

UNCONTROVERTED FACTS

1. The Plaintiffs are currently employed by the City of Topeka Fire Department. During the time period relevant to this action, they held the respective ranks of either Captain or Battalion Chief.

2. The Defendant, City of Topeka, is a home-rule municipal corporation under Article 12, Section 5, of the Constitution of the State of Kansas.

3. The Defendant, Norton N. Bonaparte, Jr., is the City Manager for Topeka, Kansas.

4. The position of City Manager was created in 2004, pursuant to Charter Ordinance No. 94. The City Manager has general supervisory responsibility over all City personnel matters, and “subject to the provisions of the personnel polices of this city,” he is empowered “to assign, reassign, discipline and remove all directors or heads of departments and all employees under his or her jurisdiction.” *See* Charter Ordinance No. 94 § 21, reprinted for informational purposes in the Code of City of Topeka, Appendix A at § A2-54. Likewise, the City Manager “may delegate to directors or other department heads responsible to him . . . the authority to appoint, discipline, and remove subordinate employees, subject to the personnel policies of this city.” *Id.*

5. The Defendant, Howard H. Giles, is the duly appointed Fire Chief of the City of Topeka, Kansas.

6. The Topeka Fire Department has four (4) divisions – the Operating Division, the Support Services Division, the Training & Safety Division, and the Fire Prevention Division.

7. Charter Ordinance No. 10, which was originally adopted by the governing body of the City of Topeka on August 29, 1967, exempted the City from the terms of K.S.A. 13-2231a. In addition, it provided “substitute and additional provisions on the same subject” as that addressed in K.S.A. 13-2231a.

8. On February 12, 1991, the City of Topeka adopted Charter Ordinance No. 75, which repealed Section 6 of Charter Ordinance No. 10. Prior to that date, Section 6 of Charter Ordinance No. 10 provided for the appointment of the Fire Chief by the governing body of the City of Topeka “either from the department or otherwise. . . .”

9. On July 11, 2006, the City of Topeka adopted Charter Ordinance No. 97, which amended Charter Ordinance No. 10 by striking the language set forth in Section 4. Prior to that date, Section 4 of Charter Ordinance No. 10 had authorized the Fire Chief to fill all positions within the Topeka Fire Department, other than the position of third class fireman, by promotion. Certain positions were to be filled by the Fire Chief upon the recommendation of a Promotion Board while other positions could be filled by the Fire Chief with the approval of the governing body.

10. The remaining sections of Charter Ordinance No. 10, which include Sections 1, 2, 3, 5 and 7, have not been amended or repealed.

11. Section 2 of Charter Ordinance No. 10, which is reprinted for informational purposes in Appendix A, § A6-16 of the Code of the City of Topeka, provides: “All new applicants for positions in the fire department shall be required to submit to a civil service examination for the position of third class fireman.”

12. The chain of command in the Operations Division of the City of Topeka Fire Department (from lowest to highest rank) includes Third Class Firefighters, Second Class Firefighters, First Class Firefighters, Advanced Firefighters, Apparatus Operators, Lieutenants, Captains, Battalion Chiefs, Shift Commanders, the Deputy Fire Chief of Operations Division and the Fire Chief.

13. On or about December 28, 2007, Fire Chief Giles stated he was accepting applications for the open positions of Battalion Chief and Shift Commander within the Topeka Fire Department, and that personnel interested should submit a letter of interest and a resume to the Fire Chief's Office.

14. On several occasions, Fire Chief Giles has stated to members of the Topeka Fire Department that there were qualified applicants for the open Battalion Chief and Shift Commander positions within the Topeka Fire Department.

15. On or about February 24, 2008, Fire Chief Giles listed the open positions of Battalion Chief and Shift Commander outside the Topeka Fire Department and accepted applications for those positions from individuals not employed by the Topeka Fire Department.

16. Although the City of Topeka advertised for the positions of Battalion Chief and Shift Commander to the public, the positions were ultimately filled by promotion from within the Topeka Fire Department.

17. This action was filed by the Plaintiffs on April 18, 2008, and the Defendants filed their Answer on May 28, 2008.

18. On or about November 18, 2008, City Manager Bonaparte recommended the adoption of a new Charter Ordinance to the City Council, which would yet again amend Charter Ordinance No. 10.

19. The proposed amendment to Charter Ordinance No. 10 would have inserted the following language in Section 2:

All new applications for *entry level firefighter* positions in the fire department of the city shall be required to submit to a civil service examination for the position of third class fireman.

