FILED May 1, 2015 09:34 AM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 75, LOCAL 2043
Respondent,
Petitioner on Review,

v.

CITY OF LEBANON,
Petitioner,
Respondent on Review.

Employment Relations Board
UP1411

Court of Appeals
A152059

S062750

RESPONDENT ON REVIEW'S BRIEF ON THE MERITS

Appeal from the decision of the Court of Appeals on judicial review from a final order of the Employment Relations Board

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Filed: April 2015

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I. Legal Question Presented; Proposed Rule

Question Presented

Whether the Court of Appeals correctly held that a municipal corporation was not liable for an unfair labor practice as a result of the personal expressions of opinion made by a lone city councilor because an individual city councilor is neither the "public employer" nor its "designated representative" under ORS 243.672.

Proposed Rule of Law

An unfair labor practice can only be committed by a public employer or its designated representative pursuant to ORS 243.672. Under the facts of this case, a single member of a seven-member City Council was neither a "public employer" nor its "designated representative." While a public employer such as a municipality can only act through its agents, including its city Administrator and supervisors, a lone city councilor is not a manager or supervisor and is without actual or apparent authority to impute liability to the City. Further, absent facts to the contrary, a single city councilor with no municipal authority other than as one vote of seven, is not the "designated representative" of the city.

II. Nature of the Proceeding

The City of Lebanon accepts AFSCME's statement of the Nature of the Proceedings.

III. Relevant Facts

This case was presented to the ERB on stipulated facts. TR 106-107. Margaret Campbell ("Campbell") is a former Lebanon City Councilor. TR. 106. On or about February 7, 2011, Campbell submitted a letter to the Lebanon Express, Lebanon's local newspaper. TR 106 and TR 170-171 (copy of letter). The letter was addressed to "All Citizens of Lebanon." TR 170. The introductory paragraph of her letter stresses:

> "I would like to clarify this letter is being written by me as an individual and **not a reflection of a majority of the City Council, the City** or my employer**."** TR 170 (emphasis added).

Campbell's letter understandably angered some local union members and union representatives as it urged employees "imprisoned by the dictatorship of a union" to look for ways to "de-certify your union captors." TR 171. There is no evidence in the record that these sentiments were shared by any other member of the Council, City Administration or those hired to conduct union negotiations. Ultimately, when signing her name to the letter, Campbell identified herself as a City Councilor for the City of Lebanon, which she was at the time. TR 171.

There is no evidence in the record that any other City Councilor, Mayor or City Administrator even knew about the letter prior to its submission to the local newspaper. The letter was neither read during a meeting of the City Council, TR 107, nor posted on any City website. There is no evidence in the record that Campbell used city resources when writing the letter or otherwise wrote the letter as part of her official duties.

Further, contrary to the assertion of AFSCME and *Amicus Curiae*, there is nothing in the stipulated facts relating to whether the City of Lebanon did or did not respond to Campbell's letter. TR 106-107. AFSCME and *Amicus Curiae* seem to assume the absence of stipulated facts related to Lebanon's public condemnation of the letter, if any, is a concession that Lebanon did not publicly repudiate the letter. Regardless, AFSCME fails to suggest in its brief why this "non-fact" is even relevant to the legal issues presented to the Court.

The City of Lebanon is a City Council/City Administrator form of municipal government. Lebanon adopted its current Charter in 2004. TR 108. The City Administrator is the "administrative head" of the City and is tasked with all employment related duties within the City of Lebanon. TR 112. Section 16 of the Lebanon City Charter provides that:

> "No action by the Council shall have legal effect unless the motion for the action and the vote by which it is disposed of takes place at proceedings open to the public." TR 111.

Section 19 further explains that:

> . . . the concurrence of a majority of the members of the Council present and voting at a Council meeting shall be necessary to decide any question before the Council." TR 111.

There is no evidence, in the record or otherwise, that grants individual city councilors any authority to take actions or make decisions on behalf of the City. The power to act on behalf of the City is vested solely to the body of the Council through a majority vote.

IV. Summary of Argument

An unfair labor practice can only be committed by a public employer or its designated representative pursuant to ORS 243.672. A lone city councilor is neither a "public employer" nor a "designated representative" and the ERB erred when it held that each City Councilor on a board of six shares the "status" as a public employer under ORS 243.672. There is no legal precedence for a "shared status" principle of law.

