REL: 05/27/2011

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2010-2011

1081570

F.D. Scott et al.

v.

Kenneth Coachman, as Mayor of the City of Fairfield

Appeal from Jefferson Circuit Court, Bessemer Division (CV-09-660)

MAIN, Justice.[1]

F.D. Scott, Vincent Smith, William Murray, Ronald Strothers, and Ves Marable, the five members of the City

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[1]This case was originally assigned to another Justice on this Court; it was reassigned to Justice Main on January 19, 2011.

Council of the City of Fairfield (hereinafter referred to collectively as "the city council"), appeal from the order of the Jefferson Circuit Court granting the declaratory and injunctive relief requested by Kenneth Coachman, as mayor of the City of Fairfield, on his challenge to the city council's enactment of Ordinance No. 1022. Mayor Coachman asserted in his motion that Ordinance No. 1022 impermissibly usurped the appointment powers granted the mayor by § 11-43-81, Ala. Code 1975. On June 9-10, 2009, the circuit court conducted a bench trial at which it heard testimony from Mayor Coachman and argument from counsel for both sides. On June 30, 2009, the circuit court issued a written order granting Mayor Coachman the declaratory and injunctive relief he sought. The city council filed a motion to alter, amend, or vacate the ruling;[2] this appeal followed. We affirm.

Factual Background

Defendant's exhibit 1, a copy of Chapter 2 of the Fairfield City Code, is included in the record. Section 2-2

[2]The record indicates that the circuit court scheduled a hearing on the motion to alter, amend, or vacate and then rescheduled that hearing. However, the record does not indicate whether a hearing was ever held, nor does the record contain any ruling on the motion.

of the code provides: "The appointing authority for the city shall be the city council. (Code 1957, § 2-1; Ord. No. 356, § 1, 10-21-57; Ord. No. 516, 8-4-69; Ord. No. 545, 10-16-72; Ord. No. 578, 5-6-74; Ord. No. 607, 11-16-76; Ord. No. 661, 6-12-79)." Ordinance No. 874, enacted on November 2, 1992, provided that the mayor was the appointing authority and that the mayor's appointing authority was to be exercised "'with the advice and consent of the Fairfield City Council as provided in Section 11-43-81, Code of Alabama.'"

On or about May 18, 2009, the city council adopted Ordinance No. 1022, which repealed Ordinance No. 874 and returned the appointing authority to the city council where it had originally reposed under § 2-2 of the Fairfield City Code. Mayor Coachman vetoed Ordinance No. 1022. On June 1, 2009, the city council overruled Mayor Coachman's veto and enacted Ordinance No. 1022. Mayor Coachman then sought declaratory and injunctive relief in the circuit court.

Mayor Coachman testified at trial that he had served on the Fairfield City Council from 1980 to 1984 and that he was elected mayor of Fairfield in November 2008. He stated that he believed that Ordinance No. 1022 would adversely impact his

ability to supervise and discipline employees of the City of Fairfield. Mayor Coachman also testified that Ordinance No. 1022 would undermine his authority over city employees and that employees would be confused as to whom they ultimately answered to in terms of things such as being assigned tasks and being disciplined. He further stated that the city council was not equipped to oversee the day-to-day operations or supervision of city employees.

Mayor Coachman conceded on cross-examination that Ordinance No. 1022 had been enacted and vetoed and his veto overridden all in accordance with applicable rules and procedures, i.e., Ordinance No. 1022 had been lawfully enacted. Mayor Coachman further conceded on cross-examination that he did not recall any instances during his tenure on the city council or as mayor of any member of the council interfering with the day-to-day activities of city employees or attempting to countermand his instructions to the heads of the various city departments.

Standard of Review

Although there were some disputed facts as to whether any irreparable harm was caused by the enactment of Ordinance No.

1022, the ultimate question in this case is whether, in light of § 11-43-81, Ala. Code 1975, the city council could lawfully enact an ordinance naming the city council, rather than the mayor, the appointing authority for the City of Fairfield. That question presents a pure question of law; as to it, the facts are undisputed.[3] Thus, we review de novo the application of the law to the undisputed facts. See Barnett v. Estate of Anderson, 966 So. 2d 915 (Ala. 2007).

