

STATE OF MICHIGAN
COURT OF APPEALS

LINSEY PORTER,

Petitioner-Appellee,

v

CITY OF HIGHLAND PARK,

Respondent-Appellant.

UNPUBLISHED

May 30, 2006

No. 263470

Wayne Circuit Court

LC No. 04-419307-AA

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Respondent appeals by delayed leave granted a circuit court order reversing the decision by of administrative law judge (ALJ) “to the extent that it did not require [respondent] to compensate [petitioner] his wages for services for the period from July 2002 to June 30, 2003.” We reverse.

I. Facts and Proceedings

Petitioner was elected to serve as Mayor of the city of Highland Park (“the City) from January 1, 2000, to December 31, 2003. On June 20, 2001, pursuant to the Local Government Fiscal Responsibility Act (LGFRA), MCL141.1201 *et seq.*, the Governor determined that the City was in a state of financial emergency, and an Emergency Financial Manager (EFM) was appointed to manage the City. On July 17, 2001, the EFM issued a directive suspending the Mayor’s salary. Petitioner claims that he continued to serve as Mayor though he no longer received a salary and was unable to occupy his office space.

On June 30, 2003, petitioner filed a complaint with the Department of Labor & Economic Growth, Wage and Hour Division (WHD), alleging that respondent had violated the Payment of Wages and Fringe Benefits Act (PWFBA), MCL 408.471 *et seq.*, by failing to pay his salary¹ after it was suspended by the EFM.² The WHD entered an order finding that petitioner’s claim

¹ Petitioner later filed a supplemental complaint for the period of July 1, 2003, through December 31, 2003.

² Specifically, petitioner alleged that respondent violated MCL 408.472 by failing to pay his
(continued...)

for wages before July 1, 2002 was time-barred under MCL 408.481(1), which provides a 12-month statute of limitations for wage claims. The order also stated that respondent had not violated the PWFBA. Therefore, petitioner was not entitled to his claimed compensation.³ Following an administrative appeal hearing, the ALJ agreed that petitioner's claim for wages before July 1, 2002 was time-barred under MCL 408.481(1). However, in regard to the validity of petitioner's claim for wages after July 1, 2002, the ALJ determined that resolution of the claim required the interpretation of the LGFRA, which was beyond the jurisdiction of the WHD.

Petitioner then appealed to the circuit court. The court found that the EFM's action of suspending petitioner's salary violated the Contract Clauses of the state and federal constitutions⁴ and violated petitioner's right to due process of law, as petitioner had a vested right to his salary already earned. The circuit court also found unconstitutional MCL 141.1221(1)(q), which expressly sanctioned the EFM's actions in suspending the Mayor's compensation before the amendment had taken effect (January 8, 2004 - one week after petitioner's term in office ended). On remand from the circuit court, the ALJ awarded petitioner his compensation from July 1, 2002, through December 31, 2003.⁵

II. Standard of Review

A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary and capricious, was clearly an abuse of discretion, or was otherwise affected by substantial and material error of law. [*Dignan v Pub School Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002).]

However, this Court reviews a circuit court's review of an agency's decision for clear error. *Dep't of Civil Rights ex rel Johnson v Silver Dollar Café*, 441 Mich 110, 117; 490 NW2d 337 (1992); *Glennon v State Employees' Retirement Bd*, 259 Mich App 476, 478; 674 NW2d 728 (2003). A decision is clearly erroneous when this Court is left with a definite and firm conviction that a mistake was made. *Dep't of Civil Rights, supra* at 117; *Glennon, supra* at 478.

Further, we review issues of statutory construction de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). Also, we review constitutional questions de novo. *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

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salary on the city's regularly scheduled bi-weekly pay day.

³ The Wage and Hour Division also determined that petitioner's claim for his "longevity bonus" was not a covered "fringe benefit" under the PWFBA, MCL 407.471(e).

⁴ Const 1963, art 1, § 10; US Const, art I, § 10.

⁵ Petitioner sought the dismissal of respondent's appeal to this Court as respondent failed to appeal the ALJ's final order to the circuit court. This Court denied that motion. *Porter v Highland Park*, unpublished order of the Court of Appeals, entered December 8, 2005 (Docket No. 263470).

III. Analysis

A. The Contract Clauses of the State and Federal Constitutions

Petitioner contends, and the circuit court agreed, that MCL 141.1221(1)(q) violated the Contract Clauses of the state and federal constitutions.⁶ The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Weakland v Toledo Engineering Co*, 467 Mich 344, 347; 656 NW2d 175 (2003). “If the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written.” *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004).

Before January 8, 2004, MCL 141.1221(1) the EMF had power to:

(b) Amend, revise, approve, or disapprove the budget of the local government, and limit the total amount appropriated or expended during the balance of the financial emergency.