Both the Lebanon City Charter and state law reveal that a city councilor has no independent source of power or authority and nothing in the facts of this case reveal apparent authority on the part of Campbell. Rather, cities govern through the collective voice of the entire council signified through a vote of the majority. One councilor, expressing her personal opinion in a public way, cannot implicate the City

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V. Argument

1. Individual city councilors, acting on their own and expressing their own personal opinions, are not "Public Employers" for purposes of PECBA.

The ERB's attempt to hold an entire city liable for the personal opinions expressed by a single city councilor should be rejected by this Court. First, the ERB failed to recognize the concept of collective governance by city councils and the lack of individual power or authority of a single city councilor under both the Lebanon Charter and Oregon law. Second, the ERB ignored established law by holding that Campbell "shares that status" as a "public employer" because "she is a member of the Council." TR 20.

a. The Lebanon Charter and Oregon Law Mandate that a Single Rogue Councilor Expressing her Personal Beliefs in a Public Way Cannot Impute Liability to the City.

The ERB erred when it held that Campbell, one of seven city councilors for the City of Lebanon (six councilors and a mayor), could impose liability on the entire City of Lebanon when she expressed her personal opinions regarding unions, an opinion certainly not shared by the City of Lebanon or its administration. Such a holding is foreign to municipal law and offensive to the concept of majority rule proscribed by Oregon law.

The City of Lebanon is a public employer under ORS 243.650(20). The City's Charter sets forth the form of government of the City of Lebanon.

Sections 6 and 7 of the Charter provide that all powers of the City are vested in the Council and the Council is composed of the Mayor and six councilors. TR. 109. Section 16 provides that no action of the Council "shall have legal effect unless the motion for the action and the vote by which it is disposed of takes place at proceedings open to the public." TR. 111. Nothing in Lebanon's Charter provides individual councilors any rights with respect to administration or management of the City. The City Council acts only collectively, not individually, and only through a majority vote in a meeting open to the public.

While the Lebanon Charter vests all power in the Council, the Council specifically delegates the majority of that power to the City Administrator, who is the "administrative head" of the City. TR. 112 (Section 21(a)). The City Administrator's delegated duties include appointing and removing all employees of the City (excluding the Municipal Judge and City Attorney) and having "general supervision and control over them and their work." TR. 112 (Section 21(c)(3)). With respect to union negotiations, no member of the Lebanon City Council has been a member of the City's negotiation team for at least the last ten years. TR. 107 (stipulated fact No. 8). Ultimately, the only power any individual city councilor has with respect to the Lebanon unions is as one vote of seven when a contract is presented to the Council to be ratified.

Oregon law similarly limits the power and authority of individual city councilors. State law provides that the "powers of the city shall be vested in

the council" and no "action by the council shall have legal effect unless concurred in by a majority of the council." ORS 221.120(6) and (8). Thus, an action by a city council member without the concurrence of a majority of the council has no legal effect.

When read together, the Lebanon Charter and Oregon law make it clear that individual city councilors have no authority to take action or make decisions on behalf of the City. The power to act is vested solely in the body of the Council (and through delegation by the body of the Council to the City Administrator). Significantly, no individual city councilor has the right to hire, fire or discipline any city employee and, in a City Administrator form of government, not even the entire council has such authority.

The ERB's conclusion, and AFSCME's assertion, that Campbell is a public employer ignores the City Charter and Oregon law. Campbell has no rights to hire, fire, discipline or manage the employees of the City. She cannot enter into contracts on behalf of the City or otherwise obligate the City in any legal way. Rather, her rights are limited to one of seven votes on the City Council. Certainly, not every Oregon Legislator could be considered the State of Oregon, a public employer, even though that is the natural implication of the ERB's decision. If the City of Lebanon can be held responsible for the personal statements of one councilor, than the State of Oregon could be held

liable for an anti-union speech delivered by any member of the Oregon Legislative body. Oregon law simply does not envision such a result.

In reaching its conclusion, the ERB relied heavily on its previous decision in *Oregon Public Employees Union v. Jefferson County*, ERB UP-20-99, 18 PECBR 18/310 (September-October, 1999). That case was not even appealed to the Court of Appeals so its value is limited.[1] However, it can also be distinguished on the facts.

