Ct 1456; 43 L Ed 2d 712 (1975). The requirements of procedural due process apply, however, only if there is to be a deprivation of interests which constitute "liberty" or "property." *City of Livonia v Dep't of Social Services*, 423 Mich 466; 378 NW2d 402 (1985).

Plaintiffs allege that the charter promotions deprived them of a legally protected property interest. To have a property interest in a benefit sufficient to invoke the protections of procedural due process, there must be more than an abstract need, desire, or unilateral expectation. There must be a legitimate claim of entitlement to the benefit. *Williams v Hofley Mfg Co*, 430 Mich 603; 424 NW2d 278 (1988). As noted, the decision to approve charter promotions under § 7-1114 rests in the sound discretion of the board. Under these circumstances, there can be no legitimate claim of entitlement to promotions based strictly on rank. *Bigby v City of Chicago*, 766 F2d 1053, (CA 7, 1985); *Burns v Sullivan*, 619 F2d 99 (CA 1, 1980). See *also Detroit Police Officers' Ass'n v Young*, 608 F2d 671, (CA 6, 1979) (under the 1974 City of Detroit charter, police officers were not deprived of vested employment rights when they were passed over for promotion in favor of officers with lower numerical standings on the promotion eligibility list). Accordingly, plaintiffs' procedural due process claim is without merit.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, a public question is involved.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Michael J. Matuzak

[1] Section 7-1114 of the City of Detroit charter provides:

> The chief of police shall make all promotions within the department. All promotions shall be with the approval of the board.
>
> *Promotions shall be made on the basis of competitive examinations* administered by the director of police personnel except for positions above the rank of lieutenant or its equivalent. All examinations will be prepared by the division of police personnel with the concurrence of the board. *No person who has taken an examination and has been placed on a register of employees eligible for promotion may be passed over in favor of an employee with a lower examination score unless the chief of police files with the board and the division of police personnel written reasons acceptable to the board.* Any person having been passed over may appeal to the board. (Emphasis supplied.)