* * *

(f) Make, approve, or disapprove any appropriation, contract, expenditure, or loan, the creation of any new position, or the filling of any vacancy in a permanent position by any appointing authority.

(g) Review payrolls or other claims against the local government before payment.

(h) Exercise all of the authority of the local government to renegotiate existing labor contracts and act as an agent of the unit in collective bargaining with employees or representatives and approve any contract or agreement.

(i) Unless prohibited by law or charter, to consolidate departments or transfer functions from 1 department to another and to appoint, supervise, and, at his or her discretion, remove heads of departments other than elected officials. [MCL 141.1221(1).]

After the January 8, 2004 amendment, the EMF additional power to:

⁶ On appeal, respondent first contends that an EFM had the authority to suspend a local elected official’s salary prior to the 2004 statutory amendment. This Court in *Attorney Gen v Flint City Council*, 269 Mich App 209, 216; ___ NW2d ___ (2005), indicated that, before the addition of MCL 141.1221(1)(q), “the law concerning whether an [EFM] could unilaterally reduce the salaries of [elected officials] was unclear.” However, because we conclude that application of MCL 141.1221(1)(q) is constitutional, we need not address this question.

(q) Reduce, suspend, or eliminate the salary, or other compensation of the chief administrative officer and members of the governing body of the unit of local government during the financial emergency. This subdivision does not authorize an [EFM] to impair vested retirement benefits. If an [EFM] has reduced, suspended, or eliminated the salary or other compensation of the chief administrative officer and members of the governing body of a unit of local government before the effective date of the amendatory act that added this subdivision, the reduction, suspension, or elimination is valid to the same extent had it occurred after the effective date of the amendatory act that added this subdivision. [MCL 141.1221(1)(q) (emphasis added).]

The Contract Clause, Const 1963, art 1, § 10, provides that no “law impairing the obligation of contract shall be enacted.” US Const, art I, § 10 similarly provides that “No State shall enter into any . . . Law impairing the Obligation of Contracts. . . .” When determining whether a change in the law violates the Contract Clause, this Court must ask whether the change “operated as a substantial impairment of a contractual relationship.” *Gen Motors Corp v Romein*, 503 US 181, 186; 112 S Ct 1105; 117 L Ed 2d 328 (1992) (*Romein II*), quoting *Allied Structural Steel Co v Spannaus*, 438 US 234, 244; 98 S Ct 2716; 57 L Ed 2d 727 (1978). In making that determination, this Court must determine 1) “whether there is a contractual relationship,” 2) “whether a change in law impairs that contractual relationship,” and 3) “whether the impairment is substantial.” *Romein II*, *supra* at 186. In this case, petitioner did not have a contractual right to the salary he had yet to earn. Absent a contractual right, the change in law could not impair that right, substantially or otherwise.

It has long been established that an elected official has no contractual right to compensation. In *Attorney Gen v Jochim*, 99 Mich 358, 367; 58 NW 611 (1894), the Michigan Supreme Court found that public officers “are not the subjects of contract, but they are agencies for the state, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it.” In *Jochim*, the Court noted its prior inconsistent rulings regarding whether a public officer has a contractual right to his or her salary or compensation. *Id.* at 367-368. The Court then definitively held that their salary is not a matter of contract. Rather, it is “at the discretion of the legislative authority of the state, or of such other authority as the legislature has seen fit to intrust [sic] it to.” *Id.* at 368. If an elected official’s salary “is reduced below what seems to him reasonable, it may be a hardship, but it is not a legal wrong.” *Id.*

B. Due Process Under the State and Federal Constitutions

The EFM’s suspension of petitioner’s salary did not violate his right to due process of law under our state and federal constitutions. “The retroactive and prospective aspects of economic legislation both must comport with due process by serving a legitimate purpose through rational means.” *Attorney Gen v Flint City Council*, 269 Mich App 209, 215; ___ NW2d ___ (2005), citing *Romein II*, *supra* at 191. When reviewing a statute under this “rational basis standard,” this Court presumes that the statute is constitutional. The challenging party has the burden of establishing that the Legislature acted in an arbitrary or irrational manner. *Romein v Gen Motors Corp*, 436 Mich 515, 525; 462 NW2d 555 (1990) (*Romein I*), quoting *Pension Benefit Guaranty Corp v Gray*, 467 US 717, 729; 104 S Ct 2709; 81 L Ed 2d 601 (1984); see also *Downriver Plaza Group v Southgate*, 444 Mich 656, 666; 513 NW2d 807 (1994). In order

to be entitled to due process protection, however, “a claimant must have a ““legitimate claim of entitlement”” to the property interest and not just a unilateral expectation concerning the property interest.” *Flint City Council, supra* at 216, quoting *York, supra* at 702-703. “Retroactive legislation does not per se violate due process. . . . Due process is violated when the legislation impairs vested rights.” *Taxpayers United for the Michigan Constitution, Inc v Detroit*, 196 Mich App 463, 467-468; 493 NW2d 463 (1992); see also *Romein I, supra* at 532.

