Agenda item #16

CITY OF SAN ANTONIO
CITY ATTORNEY'S OFFICE
INTERDEPARTMENTAL CORRESPONDENCE

TO: Mayor and City Council

FROM: Andrew Martin, City Attorney

COPIES TO: J. Rolando Bono, Interim City Manager

SUBJECT: Agenda Item 16

DATE: January 21, 2005

BACKGROUND

This ordinance responds to the court order entered September 9, 2004 in *Minella v. City of San Antonio*, Civil Action No. SA-03-Ca-246-FB, in the United States District Court for the Western District of Texas, San Antonio Division, concerning the effective date of the Charter Amendments approved by the voters of San Antonio at the November 6, 2001 election. A copy is attached for your reference. This matter was discussed in executive session at the January 13 meeting.

POLICY ANALYSIS:

This ordinance provides an effective date for the Charter Amendments adopted by the voters at the November 6, 2001 election. Section 1 establishes that date as November 15, 2001, the date the City Council enacted Ordinance No. 94956 and confirmed that a majority of the voters voting in the election had approved the Charter Amendments.

In the alternative, and only if a court invalidates the November 15, 2001 effective date established by this ordinance, Section 2 of the ordinance establishes effective dates for each of the three Propositions as follows:

- Proposition One (for the independent city auditor) is effective January 30, 2003, the date the City Council passed and approved Ordinance No. 97120 appointing the City Auditor;

- Proposition Two (confirmation by City Council of the City Attorney) is effective March 14, 2002, the date the City Council passed and approved Ordinance No. 95435 confirming my appointment as the City Attorney; and

- Proposition Three (removing civil service protection from certain licensed professionals and executive positions) is effective September 19, 2002, the date the City Council passed and approved Ordinance No. 96399 adopting among other budget matters the FY 2002-2003 Pay Plan incorporated as Attachment IV to that ordinance, and establishing and acknowledging designated "unclassified (non-executive)" job class titles for certain licensed professionals and executive job classifications removed from Municipal Civil Service coverage.

If a court invalidates both Section 1 and Section 2, the effective date of the Charter Amendments is January 27, 2005.

This ordinance does not waive or abandon the position taken by the City in the Minella litigation that argues that the Charter Amendments were effective on November 15, 2001 as a matter of law. Passing this ordinance will, however, presumably resolve a threshold issue that concerned the trial court and allow the litigation to proceed towards resolution of the remaining issues.

RESPECTFULLY SUBMITTED:

ANDREW MARTIN
City Attorney

J. ROLANDO BONO
Interim City Manager

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DIANA MINELLA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL ACTION NO. SA-03-CA-246-FB**
	)	
CITY OF SAN ANTONIO, TEXAS, a Municipal Corporation; ET AL.,	)	
	)	
Defendants.	)	

ORDER REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the Court are cross-motions for summary judgment (docket nos. 54 and 55), and related filings including an amicus curie brief submitted by plaintiffs in a state court case with similar issues (docket nos. 48-52, 56, 57). After careful consideration, the Court holds the cross-motions for summary judgment are granted in part and denied in part, with plaintiff's remaining claims being dismissed without prejudice and dismissed as moot.

BACKGROUND

The City of San Antonio is a home rule city which goes through the process of amending its city charter, the "constitution" of its local self government. TEX. CONST. art. II, § 5. After passing in August of 2001 an ordinance which called for a special election, city council placed three proposed charter amendments on the ballot which were approved by a majority of the qualified voters of the City of San Antonio in November of 2001. At issue here is Proposition 3 which abolished civil service protection for certain city employees, including assistant city attorneys such as Ms. Minella.

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The Charter Amendments

On August 16, 2001, city council passed Ordinance No. 94375 calling for a special election to be held for the purpose of amending the city charter. The language of Proposition 3, which would amend Section 69 of the city charter by removing licensed professionals and executive job classifications from municipal civil service classification, was part of this ordinance. Proposition 3 would remove assistant directors of city departments, architects, assistant auditors, attorneys, dentists, doctors, engineers, psychologists, veterinarians, and part-time and seasonal employees from civil service protection. A majority of the qualified voters of the city approved Proposition 3 on November 6, 2001. The vote was subsequently canvassed on November 15, 2001.