For example, that case does not describe the roles that County Commissioners play in Jefferson County. In most instances, the role of County Commissioners in governing a county is much different and more involved than a city councilor in a City Administrator form of government. The facts in *Jefferson County* did not indicate what role or authority the County Commissioner in that case had over employment related decisions, or whether the County Commissioner had some delegated duty with respect to union negotiations. Further, the ERB found in *Jefferson County* that the Commissioner was specifically acting in the role of County Commissioner when he made the statements which imposed liability. *Id.* At 317. Here, to the

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[1] The Jefferson County case was referenced by the Court of Appeals in *Clackamas County Employees' Association v. Clackamas County/Clackamas County District Attorney*, 243 Or App 34, 259 P3d 932 (2011). However, the Court of Appeals cited the Jefferson County case in "distinguishing a threatening statement that constitutes an unfair labor practice from one that does not." *Id.* At 41. The Court of Appeals did not discuss or address the issue of one county commissioner imposing liability on the entire county.

contrary, Campbell introduced her statement with "I would like to clarify this letter is being written by me as an individual and not a reflection of a majority of the City Council, the City or my employer**.**" TR. 170.

b. Established Law does not Impose Liability on an Entire Organization for the Actions of a Single Member of a Multi-Member Governing Board

In various circumstances, Courts have refused to impose liability on an public entity based on the independent actions of one member of a multi-member governing board. In *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994), the Ninth Circuit held that the City could not be held liable for discrimination based on the statements of one City Councilor. There, the City of Arroyo was addressing a land use decision. One City Councilor made offensive, discriminatory comments about the Japanese community such as "Why should these Japanese people make all that money?" The Court held:

> "Furthermore, the fact that Olsen made two deplorable comments off-duty does not mean that the City may be held liable for discrimination. A municipality may only be held liable under Sec. 1983 for a violation that stems from "official municipal policy." Municipal liability attaches where there is a deliberate choice made by officials with responsibility for establishing final policy, and the question of who has final decision making authority is a question of state law. Under California law, **Olsen did not have final decision making authority because the City Council must adopt a general plan by a majority vote**." *Id*. at 1239, (internal citations omitted) (emphasis added).

Similarly, in *Matthews v. Columbia County*, 294 F.3d 1294 (11th Cir. 2002), the plaintiff argued that she was terminated from County employment

as a result of her protected speech. In that case, one member of a three member commission was found to have had an unconstitutional motive for the termination. The Court held that authority rests with the entire Board of Commissioners and not any one Commissioner. The Court held:

> "Because policymaking authority rests with the Commission as an entity, the County can be subject to liability only if the Commission itself acted with an unconstitutional motive. An unconstitutional motive on the part of one member of a three-member majority is insufficient to impute an unconstitutional motive to the Commission as a whole." *Id*. at 1297.

Finally, in *City of Corpus Christi v. Bayfront Associates, Ltd*., 814 S.W.2d 98 (1991), the Court addressed the issue of city liability for breach of contract based on the activities of a single city councilor. There, the city entered into an agreement with Bayfront requiring it to assist in "obtaining all permits contemplated" by the Agreement. Subsequently, one city councilor sent letters to the Corps of Engineers on city stationary issued to her as a city council member strongly opposing a permit needed by Bayfront. Bayfront sued the city arguing it breached the contract because the individual city councilor interfered with its permit application. The Court disagreed and its reasoning is instructive:

> A city council can affect the City's business only as a group. It is a well-settled rule that the governing authorities of cities can express themselves and bind the cities only by acting together in a meeting duly assembled. A city council can transact a city's business transactions only by resolution or ordinance and, by majority rule of the council. A city can act by and through its governing body;

> **statements of individual council members are not binding on the City**." *Id*. at 105 (emphasis added) (internal citations omitted).

The Court went on to note that the city councilor had the "same First Amendment right to criticize the City's governmental policy and action as did other citizens and she cannot be sanctioned for her exercise of her First Amendment right." *Id*.

Here, the same is true. The City cannot and did not sanction Campbell for expressing her personal opinions in a public way. Of course, any attempt to suppress Campbell's right to free speech could impose liability on the City of Lebanon. So the quandary is that while the City cannot prohibit or stop Campbell from expressing her personal opinions regarding unions, AFSCME seeks to hold the City liable for that same protection of her rights of expression. The question is how far could this go? For example, a city councilor could maintain a personal blog for the sole purpose of criticizing the local unions. A councilor has the freedom to do that. Would the City which that councilor represents be guilty of an employment violation every time the Councilor posted a criticism of the union?

In each case referenced above, the Court stressed that government entities act only through a majority vote of its governing board. It is imperative that the actions of one or a minority of the members not be imputed to the entity as a whole.

The ERB and AFSCME rely on an innovative and legally non-existent theory of liability by suggesting that each individual city councilor "shared the status as a public employer". AFSCME fails to cite any authority for the proposition that a city councilor shares the status as a public employer.

c. A City Councilor is Neither a Supervisor or Manager of the City

There is no doubt or argument that a municipal corporation can act only through its agents, including supervisors and managers acting within the scope of their duties. While AFSCME argues, and *Amicus Curiae* devotes almost its entire brief, on the issue of manager and supervisor liability, both miss the point and beg the question. **A single city councilor on a seven member city council that acts only by majority vote is not a manager or supervisor of the City.** Neither AFSCME nor *Amicus Curiae* cite one case or legal precedent in which a Court has held that a single member of a governing board acting individually is a supervisor or manager pursuant to law. In all of the cases cited by AFSCME and *Amicus Curiae*, liability was imposed because an individual did have managerial or supervisory responsibilities.

The reality of elected governance is that from time to time voters will elect fringe elements to public bodies, whether it be city councils, county commissions or the state legislature. These elected officials may hold beliefs that are offensive to many, whether it be racial prejudice, bias or anti-union sentiments. As elected officials, the public entities cannot fire them, remove

them or stifle their individual right to free expression. Public entities are insulated by the absence of actual authority that individual representatives have on multi-member governing boards. Liability may accrue only if these offensive views are somehow adopted by the majority or the governing body actually provides the authority to the individual to speak or act on its behalf.

Here, there is absolutely no evidence in the record that Campbell's views were supported by any other councilor or the City, or that Campbell was provided any authority to speak on the City's behalf with respect to union matters. Obviously, if those views are offensive to a majority of the electorate, the public can and should remove that individual from the governing board at the next election or by recall.

Again, however, the governing body itself does not have the ability to stifle the free expression of opinion espoused by its elected officials. While the City itself may not have freedom of expression, the elected officials most certainly do. A decision by this Court that holds a municipal government vicariously liable for its elected officials' personal expressions of belief, however offensive, would be dangerous precedent.

d. Campbell Did Not Have Actual or Apparent Authority to Speak on Behalf of the City on Union Issues

The issue of apparent authority was never raised before the ERB. In its Amended Complaint, AFSCME alleged only that "Ms. Campbell is a representative and authorized agent of the City and a 'designated

representative.'" TR 194. However, the Court of Appeals addressed the issue and correctly held that there was no evidence in the record to impute apparent authority. This Court has held that apparent authority "arises when the agent does not possess the actual or implied authority to act for the principal in the matter, but the principal has clothed the agent with apparent authority to act for the principal in that particular." *Badger v. Paulson Investment Co., Inc*., 311 Or. 14, 24 (1991). Apparent authority is created "only by some conduct of the principal which, when reasonably interpreted, causes a third party to believe that the principal consents to have the apparent agent act for him on that matter." *Id*.

Here, AFSCME can point to no facts other than Campbell's membership on the Council to impute apparent authority. Rather, it relies on Campbell's mere presence on the city council ("Simply by virtue of the inescapable fact that she is a member of the City Council that wields all of the City's powers, she is so integral a part of the employer that she, and each of the other Council members, effectively share the City's status as employer." Petitioner's Brief, p. 20). In other words, AFSCME urges the Court to adopt a rule that every elected official that is a member of a multi-member public governing board has apparent authority to speak for that public entity on all issues. This ignores the fact that members should and do have differing opinions as independent elected officials. Would AFSCME members be similarly offended by a city

councilor that writes a scathing letter to the public about City Management and his/her support of union activities. The fact is that none of the individual councilors has actual or apparent authority to speak for the City, only the majority of the council has that authority.

AFSCME cites *NLRB v. Geigy Co*., 211F.2d 553 (9th Cir. 1954) as support for its argument that a single city councilor has apparent authority. However, in that case the Court found:

> "Kauffman was the foreman in charge of all manufacturing at the plant. **He had authority to hire and fire employees. He was the representative of management in the plant and the employees looked to him as such. He made the statements at a meeting called by him as foreman.** The Trial Examiner justifiably concluded that in these circumstances "The words `personal opinion' were not sufficiently magic to dispel in the minds of the employees the conviction that it was the representative of their employer to whom they were listening." *Id*. at 557 (Emphasis added).