Petitioner did not have a vested right to a set level of compensation. In *Ramey v Pub Service Comm*, 296 Mich 449; 296 NW 323 (1941), the Michigan Supreme Court found that elected officials had a vested right to accumulated vacation time, earned as compensation for services *already* rendered. *Id.* at 461-462.

It is a rule that after the services are rendered under a law which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate and the contract cannot be impaired by subsequent legislation. *Fisk v Jefferson Police Jury*, 116 US 131; 6 S Ct 329; 29 L Ed 587 (1885); *Robertson v Miller*, 276 US 174; 48 S Ct 266; 72 L Ed 517 (1928).

In *State, ex rel Thomas v Hoss*, 143 Ore 41, 47; 21 P2d 234 (1933), it is said:

“It is settled that after a salary has been earned the public employee’s right thereto becomes vested and cannot be taken away by any legislation thereafter enacted.” [*Ramey, supra* at 462.]

In *Ramey*, the “rights upon which plaintiffs base[d] their claims accrued prior to the amendment of the statute,” and therefore, the amendment of the statute could not be used to impair their vested rights. In this case, however, petitioner did not have a vested right to a particular salary or to collect his salary on an ongoing basis once it was suspended. Although petitioner continued to work after that time, he only had a right to the salary set for his position – zero.

Furthermore, this Court recently expressly determined that elected officials do not have a vested right to a set level of compensation, which the Legislature is prohibited from impairing. *Flint City Council, supra* at 215-216.⁷ Petitioner did have a statutory right under MCL 117.5c(b) to have his salary set by an LOCC. *Flint City Council, supra* at 216. “A right that arises by statute is valuable, but not vested.” Moreover, it is well established that “that which the legislature gives, it may take away.” *Id.* See also *Romein I, supra* at 532 (“The retroactive liability imposed by 1987 P.A. 28 does not abrogate a vested or contractual right of the employers since workers’ compensation benefits and liabilities are statutory in origin and may be

⁷ We would note, however, that under Michigan’s 1908 Constitution, no Legislature or municipal authority could decrease the salary of a public officer after election. Const 1908, art 16, § 3; *Lee v Macomb Co*, 288 Mich 233, 236-237; 284 NW 892 (1939). That right was not included in the 1963 Constitution.

revoked or modified at the will of the Legislature.”). Accordingly, this Court specifically and expressly held in *Flint City Council, supra* at 216, that MCL 141.1221(1)(q) “did not unconstitutionally deprive the City council members of a vested property right without due process.” We are, therefore, bound to find that petitioner did not have a vested right to any level of salary and the Legislature was within its power to take that salary away prospectively.

However, MCL 141.1221(1)(q) also validates any action by an EFM altering a local elected official’s salary taken *before* the amendment, retroactively approving of those actions taken prior to the effective date of the amendment. As previously noted, the retroactive aspects of legislation must also meet the test of due process—a legitimate purpose served by rational means. *Romein I, supra* at 527. When reviewing the retroactive portion of a statute under this test, the standard is met “by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.” *Romein I, supra* at 528, quoting *Pension Benefit Guaranty Corp, supra* at 730. “Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.” *Romein II, supra* at 191.

When considering the justification for retroactive legislation, we “must take into account the possibilities that the parties acted in reliance on current law and that they may have altered their conduct to reduce liability if they had anticipated the imposition of later liability.” *Romein I, supra* at 527. “To determine if the retroactivity is arbitrary or unreasonable, the party’s reliance on the preexisting state of the law should be considered.” *Id.* at 530. Petitioner contends that the Legislature’s purpose in enacting MCL 141.1221(1)(q) could not be reasonable, rational, or justified as the amendment was made specifically to deprive the elected officials of Flint, Hamtramck, and Highland Park of their right to bring a claim under the PWFBA for lost wages during a financial emergency. We disagree.

First, a party’s reliance on the prior state of the law must be “justifiable.” *Romein I, supra* at 530. “Reliance on an area of the law that is in flux is not reasonable reliance.” *Id.* at 531. In the *Romein* cases, the defendants were employers who began coordinating workers’ compensation benefits with other substitute-compensation benefits following the passage of a new law in 1981. These employers applied that coordination retroactively and reduced the benefits paid to employees for previous injuries in order to recoup the amount purportedly overpaid. In 1987, the law was amended to clarify that the coordination of benefits provision was not intended to reduce benefits for injuries occurring before the effective date of the 1981 statute. *Romein I, supra* at 521-523. The defendants were then ordered to refund the underpayments to the plaintiff employees. *Id.* at 523. The Michigan Supreme Court found that the defendants’ reliance on a particular state of the law was not reasonable or justified given the ongoing legislative debate regarding the retroactive application of the provision. *Id.* at 531.

In this case, the record reflects that both parties were aware of the existing debate regarding whether an EFM had the power to reduce, suspend, or eliminate a local elected official’s salary during a financial emergency. Also, that the Mayors and City council members of Flint and Hamtramck were contemporaneously taking court action in relation to the reduction or elimination of their salaries. Petitioner knew that the Ingham and the circuit court commented on the ambiguous nature of this statute and reached opposite conclusions regarding whether the elected officials were entitled to their compensation. Given this “state of flux,” petitioner could not reasonably rely on the correctness of his position.

Second, MCL 141.1221(1)(q) is remedial in nature and, therefore, serves a rational purpose. This Court has found that a retroactive statute or statutory amendment that is remedial in nature, and does not impair vested rights, is legally acceptable. *Tobin v Providence Hosp*, 244 Mich App 626, 662-663; 624 NW2d 548 (2001). Remedial statutes are designed to correct defects in existing law or “mischief” in the application of an existing law. *Id.* at 665. In *Romein I, supra* at 531-532, the Michigan Supreme Court found that the 1987 statute clarifying that the coordination of workers’ compensation benefits was inapplicable to injuries arising before the effective date of the 1981 statute “cure[d] a perceived defect resulting from the interpretation of the prior law.” Further, the Court found that the Legislature could enact a statute or statutory amendment to “cure judicial misinterpretation.” As long as the statute does not impair final judgments, the retroactive statute may “repeal[] the effects of a prior judicial decision. . . .” *Id.* at 537. Here, the amendment provided guidance to the circuit courts, which had reached inconsistent rulings in this regard. As this retroactive amendment served a legitimate purpose by rational means, it did not violate petitioner’s right to due process of law.

C. The Title-Object Clause of the State Constitution

As an alternate ground for affirmance, petitioner contends that MCL 141.1221(1)(q) violates the Title-Object Clause of the Michigan Constitution. That clause provides:

No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title. [Const 1963, art 4, § 24.]

Petitioner contends that, by allowing an EFM to reduce, suspend, or eliminate an elected official’s salary, the Legislature impliedly repealed the PWFBA as it applies to elected officials. This object is expressed no where in the title or purpose of the LGFRA.

“Repeals by implication are not favored and will not be indulged in if there is any other reasonable construction. The intent to repeal must very clearly appear, and courts will not hold to a repeal if they can find reasonable ground to hold the contrary.” *House Speaker v State [Admin] Bd*, 441 Mich 547, 562; 495 NW2d 539 (1993), quoting *Attorney [Gen] ex rel Owen v Joyce*, 233 Mich 619, 621; 207 NW 863 (1926). The question whether a statute is repealed by a subsequent statute relating to the same subject matter involves a determination of legislative intent, and where possible the former and subsequent statutes must be construed together and reconciled so as to give each force and effect. *Attorney [Gen] v [Pub] Service Comm*, 161 Mich App 506, 513; 411 NW2d 469 (1987). [*Attorney [Gen] v Michigan [Pub] Service Comm*, 249 Mich App 424, 432; 642 NW2d 691 (2002).]

We again disagree. MCL 141.1221(1)(q) does not supplant an employee’s right to seek compensation under the PWFBA. Rather, it allows an EFM to take actions to remedy the financial crisis of an employer. In general, an elected official still has the right to seek compensation owed and can file a complaint under the PWFBA. When the elected official’s salary is reduced to zero, however, he or she no longer has a cause of action to bring.

D. The Circuit Court's Findings and Conclusions

Finally, respondent contends that the circuit court improperly made a finding of fact on an issue which the ALJ expressly declined to review. Specifically, respondent challenges the circuit court's finding that there was no evidence that petitioner failed to fulfill his duties as the elected Mayor. If the evidence is sufficient to support the agency's decision, the circuit court (and this Court) may not substitute its judgment for that of the agency, even if the court may have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992).

Contrary to the assertion of respondent, the ALJ did not expressly decline to consider whether petitioner had performed his functions as Mayor. Rather, the ALJ determined that such a finding was unnecessary to his decision. The circuit court's finding that there was no evidence that petitioner failed to perform his duties as Mayor is supported by a review of the whole record. See *VanZandt v State Employees Retirement Sys*, 266 Mich App 579, 588; 701 NW2d 214 (2005) (when reviewing the evidentiary support for an agency's finding, the circuit court must review the entire record). Petitioner testified at length before the ALJ regarding the performance of his duties as Mayor after Pearson was appointed as EFM. Respondent presented no evidence to the contrary. As the circuit court's finding was consistent with the ALJ's decision and was supported by a review of the record, respondent's challenge lacks merit.

Reversed.

/s/ Janet T. Neff

/s/ Brian K. Zahra