Importantly, Ordinance 94375 states: "Propositions approved by a majority of the voters voting shall become effective when the City Council enters an order stating an effective date of the propositions and states on the records of the City declaring that the Charter amendments have been adopted." (Emphasis added). It is undisputed council never entered an order stating an effective date for Proposition 3.

Following the canvass of the vote pursuant to the election code, city council enacted Ordinance 94956, which adopted the passage of all three propositions on the ballot including the charter amendment eliminating civil service protection. Ordinance 94956 provides: "[T]hese Charter Amendments shall take effect when the City Council takes action by separate ordinance stating the effective date of each prospective proposition." (Emphasis added). Defendants admit city council never took action by separate ordinance stating the effective date of Proposition 3.

Plaintiff's Employment History

On June 11, 2001, plaintiff was hired by the City of San Antonio as an assistant city attorney serving as a prosecutor in municipal court, a classified civil service position under the city's civil service rules. In December of 2001, plaintiff requested permission to perform outside employment from then City Attorney Frank Garza. On December 20, 2001, Mr. Garza granted plaintiff permission to perform outside employment provided that if she were to engage in litigation such a request would be considered on a case by case basis.

On August 12, 2002, plaintiff requested permission from current City Attorney Andrew Martin to pursue outside part-time employment as a municipal court judge for the City of Live Oak, Texas. City Attorney Martin denied her request based on ethical and conflict issues he felt were present in being both a municipal court prosecutor for the City of San Antonio and an alternate municipal court judge for the City of Live Oak. After her request was denied, on October 4, 2002, plaintiff sent a letter to Mr. Martin stating she had accepted the judicial position with the City of Live Oak and informing him she would not be leaving her job as a prosecutor with the City of San Antonio.

On December 27, 2002, City Attorney Martin sent plaintiff a memo notifying her she would "be terminated from employment as an assistant city attorney for the City of San Antonio unless I receive written confirmation from both you and the City Manager of the City of Live Oak that you are not, as of January 10, 2003, or some earlier date, continuing to exercise the duties of a municipal court judge for the City of Live Oak, whether paid, unpaid, full-time or part-time." In the absence of a response, on January 13, 2003, the City of San Antonio terminated plaintiff's employment for insubordination based on her "intentional and willful disregard of [City Attorney Martin's] directive."

The parties agree the city denied plaintiff's request she be allowed to challenge defendant Martin's decision and her termination in the civil service process. Plaintiff contends in the absence of proper implementation the charter amendment could not and did not take effect and she was therefore entitled to participate in the civil service process.[1] The failure to accommodate her due process rights, she argues, violates federal, state and municipal law. Defendants maintain the charter amendment took effect when a majority of the voters approved the Proposition 3 and city council adopted the passage of the vote. Defendants therefore contend plaintiff had no entitlement to participate in the civil service process. Plaintiff and defendants have moved for summary judgment. The issue appears to be one of first impression.

STANDARD OF REVIEW

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Thurman v. Sears, Roebuck & Co., 952 F.2d 128, 131 (5th Cir.), cert. denied, 506 U.S. 845 (1992). A fact is "material" if it might reasonably affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); In re Gleasman, 933 F.2d 1277, 1281 (5th Cir. 1991). The moving party must identify the evidence on file in the case which establishes the absence of any genuine issue of material fact. Celotex, 477 U.S. at 323.

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[1] The amicus curiae brief is filed in support of plaintiff by five employees who were terminated from the San Antonio city auditor's office without having been accorded access to the civil service process.

This case is before the Court on cross-motions for summary judgment. Each party, therefore, has the burden of producing evidence to support its motion. Dutmer v. City of San Antonio, 937 F. Supp. 587, 589-90 (W.D. Tex. 1996). The movant has the initial burden of showing the absence of a genuine issue of material fact. Tubacex, Inc. v. M/V Risan, 45 F.3d 951, 954 (5th Cir. 1995). The burden then shifts to the non-movant to show that summary judgment is not proper. Duckett v. City of Cedar Park, 950 F.2d 272, 276 (5th Cir. 1992). Either party may satisfy its evidentiary burden by tendering depositions, affidavits, and other competent summary judgment evidence. Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert denied, 506 U.S. 825 (1992). The Court has been supplied with competent summary judgment evidence in this case.