Analysis

The Alabama Legislature has provided that, in a mayor-council form of government, the council is the legislative authority. See § 11-43-43, Ala. Code 1975. The general law providing for the adoption and enforcement of ordinances by municipalities is as follows:

> "Municipal corporations may from time to time adopt ordinances and resolutions not inconsistent with the laws of the state to carry into effect or discharge the powers and duties conferred by the applicable provisions of this title and any other applicable provisions of law and to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and may enforce obedience to such ordinances."

[3]We note that Mayor Coachman did not file a brief with this Court.

§ 11-45-1, Ala. Code 1975. Thus, the city council is authorized to adopt ordinances, but only to the extent that those ordinances are not inconsistent with existing state law. One of the duties assigned by the Alabama Legislature to the mayor in the mayor-council form of government is as follows:

> "The mayor shall be the chief executive officer, and shall have general supervision and control of all other officers and the affairs of the city or town, except as otherwise provided in this title. He shall have the power to appoint all officers whose appointment is not otherwise provided for by law. He may remove any officer for good cause, except those elected by the people, and fill the vacancy caused thereby, permanently, if the appointment of such officer is made by the mayor, and temporarily, if such officer was elected by the council or appointed with its consent, in either of which last two cases he must report such removal and his reasons therefor to the council at its next regular meeting, when, if the council shall sustain the act of removal by the mayor by a majority vote of those elected to the council, the vacancy shall be filled as provided in this title."

§ 11-43-81, Ala. Code 1975.

The appointing authority of the mayor, although broad, is not absolute and all encompassing. Indeed, the very language in § 11-43-81 extends the mayor's power only as far as not otherwise provided by law and contemplates situations where the council, rather than the mayor, is the appointing authority. The Alabama Court of Civil Appeals seemingly

recognized this possibility in City of Brighton v. Gibson, 501 So. 2d 1239, 1241 (Ala. Civ. App. 1987), stating:

> "In our opinion § 11-43-81, in the absence of any contrary statute or other contrary appropriate authority, gave the mayor the authority to hire the employee as her personal secretary without obtaining the consent of the City Council. Such authority is implicit in and merely part of the broad power granted to the mayor by § 11-43-81 to supervise and control the affairs of the City."

(Emphasis added.) Further, although not binding on this Court, the Alabama Attorney General has issued a number of attorney general opinions concluding that, based on the authority delegated to municipalities and in light of the language in § 11-43-81, a municipality is permitted to enact ordinances naming the city council of the municipality as the appointing authority. See Ala. Op. Att'y Gen. 2009-103 (Sept. 8, 2009); Ala. Op. Att'y Gen. No. 2009-054 (March 13, 2009); Ala. Op. Att'y Gen. No. 2004-163 (June 22, 2004).

Additionally, this Court has acknowledged that municipal ordinances are "law," stating: "[W]e find further, that Alabama case law, consistent with this statutory mandate [§ 11-45-1, Ala. Code 1975], permits the enactment of laws by ordinance or resolution in the absence of a statutory requirement for a specific mode of enactment." Tutwiler Drug

Co. v. City of Birmingham, 418 So. 2d 102, 106 (Ala. 1982). The Alabama Attorney General has relied on this Court's language in Tutwiler to conclude that a city council has the authority to reserve for itself the appointing authority for a municipality. See Ala. Op. Atty. Gen. No. 1997-166 (April 21, 1997).

