STATE OF MICHIGAN

COURT OF APPEALS

DETROIT AREA AGENCY ON AGING,

Plaintiff-Appellee,

v

STATE OF MICHIGAN OFFICE OF SERVICES TO THE AGING, THE COMMISSION ON SERVICES TO THE AGING, NANCY CRANDALL, Executive Director of the Commission, THEODORE BRIETENBACH, MICHAEL GREEN, LISELOTTE HOELZEL-SEIPP, DONALD HOFFMAN, ELWIN JOHNSON, BARBARA MANTILA, ROSELIA NEUMANN, and JACQUELINE JOLLY, Commission Members,

Defendants-Appellants,

and

AREA AGENCY ON AGING 1B,

Amicus Curiae.

FOR PUBLICATION
May 19, 1995
9:40 a.m.

No. 165148
LC No. 92-232283-AS

Before: Hood, P.J., and Gribbs and Deborah Servitto*, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order disqualifying six commissioners from participating on the Michigan Commission on Services to the Aging (Commission). The order also voided the Commission's vote approving a new state funding formula affecting the fourteen statewide local Area Agencies on Aging (AAAs). Finally, through its order, the trial court ordered the governor to appoint new members to the Commission within 60 days and further ordered the contemplated reconstituted Commission to reconsider the funding formula within 120 days. We reverse.

Under the Older Americans Act, 42 USC 3001 USC 3001 et seq., a state agency created to help the elderly is eligible to receive federal grants for funding programs to serve the elderly, provided that the agency develops a formula for distributing the funds received under the Act. Consistent with the Older Americans Act, the Commission and the Office of Services to the Aging (OSA) were created under the Older Michiganians Act, MCL 400.581 et seq.; MSA 2.638(51) et seq. The Commission, which consists of fifteen commissioners appointed by the Governor, is the policy making body for the OSA and the fourteen regional AAAs in Michigan. As the policy making body under the Older Michiganians Act, the Commission is responsible for establishing a funding formula for the distribution (by the OSA) of federal and state funds to the fourteen Michigan AAAs. Plaintiff, the Detroit Area Agency on Aging, is one of the fourteen AAAs.

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

On September 18, 1992, the Commission, by a vote of ten to five, approved a new state funding formula affecting the aforementioned fourteen AAAs. Under the new formula, plaintiff's share of the funds are scheduled to decrease due to a decline in the elderly population in Detroit. In November of 1992, plaintiff initiated this action for superintending control, mandamus, and declaratory and injunctive relief, alleging in relevant part that the Commission's approval of the new funding formula was unlawful and void because eight commissioners were ineligible to vote because they held incompatible public offices and acted under actual or potential conflicts of interest in violation of the incompatible offices act, MCL 15.181 et seq.; MSA 15.1120(121) et seq., and the State Ethics Act, MCL 15.341 et seq; MSA 4.1700(71) et seq. Among other things, plaintiff requested the trial court to void the Commission's vote approving the new funding formula and to disqualify the commissioners at issue from further participation on the Commission.

At a December 9, 1992, hearing, the trial court ruled that Commissioner Green was disqualified from voting on the new funding formula due to a conflict of interest. Defendants did not object. The trial court postponed consideration of the incompatibility issue until a later date. Defendants subsequently moved for summary disposition pursuant to MCR 2.116(C)(4), (8) and (10). Defendants denied that Commissioners Neumann, Mantila, Hoffman, Johnson, and Hoelzel-Seipp held positions which conflicted or were incompatible with their Commission positions. Thus, defendants argued, a finding by the trial court that any one of these commissioners was eligible to vote on the new funding formula in September 1992 would result in a quorum approving the formula.

At the hearing pursuant to defendants' motion for summary disposition the trial court determined that Commissioners Mantila, Hoffman, Hoelzel-Seipp, and Jolly should be removed from the Commission. Also included within the ambit of the trial court's order were Commissioners Brietenbach and Green, although no specific findings were made relative to these two commissioners. However, defendants acknowledged previously that the votes of Commissioners Brietenbach and Green were void or voidable due to the fact that they held incompatible offices when the new funding formula was adopted. Finally, as stated above, the trial court ordered the governor to appoint new Commission members within 60 days, and ordered the new Commission to ratify or amend the new funding formula within 120 days. Having granted defendants' Motion for Stay and Motion for Immediate Consideration, we now address the substance of the trial court's order.

Defendant first claims that the trial court erred by disqualifying the aforementioned six commissioner's from the Commission based on his conclusion that they held other incompatible positions. We agree.

The incompatible offices act prohibits a public officer or public employee from holding two or more incompatible public offices at the same time. MCL 184 15.182; MSA 15. 1120 (122). Wayne County Prosecutor v Kinney, 184 Mich App 681, 683; 458 NW2d 674 (1990); Contesti v Attorney General, 164 Mich App 271; 416 NW2d 410 (1987). Section 1 of the act, MCL 15.181(b); MSA 15.1120(121)(b), defines "incompatible offices" as:

> [P]ublic offices held by a public official which, when the official is performing the duties of any of the public offices held by the official, result in any of the following with respect to those offices held:
>
> (i) The subordination of 1 public office to another.
>
> (ii) The supervision of 1 public office by another.
>
> (iii) A breach of duty of public office.

This definition applies to public offices held by both public officials and public employees. Kinney, supra.

This Court need not address the issue of whether members of the Commission are public officers, because defendants commissioners have acknowledged that they are indeed public officers. Moreover, defendants commissioners concede that, as public officers, they are prohibited from simultaneously holding two or more incompatible public offices. Because it is established that the commissioners are public officers, we must determine whether the trial court erred by concluding that they held other incompatible public offices.

Under the Older Americans Act and the companion Michigan statute, the Commission is required to designate an AAA for each planning and service area of the state. The Commission is also responsible for developing a formula for the distribution of state and federal funds to these AAAs, and may enter into contracts and agreements necessary or incidental to the performance of its duties. Suffice to say, the foregoing clearly establishes that the fourteen AAAs are subordinate to, and subject to the supervision of the Commission.

In the present case Commissioners Brietenbach and Green voted to approve the new funding formula in September 1992. At the time of the vote Commissioner Brietenbach was a member of an AAA advisory board, whereas Commissioner Green was a member of an AAA administrative board. Defendants concede that Brietenbach and Green held incompatible positions when they voted to approve the new funding formula. Accordingly, defendant's concede that the votes cast by Brietenbach and Green were voidable in the discretion of the trial court pursuant to MCL 15.185; MSA 15.1120(125). The trial court indeed exercised this discretion and voided the votes of Commissioners Green and Brietenbach. We find no error in the trial court's decision in this regard.

However, notwithstanding the fact that the trial court had the discretion to void the two votes in question, defendants claim that the trial court erred in disqualifying Commissioners Green and Brietenbach from the Commission because they each resigned from their respective "other" incompatible positions prior to the trial court's ruling. We agree.

First, it is apparent from the record that the trial court treated as synonymous the issues of "incompatibility" and "conflict of interest." The trial court's failure to distinguish these two issues is significant. Vacation of one office will solve a public official's dilemma of two incompatible offices. Kinney, supra at 684; Contesti, supra at 281. This is not necessarily the case in "conflict of interest" situations. In the present case Commissioners Green and Brietenbach each resigned from the acknowledged "other" incompatible positions prior to the trial court's ruling. This being the case, the question of "incompatibility" was effectively resolved. Kinney, supra; Contesti, supra. Accordingly, the trial court's decision to remove Green and Brietenbach from the Commission was unwarranted because they had already renounced their "other" incompatible positions.

Next, regarding Commissioner Hoffman, a more difficult question exists as to whether he, like Green and Brietenbach, held an incompatible office when the new funding formula was approved. At the time of the vote Commissioner Hoffman was a member of an advisory board to the Portage Senior Center operated by the City of Portage, which received funds from the area AAA. However, the evidence also indicates that Commissioner Hoffman was not involved in that funding, that the Senior Center was not controlled by and did not have a direct relationship with an AAA, the Commission, or the OSA, and that the advisory board on which he served did not make recommendations as to which organizations should receive funding or advise the area AAA in any way.

With respect to MCL 15.181(b)(i) and (ii), it is clear that Commissioner Hoffman did not hold an "incompatible position." The issue, therefore, is whether the duties of each office result in a breach

of duty of public office pursuant to section (b)(iii). Under this section an incompatibility of public offices would certainly exist if Commissioner Hoffman were involved in direct contractual negotiations with the Commission on behalf of the Senior Center or city commission relating to funds for the elderly. These circumstances are not supported by the evidence and, thus, we are of the opinion that the trial court erred in disqualifying Commissioner Hoffman from the Commission.

The trial court also disqualified Commissioner Mantila from the Commission. Again, the trial court erred in so doing. Suffice to say, the volunteer positions held by Commissioner Mantila were not "incompatible" with her position as a commissioner. As for Commissioner Jolly, the record reveals that she resigned from the Commission in December 1992 for personal reasons. Her disqualification from the Commission is therefore moot. Detroit v Detroit Police Officers Ass'n, 174 Mich App 388, 391-392; 435 NW2d 799 (1989). [Commissioner Hoelzel-Seipp's dismissal from the Commission will be discussed under the "conflict of interest" analysis.]

Under the foregoing analysis it is clear that the votes of Commissioners Brietenbach and Green in favor of the new funding formula were the only votes which were properly disqualified by the trial court. Absent these votes, the new formula would have been approved by a vote of 8 to 5, instead of 10 to 5. The trial court declared the entire vote void. This action was inconsistent with the requirement of MCL 15.185; MSA 15.1120(125), namely that any judicial relief under the incompatible public offices act shall operate prospectively only. Accordingly, the trial court erred by voiding the Commission's vote approving the new funding formula.

Finally, but not least significant, plaintiff lacked standing to raise the issue of incompatibility in the trial court. MCL 15.184; MSA 15.1120(124) specifically provides that an action for incompatibility may be brought by the Attorney General or a prosecuting attorney, and that there is no private cause of action under the incompatible public offices act. Where a new right or a new duty is imposed by statute, the remedy provided by the statute for enforcement of the right or for nonperformance of the duty is exclusive unless the remedy is plainly inadequate. Forster v Delton School District, 176 Mich App 582, 584; 440 NW2d 421 (1989).

Plaintiff was not precluded from communicating its concerns to the Attorney General's office or to the local prosecutor. These parties, being specifically designated by the legislature to act in situations such as these, are sufficiently capable of forwarding plaintiff's grievance in the appropriate forum when the circumstances so dictate. As plaintiff is not without an adequate remedy we conclude that it lacked standing to raise the incompatibility issue in the trial court. Id.; MCL 15.184; MSA 15.1120(124).

Next, we conclude that Commissioner Hoelzel-Seipp had a conflict of interest in this case. Although the trial court found that the new funding formula was not a contract, the AAAs are authorized to enter into subcontracts for services to the elderly. MCL 400.589(2)(d); MSA 2.638(59)(2)(d). At the time of the Commission's vote in September 1992, Commissioner Hoelzel-Seipp held a management and stock ownership position with Michigan Home Care, a company which provided nursing and basic home care to the elderly. Through her affidavit Commissioner Hoelzel-Seipp acknowledged that the company received funding from the Grand Traverse County Commission on Aging, which in turn received grants from the area AAA. In light of Commissioner Hoelzel-Seipp's financial interest in AAA funds as a result of her involvement in Michigan Home Care, we conclude that her participation in approving the new funding formula created a conflict of interest under MCL 400.584(2); MSA 2.638(54)(2), and MCL 15.322(1); MSA 4.1700(52)(1).

Addressing defendants' third argument, we conclude that plaintiff had no standing to bring an action before the trial court pursuant to the State Ethics Act in this case. As pointed out by defendants, the State Ethics Act is intended as a code of ethics for public officers and employees, and not as a rule of law for public contracts. See MCL 15.341 et seq.; MSA 4.1700(71) et seq.

Having reversed the trial court's order on other grounds, we need not address defendant's remaining issue which concerns the portion of the trial court's order compelling the governor to appoint new commissioners.

Reversed.

/s/ Harold Hood
/s/ Roman S. Gribbs
/s/ Deborah A. Servitto

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STATE OF MICHIGAN

COMMISSION
ELWIN M. JOHNSON
CHAIRPERSON

JOHN ENGLER, Governor

OFFICE OF SERVICES TO THE AGING

NANCY CRANDALL, Director

MEMORANDUM

DATE: December 21, 1992

TO: Commission on Services to the Aging

FROM: Nancy Crandall, Director NC

SUBJECT: Conflict of Interest and Incompatible Offices

There has recently been concern about whether members of the Commission have a conflict of interest as a result of their involvement with area agencies or providers of services under area plans. The purpose of this memorandum is to provide some perspective on this issue. I have also attached photo copies of statutory provisions discussed below.

There are two state statutes which address conflict of interest for members of the Michigan Commission on Services to the Aging. First, the Older Michiganians Act (PA 180 of 1981) at Section 4.(2)(a) through (c), describes situations where members shall not participate or shall abstain. Second, PA 317 of 1968, as amended, relates to the conduct of public servants in respect to contracts with public entities. However, neither of these statutes prohibit involvement with area agencies or service providers by members of the Commission. The provisions of the statutes require disclosure of a member's interest in certain contracts and limits their opportunity to discuss, make recommendations and vote on contracts for which an interest has been disclosed. Please find attached a disclosure form for use by members of the Commission.

A related but separate statute, PA 566 of 1978, addresses the incompatibility of certain public offices. The intent of this statute is to prevent an individual from occupying two public offices at the same time where one office is subordinate to or supervises the other. The Older Michiganians Act establishes a supervisory relationship between the Michigan Commission on Services to the Aging and area agencies. Therefore, an individual may not be a member of both at the same time.

I hope the above and attached information provides you with a clearer understanding of conflict of interest as it relates to membership on the Commission. If you have any questions on the above or attached, please don't hesitate to let me know.

NC/EB/pah

Attachments

MEMORANDUM

STATE OF MICHIGAN

OFFICE OF SERVICES TO THE AGING

LANSING

Date: January 13,1988

To: Commissioners

From: Olivia P. Maynard, Director

Subject: Incompatible Offices/Conflict of Interest

At the last Commission meeting I told you I would investigate further the issue raised in the Attorney General's letter to Bob McReavy (10/26/87).

The AG's opinion as to whether a state Commissioner may also hold a position on an area agency policy board or advisory council is based on P.A. 566, 1978 (attached). As I read that statute I concur with the AG. If any of you serve on area agency boards or advisory councils, you should resign as Bob McReavy has done.

"Incompatible Offices" is a separate issue from conflict of interest. Under "conflict of interest" you may still serve on agency boards in the field of aging. You must declare conflict of interest and not vote or speak if a vote is going to be taken by the Commission on that particular agency.

/haw

Attachment