DISCUSSION

Procedural Due Process Under the Fourteenth Amendment and the Texas Constitution

Plaintiff argues defendants violated her procedural due process rights under the Fourteenth Amendment to the United States Constitution and Article 1, section 19 of the Texas Constitution when they failed to give her the opportunity to respond through the pre-termination grievance process and appeal her termination pursuant to the civil service rules. See U.S. CONST. AMEND. XIV, § 1; Tex. Const. art. 1, § 19. Defendants maintain plaintiff is not entitled to civil service protection because city council had canvassed the vote verifying the passage of Proposition 3. The record reveals, however, that canvassing alone is not sufficient to put the charter amendment into effect. For reasons unknown to the Court, city council placed additional restrictions on implementation of the charter amendment. Ordinance 94375 specifically states Proposition 3 "shall become effective"only "when the City Council enters an order stating an effective date of the propositions."

Ordinance 94956 expressly provides Proposition 3 "shall take effect" only "when the City Council takes action by separate ordinance stating the effective date of each prospective proposition."

Defendants contend this language is surplus because the voters had made known their intention when the charter amendment passed. Traditionally, the intent of the voters has not been enough to implement fundamental civil rights. After the end of the Civil War in 1865, the sovereign people of the United States passed the Thirteenth[2], Fourteenth[3], and Fifteenth[4] Amendments to the United States Constitution. Discrimination did not end just by amending the American charter. It took a hundred years for the legislative and judicial branches to implement equal rights. See, e.g., Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 1981-2000h (2003)); Voting Rights Act of 1965 (codified as amended at 42 U.S.C. §§ 1971-1974e (2003 & Supp. 2004)); Brown v. Board of Educ., 347 U.S. 483, 493 (1954)("separate but equal" treatment of races is unconstitutional).

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[2] The Thirteenth Amendment provides in part:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. U.S. CONST. amend. XIII, § 1.

[3] The Fourteenth Amendment provides in part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, §1.

[4] The Fifteenth Amendment provides in part:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

U.S. CONST. amend. XV, § 1.

Similarly, the sovereign people of San Antonio amended their charter, but the enabling ordinances state Proposition 3 must be implemented by city council. Council did not, and has not, taken implementing action. The amendment removing civil service protection therefore never took effect according to the very rules city council put in place. Plaintiff was thus entitled to participate in the civil service process. The failure to allow her to do so was a violation of her rights to procedural due process under the Fourteenth Amendment and the Texas Constitution. Accordingly, summary judgment is granted in plaintiff's favor on these claims.

42 U.S.C. § 1983

Plaintiff alleges defendants' conduct was intentional, reckless and objectively unreasonable in violation of 42 U.S.C. § 1983. To state a claim under section 1983 for a procedural violation of the Due Process Clause, plaintiff must show she has asserted a recognized liberty or property interest within the purview of the Fourteenth Amendment and she was intentionally or recklessly deprived of that interest, even temporarily, under color of state law. Griffith v. Johnson, 899 F.2d 1427, 1435 (5th Cir. 1990)(citations omitted), cert. denied, 498 U.S. 1040 (1991). Defendants sued in their individual capacity, City Attorney Martin and City Manager Brechtel, are immune from suit if they can show their actions were objectively reasonable in light of clearly established law at the time the action was taken. Anderson v. Creighton, 483 U.S. 635 (1987).[5]

Though the Court has concluded plaintiff has shown a protected property interest in her

[5] In addition to bringing suit against the City of San Antonio for purposes of 42 U.S.C. § 1983, plaintiff brought suit against the mayor, city council members and civil service commission members in their official capacities. She also sued the city manager, Terry Brechtel, and the city attorney, Andrew Martin, in their official and individual capacities. To the extent a city official is sued for damages in his or her official capacity, such a suit is deemed to be one against the city. Turner v. Houma Mun. Fire & Police Civil Serv. Bd., 229 F.3d 478, 485 & n.14 (5th Cir. 2000). The remaining immunity discussion "necessarily concerns only the personal liability of individuals sued in their individual capacities." Id. Therefore, plaintiff's section 1983 allegations against the mayor and city council/civil service commission members are deemed to be claims against the City of San Antonio and the qualified immunity discussion applies only to defendants Brechtel and Martin.

procedural due process right to civil service protection, the Court also holds this right was not recognized or clearly established such that defendants would have plainly and objectively known they were infringing upon that right. During the time period at issue, City Attorney Martin stated "there was a controversy about what rights individual employees, particularly assistant city attorneys, had as a result of the voters' adoption of Proposition 3." Deposition of Andrew Martin, Exhibit C, page 48, lines 5-8, Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment (docket no. 55). He further testified plaintiff's situation was one of first impression and "nobody had been fired since the voters had adopted" the amendment. Id. at lines 11-18.

