S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

SHARON MCPHAIL,

Plaintiff-Appellant,

v

ATTORNEY GENERAL of the STATE of MICHIGAN,

Defendant-Appellee,

and

RUTH CARTER and KEVIN P. KAVANAUGH,

Defendants.

UNPUBLISHED
November 9, 2004

No. 248126
Wayne Circuit Court
LC No. 03-305475-CZ

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right[1] from a judgment for defendant-appellee (defendant). The circuit court, in response to plaintiff's request for a declaratory judgment, ruled that the positions of city attorney for the city of Ecorse and member of the Common Council of the city of Detroit were incompatible under Michigan's Incompatible Public Offices Act (MIPOA), MCL 15.181 *et seq*. In response to defendant's request for a permanent injunction, the trial court ordered plaintiff to resign from one of the public offices within twenty-one days. We affirm.

Plaintiff argues that the trial court erred in ruling that the positions in question were incompatible under the MIPOA because, although both offices are public offices, plaintiff's performance of the duties of the offices did not result in an actual breach of duty of a public office.

[1] We reject defendant's claim that plaintiff could not appeal as of right in this case because the order from which she purportedly appealed was not a final order. Indeed, despite the circuit court's language referring to the order as non-final, the order did in fact "dispose[] of all the claims and adjudicate[] the rights and liabilities of all the parties." See MCR 7.202(7)(a)(i).

The interpretation and application of a statute is a question of law that this Court reviews de novo. *Macomb County Prosecuting Attorney v Murphy*, 464 Mich 149, 157; 627 NW2d 247 (2001). The goal of judicial interpretation of statutes is to ascertain and effectuate the intent of the Legislature. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003), superceded on other grounds by statute as stated in *Nichols v Moore,* 334 F Supp 2d 944 (2004). It is presumed that the Legislature intended the plain and obvious meaning it expressed. *Pohutski v City of Allen Park,* 465 Mich 675, 683 ; 641 NW2d 219 (2002). If the terms of a statute are ambiguous, judicial construction is appropriate. *Murphy*, *supra*, 464 Mich 158. The Court must apply a reasonable construction that considers the purpose of the statute and the harm it is designed to remedy. *Id*. The Court must give effect to every word, clause, and sentence, presuming that each is used for a purpose. *Pohutski, supra,* 465 Mich 683-684. Likewise, the Court should avoid a statutory construction that renders any portion of the statute irrelevant or invalid. *Id.* at 684. The provisions of a statute must be read within the context of the entire statute so as to produce a harmonious and consistent enactment. *Murphy*, *supra*, 464 Mich 159-160.

The MIPOA prohibits a public officer or public employee from holding incompatible public offices at the same time. MCL 15.182; *Murphy*, *supra*, 464 Mich 154. A public officer includes a person who is elected or appointed to a public office of a city in this state or to a council of a city in this state. MCL 5.181(e)(ii) and (iii); *Id*. The term "incompatible offices" is defined in MCL 15.181(b) as follows:

> [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, results 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.

Under the provisions of the act, incompatibility exists when the performance of the duties of an office results in one of these three enumerated circumstances. *Murphy, supra,* 464 Mich 162-163.[2] The focus in the instant case is whether plaintiff's performance of her duties under the two positions resulted in a breach of duty of a public office. MCL 15.181(b)(iii).

Under an agreement entered into on September 30, 1940, the city of Ecorse has an existing contract for water services with the city of Detroit. Plaintiff admits that members of the Detroit City Council participate in approving or disapproving the annual water rates as determined by the Detroit Water and Sewer Department (DWSD). Moreover, as city attorney for the city of Ecorse, plaintiff is required by charter to "act as legal advisor to and as attorney and

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[2] There are certain exceptions to the general rule, but they do not apply in this case. MCL 15.183.

counsel for the municipality and all its officers and departments in matters relating to their official duties." Under the Ecorse City Charter, plaintiff must "prepare, or officially pass upon, all contracts, bonds and other instruments in writing, in which the [c]ity is concerned[.]" Plaintiff is also required to maintain copies of all contracts entered into by the city of Ecorse or on the city's behalf.

