

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 06**

STATE OF KANSAS, ex rel.)
ROBERT D. HECHT, District Attorney)
Third Judicial District)
)
Plaintiff)
)
vs.)
)
THE CITY OF TOPEKA, KANSAS)
NORTON BONAPARTE, City manager)
of the City of Topeka, Municipal)
Services Group, Inc., and Schreib-Air, Inc.)
)
Defendants)
_____)

Case No. 08-C-339

MEMORANDUM DECISION AND ORDER

This matter is before the Court on the Defendant’s Schreib-Air, Inc., Lawson Software Americas, Inc., City of Topeka, and Norton Bonaparte’s Motions to Alter or Amend this Courts Memorandum Decision and Order filed February 3, 2009. The Court is also in receipt of a letter from Defendant Municipal Services Group, Inc., for clarification of the Courts order which this Court will consider to be a Motion to Alter.

The Plaintiff, State of Kansas ex. rel and Amicus Curiae have responded to these motions. After careful consideration of the evidence, the relevant law, and the arguments of the parties, the Court finds as follows:

DISCUSSION AND CONCLUSIONS OF LAW

The Defendant’s have requested that this Court alter or amend its judgment pursuant to K.S.A. 60-259(f). The Court will address each Defendant’s motions individually.

First Defendant, Schreib-Air, Inc., (Schreib) contends the City's contract with Schreib was valid and lawful when approved by the City Council. Schreib would have this Court rule that a contract made with the approval of a City Council is valid notwithstanding the fact that the Mayor of that City vetoed that action within the authorized time limit to exercise a veto.

The Court finds the arguments of Schreib to be disingenuous. Schreib argues the contract with the City was valid at the time of its approval on December 6, 2007, due to the City passing a council action form on December 4, 2007, purportedly authorizing the approval of a lease purchase for the helicopter. Schreib argues how was it to know the Mayor would veto the council action form. One indication might have been the Mayor's previous veto of a prior attempt to purchase the same helicopter on July 2, 2007. Schreib had knowledge that the Mayor and City Council were not in agreement with the purchase of the helicopter. Schreib knew or should have known that any ordinance, resolution or council action form passed by the City Council that purported to authorize the purchase of the helicopter was subject to the Mayor's veto. If it was not clear to Schreib such knowledge is imputed and the result is the same.

In *Genesis Health Club, Inc., et. al. v. City of Wichita*, 285 Kan. 1021, 1043 (2008) quotes favorably *Blevins v. Board of Douglas County Commissioners*, 251 Kan. 374, 384, 834 P.2d 1344 (1992) which states:

Contracts which a municipal corporation is not permitted legally to enter into are not subject to ratification, and a city may not be estopped to deny the invalidity of a contract that is ultra vires in the sense that it is not within the power of the municipality to make. In other words, no ratification or estoppel can make lawful a municipal contract which is beyond the scope of the corporate powers, or which is not executed in compliance with mandatory conditions prescribed in the charter or statutes, or which is contrary to a declared policy adopted to protect the public. The notice imputed to all persons dealing with a municipal corporation of the limits of its powers, is in some cases advanced as the reason upon which these rules are based.

The City of Topeka's Charter prescribes that the Mayor has the authority to approve or veto the councils vote. This is a mandatory requirement before the proposed vehicle which authorizes the subject contract is final. Schreib's knowledge of this fact is imputed, if in fact, it claims ignorance of this requirement. Since the contract was never approved by appropriate and lawful action of the city, the contract was invalid.

This Court need not address the issue of the Cash Basis Law violation since the above ruling voids the contract with Schreib. This Court denies Schreibs Motion to Reconsider. The Court will note its ruling addresses only the City's obligation to Schreib and the City's obligation to MSG. Schreib raises an issue of \$74,000 paid by MSG to Schreib. Neither Schreib nor MSG made a cross claim in this action against the other. The Court has taken no position relative to breach of agreements between Schreib and MSG and does not do so here. It is up to those parties to protect and address whatever rights they believe exist between the two parties. This Courts ruling was only to require return of any money to the City that was expended by the City as a result of the attempted purchase.

Next, the Defendant Lawson Software America's, Inc., (Lawson) asks the Court to clarify the extent of the issues addressed in its opinion concerning Lawson. To the extent it is not clear, the Courts opinion reaches only City obligations to Lawson that arise as a result of the failed passage of Resolution No. 8051 and The Master Lease and Option Agreement associated therewith. The Court makes no ruling on any other lawful contracts between the City of Topeka and Lawson. The Courts ruling, if unclear, is hereby amended to reflect only the obligations associated with the Municipal Lease Option Agreement between the City and MSG.

The Defendant's, City of Topeka, and Norton Bonaparte request that the Court reconsider its ruling that K.S.A. 12-3003 is not in effect to provide the Topeka City Council with authority

to override a mayoral veto. The City's passage of Charter Ordinance 98 on February 24, 2009, which was passed by the City's electorate on April 7, 2009, render the City's requests moot. However, the Court will respond to each request.