The citizens of San Antonio had elected to remove civil service classification from plaintiff's position on November 6, 2001, but city council took no action setting forth the effective date of the amendment. Former City Attorney Garza stated he didn't "remember when, where or who, but I may have told the staff that it was my belief that council still had to take further action" before Proposition 3 would come into effect. Deposition of Frank J. Garza, Exhibit A, page 136, lines 4-9, Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment (docket no. 55). Elisa Bernal, Director of Human Resources for the City of San Antonio with direct supervisory responsibility during the relevant time period over the civil service commission, stated it was her understanding that Proposition 3 would not take effect for about a year, coinciding somehow with the adoption of the October 2002 budget. Deposition of Elisa P. Bernal, Exhibit B, page 26, lines 6-8 & page 27, lines 2-5, Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment (docket no. 55). City Attorney Martin testified he first "assumed based on [his] knowledge of municipal law that

the charter amendment took effect when the voters approved it" and "there's going to have to be some additional step or action taken by the council." Deposition of Andrew Martin, Exhibit C, page 49, lines 2-3 & 18-20, Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment (docket no. 55). Finally, he took the position Proposition 3 became "effective when the election was canvassed and the council confirmed that a majority . . . of those casting votes in the election had adopted it." Id. at lines 9-14. City Manager Terry Brechtel testified by deposition that "Proposition 3 had passed in November, and . . . there was some concern[] in the city attorney's office . . . specifically related to the issue of whether or not the attorneys were grandfathered." Deposition of Terry Brechtel, Exhibit G, page 91, lines 15-18, Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment (docket no. 55).

Given the undisputed confusion over Proposition 3, plaintiff had no recognized or clearly established property interest in the civil service process. Because her property right is "at best 'arguable,' defendants cannot have plainly known they were infringing [upon] it" for purposes of section 1983. Connelly v. Comptroller of Currency, 876 F.2d 1209, 1214 (5th Cir. 1989). Defendants Martin and Brechtel are therefore entitled to qualified immunity and summary judgment is granted in defendants' favor on plaintiff's 42 U.S.C. § 1983 cause of action.

Intentional Municipal Law Violations–Charter and Civil Service Rules of the City of San Antonio

Similar to her 42 U.S.C. § 1983 theory of recovery, plaintiff argues defendants' intentional violation of her clearly established right to participate in the civil service process constituted a fraudulent interference with provisions of the city's charter and the rules and regulations made thereunder in contravention of the City Charter, Article VI, section 78(a). For the reasons discussed

above, the Court has found plaintiff had no clearly established right in the civil service process. Accordingly, defendants could not have acted to defrauded in a willful or intentional manner. See Connelly, 876 F.2d at 1214 (defendant's conduct is not intentional in absence of clearly established property right). Summary judgment is therefore granted in defendants' favor on plaintiff's claim that defendants intentionally violated municipal law.

Texas Open Meetings Act

Plaintiff maintains the Texas Open Meetings Act was violated on August 16, 2001, when a videotaped statement from absent councilman David Garcia was played at a council meeting. It was at the August 16, 2001, council meeting that city council passed the Ordinance ordering the placement of the proposed amendments, including Proposition 3, on the November 6, 2001, special election ballot. Regarding the videotaped statement, the minutes of the meeting provide:

> At this point, Mayor Garza stated that Councilman Garcia, being out of town on official business, asked that his remarks be presented at this time.
>
> Mr. Garcia via video spoke on behalf of postponing this [special election] issue until such time as the term limit proposition can be voted upon. He added that if this was not possible at this time, he would support the majority of the council on what it deemed best.

Plaintiff contends the playing of the videotaped statement constitutes a violation of the Texas Open Meetings Act (sometimes referred to as "the Act") as a matter of law.