20. The amendment proposed in 2008 was deferred to the City Council's December 16, 2008 meeting, where the council voted 7-1 to table the matter indefinitely.

STANDARD OF REVIEW

The Kansas Supreme Court has stated the familiar standard of review for summary judgment motions as follows:

“Summary judgment is appropriate when the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to dispute must be material to the conclusive issues in the case.”

Miller v. Westport Ins. Corp., 288 Kan. 27, Syl. 1, 200 P.3d 419 (2009).

Moreover, the Kansas Declaratory Judgment Act, K.S.A. 60-1701 *et seq.*, grants this Court the authority to enter declarations which “have the full force and effect of a final judgment.” K.S.A. 60-1701. “Any person having an interest under a . . . municipal ordinance . . . may seek a determination of any question of construction . . . arising under that enactment . . . and may obtain a declaration of rights, status or other legal relations thereunder.” K.S.A. 60-1704. Thus, the Court finds that a determination of the rights of the parties under the terms of Charter Ordinance No. 10 is an appropriate issue for resolution in a declaratory judgment action and further finds that the interpretation of Charter Ordinance No. 10 presents a question of law which can be resolved by summary judgment.

ISSUE PRESENTED

The issue presented in this declaratory judgment action involves an interpretation of Charter Ordinance No. 10, adopted by the City of Topeka on August 29, 1967. Specifically, the Plaintiffs seek the Court’s interpretation of Section 2 of Charter Ordinance No. 10, which states: “All new applications for positions in the Fire Department of the City shall be required to submit to a civil service examination for the position of third class fireman.”

CONCLUSIONS OF LAW

I. Home Rule Amendment

As the parties are aware, charter ordinances are authorized by Article 12, Section 5 of the Kansas Constitution. This section, known as the Home Rule Amendment, took effect in 1961 and “ensures that Kansas cities have the power to determine local public policy and

regulation.” *Farha v. City of Wichita*, 284 Kan. 507, 512 161 P.3d 717 (2007), citing Kan. Const. art 12, § 5(b) and *Kansas City Renaissance Festival Corp. v. City of Bonner Springs*, 269 Kan. 670, 673, 8 P.3d 701 (2008). The Home Rule Amendment sets forth the required procedure for adoption, amendment and repeal of charter ordinances. Kan. Const. art. 12 § 5(c).

Specifically, once adopted by a city, “[e]ach charter ordinance enacted shall control and prevail over any prior or subsequent act of the governing body of the city and may be repealed or amended only by charter ordinance. . . .” Kan. Const. Art. 12, § 5(c)(4). In other words, a charter ordinance may “be amended only by another charter ordinance, in order to preserve the super majority and referendum period requirements” set forth in the Kansas Constitution. *Edgington v. City of Overland Park*, 15 Kan. App. 2d 721, 726, 815 P.2d 1116 (1991). As long as the appropriate procedure is followed, a subsequent charter ordinance may amend or repeal one or more sections of a prior charter ordinance while leaving the remaining sections intact. See *State ex rel. Tomasic v. Unified Government of Wyandotte County*, 264 Kan. 293, 329-30, 955 P.2d 1136 (1998).

II. Plain Language of Section 2 of Charter Ordinance No. 10

The interpretation of statutes and ordinances is a question of law. *Steffes v. City of Lawrence*, 284 Kan. 380, 385, 160 P.3d 843 (2007), citing *City of Wichita v. Hackett*, 275 Kan. 848, 850, 69 P.3d 621 (2003). “The fundamental rule of statutory interpretation is that a court must give effect to the intent of the [governing body] as expressed.” *Polson v. Farmers Insurance Co. Inc.*, ___ Kan. ___, Syl. 2, 200 P.3d 1266 (2009). If the language

of a statute or ordinance “is plain and unambiguous, a court must give effect to that language rather than determine what the law should be, speculate as to [the governing body’s] intent, add something not readily found in the statute, resort to canons of statutory construction, or consult legislative history.” *Id.* Thus, the Court must initially review the actual language used in Charter Ordinance No. 10 in an attempt to determine the intent of the City of Topeka as expressed.

As indicated above, Section 2 of Charter Ordinance No. 10 states: “All new applicants for positions in the Fire Department of the City shall be required to submit to a civil service examination for the position of third class fireman.” This language has remained unchanged since the Charter Ordinance was originally adopted in 1967. The Oxford English Dictionary defines “all” to mean: “The entire number of; the individual constituents of, without exception.” (Oxford English Dictionary, Oxford University Press 1996.) Using the common meaning of the word “all” as used in Section 2 of Charter Ordinance No. 10, it is clear that this section was intended to apply to every new applicant for a position as a firefighter in the City of Topeka. In fact, it is difficult to envision language which could possibly be more inclusive.

It should also be recognized that the Oxford English Dictionary defines “new” to mean: “Not existing before; now made or existing for the first time.” Furthermore, the Oxford English Dictionary defines “applicant” to mean: “A person who applies or makes request, esp. formally.” Finally, the Oxford English Dictionary defines “position” to mean: “A post of (paid) employment.” Thus, based on a review of the plain and simple language

used in Section 2, the Court declares that this section of the Charter Ordinance No. 10 was intended by the governing body to mean that everyone not currently employed by the Topeka Fire Department who applies for employment as a firefighter with the department must take the civil service examination for the entry level position of third class fireman.¹

III. Review of Charter Ordinance No. 10 in its Entirety

The interpretation of Section 2 set forth in the previous paragraph is also consistent with reading Charter Ordinance No. 10 as a whole. As originally adopted in 1967, Section 4 made it clear that “[a]ll positions, other than third class fireman, shall be filled without further civil service examination by promotion. . . .” Section 4 of Charter Ordinance No. 10 gave “the Chief of the department, with approval of the governing body” the authority to “make promotions of First Assistant Chief, District Chief, Battalion Chief, Fire Department Communication Officer, Fire Department Mechanic, Fire Marshall, Training Officer, Superintendent of Buildings or other speciality departments that may be created.” Section 4 further provided that all other positions were to be filled “by promotion only after being interviewed by the promotion board [created in Section 3 of the Charter Ordinance], which board shall make recommendations of qualified personnel to the chief who shall make promotions from such recommendations.”

¹ Because the actual controversy presented in this declaratory judgment action involves Battalion Chiefs and Shift Commanders, this decision is limited to those persons applying for positions in the Operations Division. As such, if there is a legitimate question regarding whether Section 2 of Charter Ordinance No. 10 is also applicable to applicants for positions in other divisions of the Topeka Fire Department, it should be addressed in another forum.

The Oxford English Dictionary defines the term “promote” to mean: “Advance or raise (a person) to higher rank or position. . . .” As such, reading the original language of Charter Ordinance No. 10 in its entirety, the Court finds that the City of Topeka intended that the only firefighter positions which could be hired from outside the department were those of third class fireman and Fire Chief.² All other positions were to be filled from within the department by promotion. Furthermore, the Court finds that neither the partial amendment of Charter Ordinance No. 10 in 1991 (which deleted Section 6) nor the partial amendment in 2006 (which deleted Section 4) altered the original intent of the remaining sections of the Charter Ordinance.

IV. Legislative History of Charter Ordinance No. 10

The present case is unique in that it is the City of Topeka claiming its own Charter Ordinance is ambiguous. Notwithstanding the fact that Charter Ordinance No. 10 has been on the books for more than thirty (30) years, the current city leaders contend that the intent of Charter Ordinance No. 10 is unclear. As such, the City Attorney’s Office has been placed in the awkward position of asking this Court to disregard the plain language of Charter Ordinance No. 10 in order to determine the intent of Section 2. Thus, the Court will briefly address the legislative history of Charter Ordinance No. 10 out of an abundance of caution.

² Section 6 of Charter Ordinance No. 10, which was repealed in 1991, provided that the Fire Chief “shall be appointed by the governing body of the City either from the department or otherwise and shall serve at the will of the governing body.” Currently, the Fire Chief is appointed by the City Manager pursuant to Section 2-154 of the Code of the City of Topeka.

As adopted on August 29, 1967, Charter Ordinance No. 10 was enacted in order to exempt the City of Topeka from K.S.A. 13-2231a and to provide “substitute and additional provisions on the same subject. . . .”³ K.S.A. 13-2231a, which was originally enacted in 1939 and was subsequently repealed in 1974, provided that all positions in a fire department, except for the positions of “third-class fireman” and “chief of the fire department, shall be filled by promotion only by the chief of the fire department with the approval of the governing body of said city on the basis of merit, seniority and personal record equally and without further civil service examination.” The statute also provided that applicants for the position of “third-class fireman” were required to take a civil service examination.