The City recognizes that no Kansas authority is directly on point and that this is an issue of first impression. Since the Court's decision is based on Kansas Law and the Kansas Constitution, the Nebraska holding is of little value without additional information concerning the similarity of Nebraska Law and its constitution. The Court also finds *Edington v. City of Overland Park* to be of little value. The City makes good arguments not previously made to the Court concerning whether repeal of a charter ordinance operates to reinstate the application of a statute or statutes that had been chartered out of by charter ordinance in the first instance. The City contends the law does not favor a vacuum. This logic leads to the conclusion that failure to have override of a mayoral veto creates a vacuum. However, the Kansas Constitution does not provide for city council override power. Thus, if as occurred here, a city provides its own legislation for mayoral veto and the City Council override of that veto (Charter Ordinance No. 65) and then repeals that charter ordinance and replaces it with new legislation (Charter Ordinances # 94 & # 96) which provide for mayoral veto but not veto override, there is no vacuum. What has occurred is legislation that does not provide for mayoral veto override. The Kansas Constitution does not mandate City Council override power, nor does any State Legislation. It can be deleted as a requirement by Charter Ordinance as it is a non-uniform requirement.

The City's illustration concerning laws controlling the sale of liquor, at first blush, is a compelling one. However, Kansas cities cannot exempt themselves from state prohibition against the Easter Holiday retail sale of liquor. This is a uniform law applicable to all Kansas cities and

therefore not subject to charter ordinance. As noted above, that is the difference. Override power by the city council does not fall under the same prohibition. As stated in the City's original memorandum of law at page #7, the Kansas Constitution at Article 12, Section 5, grants cities the largest measure of home rule, including the authority to craft their own government. The City of Topeka has crafted its government but now does not like what it has crafted.

The city argues that while K.S.A. 12-3003 specifically provides that veto of an ordinance by the mayor may be overridden by a three-fourths vote of the whole number of councilmen elected, it is possible that the name attached to a document may not in fact be what it is in substance. A document labeled a resolution may in fact be an ordinance and vice versa. The city contends that parties must look to the substance of each document to determine what type of legislation is proposed. This argument is made by the municipal corporation that passed a communication (communication # 37914) and contended it was not subject to veto by the mayor. The previous memorandum of the City and its argument previous to the motion to reconsider did not address that the resolution in question was an ordinance. This Court did not have that argument in front of it in its original consideration. The city now contends that the document in question although denominated as a resolution, was a matter of council legislation with all the formalities associated with the passage of a legislative act and therefore an ordinance. K.S.A. 12-3003 is clear and unambiguous in its requirement that any ordinance vetoed by the mayor may be passed over the veto. The city has failed to satisfactorily prove to this Court that the document in question was an ordinance. The Court denies the City's request to reconsider on this basis.

The City asks the Court to narrow its finding that Ordinance 17226 is inconsistent with Charter Ordinances #94 & #96. The Court's decision was focused on Section 11 of Ordinance No. 17226 / Section 2-32 of the current code. The section addresses veto procedures and

council override of the mayor's veto. It was the Courts intent to find that the change from a strong mayor-council form of government to a strong council-manager form of government provided the conflict in this area of the ordinance. The ruling only affects those portions of Ordinance 17226 dealing with the mayors veto and override of that veto. No other questions concerning Ordinance 17226 as it relates to Ordinances #94 & #96 were before the Court. Therefore, only those parts of Ordinance 17226 dealing with mayoral veto and override by the city council are affected by the Courts ruling. Any other provisions of Ordinance 17226 were not addressed by the Courts ruling and therefore, not found to be in conflict with Charter Ordinances #94 & #96.

Defendant Municipal Services Group, Inc., (MSG) requests the Court order refund of monies deposited in escrow and disbursed by Comerica for the Helicopter Lease and MSG for ERP Software. As this Court previously addressed in its response to Schreib, these issues were not before the Court for consideration. The Court ruled that any monies paid by the city should be refunded. However, if third-parties expended monies for the city, that issue remains to be determined between the city, the third parties and the recipient of those funds. The Court makes no ruling on issues not before the Court.

CONCLUSION

For the reasons cited above the Court finds the Defendant Schreibs Motion to Reconsider is denied; Defendant Lawsons' Motion to reconsider is granted to the extent that the Courts prior opinion only addresses obligations to Lawson associated with the Master Lease and Option Agreement; Defendant's City of Topeka and Norton Bonaparte's Motion to Reconsider is denied except as to the clarification of the extent of Ordinance 17226 conflict with Ordinances #94 & #96; and Defendant Municipal Services Group, Inc.'s, Motion to reconsider is denied.

The foregoing memorandum decision and order shall serve as the final entry of judgment of the court, no further journal entry being required.

IT IS SO ORDERED THIS _____ DAY OF MAY, 2009

Larry D. Hendricks
District Judge

LDH/cld