The Act requires open meetings by governmental bodies and prohibits closed meetings except for instances specified in the statute. See Tex. Gov't Code Ann. § 551.002 (Vernon 1994). Save for emergencies, a meeting must be preceded by written notice posted in a place readily accessible to the general public in advance of the meeting. Id. § 551.043. The term "closed meeting" refers to a "meeting to which the public does not have access." Id. § 551.001(1). The word "open" means

"open to the public." Id. § 551.001(5). The Texas Open Meetings Act provides "[a]n action taken by a governmental body in violation of the [Act] is voidable." Id. § 551.141.

Plaintiff presents no authority, and independent research has uncovered none, which supports the proposition that the playing of the videotaped statement converted what was theretofore an open meeting into a closed meeting and thus into a violation of the Texas Open Meetings Act. As indicated, the purposes of the Act "are to enable public access to and to increase public knowledge of government decisionmaking." City of San Antonio v. Fourth Court of Appeals, 820 S.W.2d 762, 765 (Tex. 1991)(orig. proceeding). Here, there is no evidence or suggestion any member of the public was denied access to the meeting or an opportunity to acquire knowledge of government decision making. See also Charlie Thomas Ford, Inc. v. A.C. Collins Ford, Inc., 912 S.W.2d 271, 273-74 (Tex. App.–Austin 1995, writ dism'd)(lack of two-way communication between plaintiff and council during entirety of hearing did not for purposes of Texas Open Meetings Act convert open meeting into closed one). Summary judgment is therefore granted in defendants' favor on plaintiff's Texas Open Meetings Act claim.

Untimely Election Contest

Defendants argue plaintiff's suit constitutes an untimely election contest challenging the voter's decision to remove civil service classification for assistant city attorneys. Any challenge to the election, defendants maintain, must have been brought within thirty days after the canvas of the vote. See TEX. ELEC. CODE ANN. § 233.006 (Vernon 1986)(requiring individual who wishes to contest election to file petition not later than thirtieth day after date official results of contested election are determined). In this case, plaintiff does not challenge the election results, and, in fact, concedes the election was properly conducted. Pages 27, Plaintiff's Memorandum in Opposition to

Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment (docket no. 55). Rather, plaintiff challenges the decision to implement the result of the election without enabling city council action. These arguments do not constitute an election challenge. Accordingly, defendants are not entitled to summary judgment on this ground.

Plaintiff's Remaining Claims

As this Court has found defendants improperly put Proposition 3 into effect in the absence of city council having taken action stating the effective date of the proposition, summary judgment disposition is not appropriate for the remainder of plaintiff's claims. Plaintiff alleges the decision to fire her was arbitrary and capricious in violation of her substantive due process rights under the Fourteenth Amendment and 42 U.S.C. § 1983. She also claims she was improperly terminated without cause in breach of her employment contract. In light of the fact plaintiff shall have the opportunity to challenge her termination in the civil service process, these claims are dismissed without prejudice. Plaintiff also alleges she was subjected to an ex post facto or retroactive application of the law in violation of her constitutionally protected property rights. As the charter amendment never took effect, it is not a law to which plaintiff could have been subjected. Her ex post facto or retroactive application of the law claims are therefore dismissed as moot.

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment (docket no. 55) is GRANTED in PART and DENIED in PART. Plaintiff is GRANTED summary judgment on her claims that her procedural due process rights under the Fourteenth Amendment to the United States Constitution and Article 1, section 19 of the Texas Constitution were violated when she was denied access to the civil service process; the remainder of her motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment (docket no. 54) is GRANTED in PART and DENIED in PART. Defendants Martin and Brechtel are entitled to qualified immunity for claims brought against them in their individual capacities and defendants are GRANTED summary judgment on plaintiff's 42 U.S.C. § 1983 procedural due process claim; defendants are also GRANTED summary judgment on plaintiff's claims that defendants violated municipal law and the Texas Open Meetings Act; the remainder of defendants' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that plaintiff's claims she was denied substantive due process under the Fourteenth Amendment and in violation of 42 U.S.C. § 1983, and her breach of contract claim, are dismissed without prejudice. Plaintiff's claims she was subjected to an ex post facto or retroactive application of law are dismissed as moot.

IT IS FINALLY ORDERED that the above-styled and numbered cause is DISMISSED. Motions pending with the Court, if any, are dismissed as moot.

It is so ORDERED.

SIGNED this 9 day of September, 2004.

FRED BIERY
UNITED STATES DISTRICT JUDGE

Publish.