In February 2003, the Ecorse City Council passed a resolution absolving plaintiff of any future responsibilities or duties in any matters between Ecorse and Detroit. The resolution specified that in such matters, outside council would be appointed. Moreover, the resolution appointed a separate attorney to handle all water and sewer matters for the city.

Plaintiff contends that her two positions were not incompatible because, in her capacity as a council member for the city of Detroit, she merely votes on the annual water rates for all the areas serviced by the DWSD. She claims that she is not involved in any negotiations or other aspects of the water contract. Plaintiff also claims that, as city attorney for the city of Ecorse, she had never been required to participate in or assist with any matter between Ecorse and Detroit. She contends that it is permissible to avoid a breach of duty by abstaining from performing a function that may cause a breach of duty.

Plaintiff relies heavily on the Supreme Court's decision in *Murphy*, *supra*, to support her claim that the two offices were not inherently incompatible.

In *Murphy, supra,* 464 Mich 151, the Court considered whether the defendant violated the MIPOA "by simultaneously holding positions as the delinquent personal property tax coordinator in the Macomb County treasurer's office and as an elected member of the Harrison Township Board of Trustees." As a trustee, the defendant could have been required to vote on a proposal for a contract to have the county treasurer collect the township's delinquent personal property taxes. *Id.* at 151-152.

The Court, in interpreting the language of the MIPOA, stated that the phrase "results in" in MCL 15.181(b) manifests the legislature's clear intention to restrict applicability of the statutory bar to "situations in which the specified outcomes or consequences of a particular action actually occur." *Murphy, supra,* 464 Mich 162-163. The Court stated, "That a breach of duty *may* occur in the future or that a *potential* conflict exits does not establish incompatible offices. The official's performance of the duties of one of the offices must actually result in a breach of duty." *Id*. at 163 (emphasis in original). The Court concluded that the act concentrates on the "manner in which the official actually performs the duties of the public office." *Id*. at 164.

The Court concluded that the *Murphy* defendant's public positions were "not inherently incompatible because only a potential breach of duty of public office arises from the ability of the township to contract with the county for the collection of its delinquent personal property taxes." *Id*. at 166-167. Because the two entities had no existing contract and had not actually negotiated a contract, the defendant was not in violation of the MIPOA. *Id*. at 165-167.

Plaintiff ignores the primary distinction between *Murphy* and this case. In *Murphy*, the defendant's performance of her duties had the potential for conflict but had no actual conflict because Harrison Township had no existing contract with the county and was not negotiating a

contract with the county.[3] Unlike the situation in *Murphy*, plaintiff occupies positions within two governmental entities that are contractually bound. The city of Ecorse has an existing contract with the city of Detroit for water services. According to the terms of the contract, the city of Detroit has the exclusive duty to provide water to the city of Ecorse. Moreover, the contract was entered into for "an indefinite period of time, with termination by one year notice of either party or mutual agreement of both parties."

Current case law prohibits a person from simultaneously serving as an officer of one public entity that has entered into a contract or is negotiating a contract with another public entity of which the person is an officer. *Murphy*, *supra*, 464 Mich 165-167; *Wayne Co Prosecutor v Kinney*, 184 Mich App 681, 684-685; 485 NW2d 674 (1990); *Contesti v Attorney General*, 164 Mich App 271, 281; 416 NW2d 410 (1987).

Moreover, although we acknowledge that the opinion is not binding on this Court, the Attorney General explained in OAG, 1992, No 6717, p 139 (April 7, 1992), that the MIPOA specifically prohibits a person serving on the governing body of a local unit of government from simultaneously serving as the attorney for another local unit of government if both entities have entered into or are negotiating one or more contracts with one another. Likewise, in OAG, 1995, No 6840, p 25 (March 28, 1995), the Attorney General stated that the act prohibits a person from simultaneously serving as a member of a governing board of a state university and a member of a city council when the two entities have contractual agreements for lands sales and acquisitions and the provision of utility services by the city to the university. Additionally, "a contract that already exists before a person serves on both bodies simultaneously can also create an incompatibility if the contract is one that is certain to require some action or decision by one or both public bodies during the time that person holds both public offices." OAG, 1995-1996, No 6927, p 232 (December 16, 1996).