However, despite the Court of Civil Appeals' conclusion in Brighton and the aforementioned attorney general opinions to the effect that a city council can enact an ordinance reserving for itself the appointing authority for a municipality, we hold that the phrase "not otherwise provided for by law" in § 11-43-81 does not allow such an interpretation in this case. The source of a city council's authority is not found in the ordinances enacted by the city council. Rather, the source of a city council's authority is the authority that the Alabama Legislature granted it by statute. The legislature has granted city councils appointing authority with regard to certain officers of a town. See, e.g., § 11-43-3, Ala. Code 1975 (city council appoints city treasurer and city clerk in towns having more than 6,000 inhabitants); § 11-43-4 (city council appoints city clerk in

cities having less than 6,000 inhabitants and in towns); and § 11-43-5, Ala. Code 1975 ("The council may provide for a tax assessor, tax collector, chief of police, and chief of the fire department and shall specifically prescribe their duties."). The legislature has also granted the mayor general appointing authority, subject only to those positions as to which the legislature designated appointing authority elsewhere. Conversely, the city council's authority to adopt ordinances and resolutions in a legislative fashion is limited to ordinances and resolutions that are not inconsistent with existing state law. See § 11-45-1, Ala. Code 1975. Thus, the council did not have the authority to override state law to take the general appointing authority from the mayor and assign that power to itself.

Conclusion

For the above-stated reasons, we conclude that Ordinance No. 1022 is inconsistent with § 11-43-81, Ala. Code 1975. Therefore, we affirm the circuit court's judgment.

AFFIRMED.

Cobb, C.J., and Woodall, Stuart, and Wise, JJ., concur.

Bolin, Murdock, and Shaw, JJ., concur in the result.

MURDOCK, Justice (concurring in the result).

By statute, the legislature has chosen mayors, and not city councils, to be the repositories of the general power to hire and fire municipal employees. The statute by which the legislature has made this choice, § 11-43-81, Ala. Code 1975, by merely accommodating those situations "otherwise provided by law," is reasonably understood simply to mean "law" that is equal to or superior to that statute. I cannot conclude that the legislature intended to say: "We choose by statute to give this power to mayors as a general rule, but only to the extent that a local city council does not override our choice and elect to assign this power to itself." I am not more inclined to accept this notion merely because the legislature has given the city council the general legislative authority to enact ordinances.[4] Nor am I persuaded by the opinion of the Court of Civil Appeals in City of Brighton v. Gibson, 501 So. 2d 1239 (Ala. Civ. App. 1987), which actually is a ruling in favor of the mayor in that case and which contains only an

[4]Also, the authority to enact an ordinance is not without limitations in addition to the statutory requirement that the ordinance not be inconsistent with existing state law. See, e.g., § 11-45-1, Ala. Code 1975.

unexplained reference to other contrary "appropriate authority," or by applicable attorney general opinions, which also suffer from a lack of analysis and for the most part merely rely upon City of Brighton.

In pertinent part, § 11-43-81 provides that the mayor "shall have the power to appoint all officers whose appointment is not otherwise provided for by law." In City of Brighton, the Court of Civil Appeals interpreted this statement to mean that

> "§ 11-43-81, in the absence of any contrary statute or other contrary appropriate authority, gave the mayor the authority to hire the employee as her personal secretary without obtaining the consent of the City Council. Such authority is implicit in and merely part of the broad power granted to the mayor by § 11-43-81 to supervise and control the affairs of the City."

501 So. 2d at 1241 (emphasis added). The Court of Civil Appeals did not provide any authority for its assertion that the phrase "otherwise provided for by law" includes "other contrary appropriate authority" (although I would consider this a correct statement insofar as it would include constitutional provisions, assuming any were applicable, or perhaps some contrary, but more specific, statutory delegation of authority). More specifically, the Court of Civil Appeals

did not explain, and provided no authority as to, what it meant by the phrase "other contrary appropriate authority."

The Court of Civil Appeals in City of Brighton did, however, go on to explain that the power to hire and fire resided with the mayor in that case because there was no contrary statutory authority:

> "The City's reliance upon Ala. Code (1975), §§ 11-43-4 and 11-43-7, is misplaced. Section 11-43-4 gives the City Council the power to determine the City's officers, their salary, the manner of their election, and their terms of office. That statute has nothing to do with the hiring of administrative personnel by the mayor to carry on the functions of her office. Section 11-43-7 gives the City Council the authority to prescribe by ordinance the salaries of City employees whose compensation is not fixed by law. That statute does not address the question presented on appeal of who is authorized to hire City employees."

Id. (emphasis omitted; some emphasis added). Thus, aside from its unexplained and unsupported statement concerning "other contrary appropriate authority," the opinion in City of Brighton actually supports the conclusion that it is the mayor in this case who has the authority to hire and fire municipal employees.

Several attorney general opinions state that city councils have the authority to withdraw the power to appoint

city officers from the mayor and give that authority to themselves. See, e.g., Ala. Op. Att'y Gen. No. 2009-051 (March 10, 2009) (stating that "section 11-43-81 has been interpreted as authorizing the adoption of personnel rules, which then have the force and effect of law and take the hiring authority out of the hands of the mayor"); Ala. Op. Att'y Gen. No. 2009-054 (March 13, 2009) (same); Ala. Op. Att'y Gen. No. 2009-103 (Sept. 8, 2009) (same); Ala. Op. Att'y Gen. No. 99-072 (Jan. 5, 1999) (stating that "section 11-43-81 allows for other appropriate authority, such as personnel rules, to govern the appointment of municipal employees"). As Ala. Op. Att'y Gen. No. 2004-163 (June 22, 2004) makes clear, however, these attorney general opinions rely upon the reference in City of Brighton to "other contrary appropriate authority" to reach this conclusion:

> "Section 11-43-81 of the Code of Alabama provides, in pertinent part, that the mayor 'shall have the power to appoint all officers whose appointment is not otherwise provided for by law.' Ala. Code § 11-43-81 (1989) .... The Alabama Court of Civil Appeals has held that, under the statute, absent contrary authority, a mayor has the sole power to hire a secretary. City of Brighton v. Gibson, 501 So. 2d 1239, 1240 (Ala. Civ. App. 1987). In reliance on Brighton, this Office has interpreted the statute to hold that a city personnel rule governed the appointment of officers and employees

> [Opinion to Honorable Jerry W. Jackson, Attorney, Haleyville City Council, dated January 5, 1999, A.G. No. 99-00072] and that a city council can make itself, by ordinance, the appointment authority for all officers and employees [Opinion to the Honorable Jay M. Ross, Attorney, City of Bayou La Batre dated April 21, 1997, A.G. No. 97-00166]."

Ala. Op. Att'y Gen. No. 2004-163 (emphasis omitted; emphasis added).[5]

The sole exception to this reliance upon City of Brighton is Ala. Op. Att'y Gen. No. 1997-166 (April 21, 1997), which provides, in pertinent part:

> "The issue of whether an ordinance is a law is well-settled in the case law of Alabama. The Supreme Court, in Tutwiler Drug Company v. City of Birmingham, [418 So. 2d 102, 106 (Ala. 1982),] when interpreting Code of Alabama 1975, § 11-45-1, which provides for the adoption of ordinances by a municipality, held:
>
> > "'We find further, that Alabama case law, consistent with this statutory mandate, "permits the enactment of laws by ordinance or resolution in the absence of a statutory requirement for a specific mode of enactment." Tucker v. City of Robertsdale, 406 So. 2d 886 (Ala. 1981). See, also, McQuillen, Municipal Corporations, Vol. 5 (3rd ed., 1981) 15.06.'
>
> "(Emphasis added.)

[5]The 2009 attorney general opinions cite previous attorney general opinions that directly rely upon City of Brighton.

> "Clearly, if the council, by ordinance, reserves for itself the authority to appoint all officers and employees, it has provided otherwise by law as mandated in Section 11-43-81."

The conclusory assertion in the last sentence quoted above is just that -- a conclusory assertion unaccompanied by any authority or reasoning. The quotation from Tutwiler Drug Co. v. City of Birmingham, 418 So. 2d 102 (Ala. 1982), that precedes it merely states that, if a local law is to be enacted, an ordinance or resolution may be the appropriate form for that enactment. Further, although it is true that a municipal ordinance is binding as "law" in respect to matters that have not been decided otherwise by the constitution or by statute and that the municipality has the authority to address by ordinance, this merely begs the questions whether the matter at hand has in fact been decided otherwise by statute and whether the municipality has the authority to address this matter by way of an ordinance enacted by its city council. In light of the general statutory delegation of authority to mayors in § 11-43-81, the question becomes whether this Court can conclude that the legislature intended that city councils have the authority to create exceptions to this general rule by enacting ordinances to such effect. If

not, then any such ordinance would have to yield to the contrary statutory delegation of authority.