Understandably, it is not a stretch to impute apparent authority to the person who has the right to hire and fire and is the representative of the employer in the workplace. Here, on the other hand, Campbell individually cannot hire, fire, discipline or otherwise affect the employment of city employees in any manner. The Court of Appeals correctly held that Campbell did not have apparent authority on behalf of the City.

2. Individual City Councilors are not Designated Representatives of a Public Employer

An unfair labor practice can only be committed by a public employer or its designated representative. ORS 243.672; *Service Employees International*

Union Local 503 v. State of Oregon, Department of Administrative Services, 202 Or. App. 469, 476 (2005). A public employer includes "municipal corporations." ORS 243.650(20). However, the definition of public employer does not include any reference to elected officials of the public employer.[2] A representative of a public employer is "any individual or individuals specifically designated by the public employer to act in its interests in all matters dealing with employee representation, collective bargaining and related issues." ORS 243.650(21).

Here, Campbell was not a "representative" of the City of Lebanon as that term is defined in law. Stated more succinctly, Campbell was never specifically designated by the City of Lebanon to act in its interests in all matters dealing with employee representation, collective bargaining and related issues. ORS 243.650(21). Based on the facts of this case, Campbell is not the "representative" of the City of Lebanon. Ms. Campbell does not represent the City in any matters dealing with employee representation, collective bargaining or related issues, let alone "all matters."

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[2] In some cases a public official can be an employer. However, those cases have been limited to instances when the public official exercises significant control over employment relations matters. These cases have been limited to public officials who run departments, like District Attorneys or Sheriffs. See *Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney and State of Oregon*, ERB UP-32-01 PECBR 20/87 (November-December, 2002) holding that a district attorney is an employer of his staff); *Hockema v. Oregon State Employes Association*, 34 Or. App. 527 (1978) (holding that the sheriff in that case was designated by the State to act in its interest and thus was a public employer).

The City has discovered only one case dealing with the definition of a designated representative of a public employer. In *Service Employees International Union Local 503 v. State of Oregon*, 202 Or. App. 469 (2005) the Court found that the Department of Human Services ("DHS") was not the designated representative of the public employer. The case is instructive.

In *SEIU v. State*, the Home Care Commission (the "Commission") is the public employer of home care workers, who are paid by DHS. Home care workers are public employees and have the right to form, join, and participate in the activities of labor organizations. The Department of Administrative Services ("DAS") is the Commission's representative in collective bargaining and is authorized to agree to terms and conditions of collective bargaining agreements. *Id*. at 473.

In 2002, SEIU and DAS were engaged in negotiating a contract. An individual named Anthony Rogers received home care through DHS and various home care-givers. As part of his home care, Rogers requested a rate exception. In response, the DHS office, verbally and in writing, denied the request citing "unionization" issues as the reason for the denial. *Id*. at 474.

The Union filed a complaint against the Commission, DAS and DHS. The ERB found in favor of the Union, holding that DHS's critical role in labor relations and employment conditions of home care workers required that DHS's conduct be attributed to the Commission. The Court of Appeals

disagreed, holding that DHS is neither a public employer nor its designated representative.

In *SEIU v. State*, the Union conceded that there was no "express designation" of DHS as a representative for the Commission. Rather, the Union argued that "practical realities" of the role of DHS dictate that it be treated as a designated representative. The Court disagreed and held:

> "DAS represents the commission in collective bargaining negotiations. There is no provision, however, designating DHS as the commission's representative in any capacity, for any purpose." *Id*. at 476.

Similarly, in this case, the Union has presented no evidence that Ms. Campbell was designated the City's representative in any capacity. Having one vote out of six city councilors cannot, as a matter of law, elevate Ms. Campbell's status to that of a designated representative of the City "designated to act in its interests in all matters dealing with employee representation, collective bargaining and related issues."

VI. CONCLUSION

The Court of Appeals correctly reversed the decision of ERB which found that the City of Lebanon had committed an unfair labor practice. Councilor Campbell was neither a "public employer" nor a "designated representative" of the City of Lebanon.

Dated this 29th day of April, 2015.

Respectfully Submitted

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CERTIFICATION OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 4,919 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

/s John Kennedy__

PROOF OF SERVICE

I certify that on April 29, 2015 I caused this Petitioner's Opening Brief to be filed electronically with the state Court Administrator.

I also certify that on April 29, 2015 I caused to be served electronically a true copy of the Petitioner's Opening Brief by electronic means on:

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