Like K.S.A. 13-2231a, Section 4 of Charter Ordinance No. 10 also provided that all positions other than third class fireman and fire chief were to be filled “by promotion only” without further civil service examination. The primary difference between Charter Ordinance No. 10 and K.S.A. 13-2231a involved the creation of a Promotion Board. In addition, while Charter Ordinance No. 10 includes a probationary period of one (1) year for “[a]ll appointments or promotions other than the chief of the department,” K.S.A. 13-2231a provided for a “probationary period of six months.” The Charter Ordinance also added a requirement that third class firemen were ineligible for promotion until they “had at least two (2) years continuous service with the department.”

³ Although Charter Ordinance No. 10 refers to K.S.A. 13-2231(a), the Court notes that K.S.A. 13-2231 did not have a subsection (a) in 1967. Moreover, it is clear from a review of the statutory language in effect in 1967 that the statute from which the City exempted itself was actually K.S.A. 13-2231a.

It is important to recognize that the language of Section 2 of Charter Ordinance No. 10, which has not been modified since it was first adopted in 1967, is nearly identical to the first sentence of K.S.A. 13-2231a. The statute provided: “All applicants for positions in the fire department in said cities shall be required to submit to an examination for positions as a third-class fireman.” Similarly, Charter Ordinance No. 10 continues to provide: “All new applicants for positions in the Fire Department of the City shall be required to submit to a civil service examination for position of third class fireman.” Thus, it is apparent from a review of the legislative history of Charter Ordinance No. 10 that the intent was to require all positions other than third class fireman and Fire Chief to be filled only by promotion from within the fire department.

Any confusion over the intent of Charter Ordinance No. 10 which may currently exist was caused by the fragmentation which resulted from the City of Topeka’s decision to amend the Charter Ordinance on a piecemeal basis in 1991 and in 2006. In fact, this case could be viewed as a textbook example of the potential problems which can result from amending a Charter Ordinance on a piecemeal basis. Nevertheless, when the original language of Charter Ordinance No. 10 is considered in its entirety, the intent is abundantly clear. Moreover, Section 106-74(a) of the Code of the City of Topeka continues to provide that all promotions in the Topeka Fire Department “shall be in accordance with Charter Ordinance No. 10.” Thus, regardless of whether one looks to the unambiguous language of Section 2, to a review of Charter Ordinance No. 10 in its entirety and/or to the legislative history of the

Charter Ordinance, the intent of Section 2 remains unchanged since the time it was first adopted in 1967.

V. Public Policy Issues

Both parties have made arguments involving public policy issues that they would like this Court to consider. On the one hand, the Plaintiffs want to maintain the status quo when it comes to promotion of firefighters from within the Topeka Fire Department. On the other hand, the Defendants want to change the selection process so that they have the option to seek applicants for certain managerial positions from outside the Topeka Fire Department.

Such policy questions should not be decided by the courts. As indicated above, Article 12, Section 5 of the Kansas Constitution grants cities “the power to determine local public policy. . . .” So long as the City of Topeka uses the appropriate procedure, it has the right to amend or even repeal Charter Ordinance No. 10 if it so desires. Moreover, by following the appropriate procedure for amendment or repeal, all of the citizens of Topeka would have the opportunity to be heard on the important public policy issues that have been presented by the parties.

VI. Further Relief

At this point in time, it does not appear any relief in addition to a declaratory judgment will be necessary. The Court is hopeful that the City of Topeka will abide by the declaratory judgment set forth in this Memorandum Decision and Order until such time as Charter Ordinance No. 10 may be repealed and/or amended in the future. If so, no further relief will

be necessary. However, in the event that the City of Topeka fails to comply with this declaratory judgment, the Plaintiffs may seek further relief pursuant to K.S.A. 60-1703.

CONCLUSION

Therefore, this Memorandum Decision and Order shall serve as the declaratory judgment of the Court, and the City of Topeka is directed to comply with the original intent of Charter Ordinance No. 10 until such time as it may be repealed or amended using the appropriate procedures set forth in Article 12, Section 5 of the Kansas Constitution. The Court finds that no further relief is necessary at this time. As such, the Plaintiffs' claims for a permanent injunction and for an order of mandamus are dismissed without prejudice.

This Memorandum Decision and Order shall serve as the final judgment of the Court. No further Journal Entry is required.

IT IS SO ORDERED.

Entered on this _____ day of May, 2009.

David E. Bruns
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in the pick-up bin on this _____ day of May, 2009, to the following:

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