It is axiomatic that State statutory law is superior to ordinances enacted by municipal corporations. Section 11-45-1, Ala. Code 1975, provides that "[m]unicipal corporations may from time to time adopt ordinances and resolutions not inconsistent with the laws of the state to carry into effect or discharge the powers and duties conferred by the applicable provisions of this title and any other applicable provisions of law ...." See also Reed v. City of Montgomery, 341 So. 2d 926, 933 (Ala. 1976) (discussing a Montgomery ordinance and stating that "[a] basic principle of our system of government is the superiority of state law"); Hall v. City of Tuscaloosa, 421 So. 2d 1244, 1249 (Ala. 1982) (holding that "a municipal ordinance that contravenes state law, as here, is invalid for that reason alone"). Did the legislature intend to make a general policy choice -- giving mayors the general power to hire and fire -- only to follow that choice with a caveat that local city councils are free to override the legislature's choice and make some different "law" for themselves? Had the legislature intended this, it certainly could have chosen a

less obsfucated manner of expressing it, e.g., by simply saying, "Except as a city council may by ordinance assign this power to itself ...."

Furthermore, the term "law" in the phrase "provided by law" when used in statutes is generally understood to mean statutory law. For example, the sixth edition of Black's Law Dictionary states: "Provided by law. This phrase when used in a constitution or statute generally means prescribed or provided by some statute." Black's Law Dictionary 1224 (6th ed. 1990). State courts have interpreted the phrase in the same manner. See, e.g., Brooks v. Northglen Ass'n, 76 S.W.3d 162, 167 (Tex. App. 2002) (stating that "[t]he phrase 'unless otherwise provided' or similar language, when used in a statute, usually refers to other statutes pertaining to the same subject matter" (reversed in part on other grounds, 141 S.W.3d 158 (Tex. 2004))); Cook v. Turner, 219 Conn. 641, 644, 593 A.2d 504, 505 (1991) (concluding that the word "law" in the phrase "[e]xcept as otherwise provided by law" is "limited to state and federal statutes"); Oregon County R-IV Sch. Dist. v. LeMon, 739 S.W.2d 553, 557 (Mo. Ct. App. 1987) (stating that "'"except as otherwise provided by law," means except as

otherwise provided by statute'" (quoting Yates v. Casteel, 329 Mo. 1101, 1104, 49 S.W.2d 68, 69 (1932))); Manchin v. Browning, 170 W. Va. 779, 785, 296 S.E.2d 909, 915 (1982) (holding that the phrase "provided by law" means prescribed or provided by statute); Trujillo v. Tanuz, 85 N.M. 35, 40, 508 P.2d 1332, 1337 (N.M. Ct. App. 1973) (noting that "'[p]rovided by law' means 'provided by statute law'" (quoting Fountain v. State, 149 Ga. 519, 101 S.E. 294, 295 (1919))); and Pace v. Pace Bros. Co., 91 Utah 132, 59 P.2d 1, 8 (1936) (concluding that the phrase "except as provided by law" did not refer to the "general law"; rather the phrase seems to "smack of the flavor of something done by the legislature").

This general understanding of the phrase "provided by law" supports the conclusion in this particular case that the legislature did not expressly choose mayors rather than city councils to be the repositories of the power to appoint, only to then add a clause in the same statute intended to empower city councils to contravene that choice by way of local ordinances. It seems clear that the phrase "otherwise provided for by law" in § 11-43-81 was intended by the legislature to accommodate any applicable constitutional

provisions and any existing or future statutes providing for the appointment by city councils of specific city officials;[6] it is not intended to grant to city councils the authority to assign the power of appointment to themselves through local ordinances.

[6]See, e.g., §§ 11-43-3 and -4, Ala. Code 1975 (described in the main opinion). Unlike the main opinion, I am not persuaded that the language in § 11-43-5, Ala. Code 1975, lends that statute for use as a further example of this point.