We note that the Attorney General also issued an opinion in the specific matter currently before us. We conclude that the opinion is in conformity with the current state of the law. The Attorney General opined that the MIPOA prohibits a person from simultaneously serving as a member of a city council of one city and the city attorney of another city if the two entities are contractually bound. OAG, 2003, No 7125 (February 20, 2003). The opinion states, "When called upon to consider whether to approve or disapprove the rates to be charged residents of the [c]ity of Ecorse and when considering whether to adopt water-related ordinances that will become a part of the contract with Ecorse by operation of clause 16, the person who also serves as Ecorse City Attorney cannot simultaneously satisfy a fiduciary duty of loyalty owed to both

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[3] The *Murphy* Court noted that the defendant should have abstained from voting on the preliminary matter of whether the township should continue to collect its delinquent personal property taxes instead of attempting to contract with the county. *Murphy*, *supra*, 464 Mich 166 n 15. However, the Court concluded that, because the township never negotiated for a contract with the county or entered into a contract with the county, the defendant's vote did not necessitate resignation of one of the positions. *Id.* Additionally, the Court concluded that the circuit court properly declined to void the defendant's vote on the preliminary motion because there was no evidence that her vote was the deciding vote. *Id.*

cities." *Id.* The Attorney General concluded that plaintiff was situated on both sides of a contractual relationship, which resulted in an incompatibility under the act. *Id.* Moreover, the Attorney General concluded that abstaining from the duties of the offices did not cure the incompatibility. *Id.* Citing *Contesti*, *supra*, 164 Mich App 281, the Attorney General stated, "A person cannot refrain from voting on a matter to avoid a breach of public duty or attempt through other less direct means to avoid the responsibilities that inhere in a given office." OAG, 2003, No 7125 (February 20, 2003).

The Attorney General was correct in noting that refraining from voting on certain matters does not "cure" incompatibility of offices. The appropriate remedy for incompatibility is to vacate one of the two offices. *Oakland Co Prosecutor v Scott*, 237 Mich App 419, 424; 603 NW2d 111 (1999); *Kinney*, *supra*, 184 Mich App 684; *Contesti*, *supra*, 164 Mich App 281. Indeed, as a public officer, plaintiff owes a duty of loyalty to the public. *Murphy*, *supra*, 464 Mich 164. It is impermissible for a public officer to hold dual offices when the officer "cannot protect, advance, or promote the interest of both offices simultaneously." *Id.* Plaintiff cannot use other means to avoid the responsibilities of her given offices. She cannot merely abstain from voting on the annual water rates for the city of Detroit because that would constitute a breach of duty of the office of council member. Plaintiff cannot merely delegate her duties to approve and pass all contracts for the city of Ecorse to another attorney. Delegation of responsibilities or abstention from voting as a remedy to incompatibility disregards the public policy that an officer owes a duty of loyalty. See, generally, *Contesti*, *supra*, 164 Mich App 281.

Plaintiff's argument that *Murphy*, *supra*, indicates that a person may abstain from participation in order to avoid incompatibility misinterprets the Court's ruling. Referring to preliminary contractual negotiations, the *Murphy* Court quoted an Attorney General opinion proposing that a public officer or employee could avoid a breach of duty "'by abstaining from participating in the consideration of the contract.'" *Murphy*, *supra*, 464 Mich 163, quoting OAG, 1979-1980, No 5626, pp 537-542 (January 16, 1980). This indicates that abstention from participation is permissible during preliminary contractual matters – not after contractual negotiations commence or an actual contract is formed.

Plaintiff's claim also ignores the act's omission of additional remedial measures to cure an incompatibility. The statute states that "a public officer or public employee shall not hold 2 or more incompatible offices at the same time." MCL 15.182. Implicit in this language is the sole remedy requiring an officer in violation of the statute to vacate a position that is deemed incompatible.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter