COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-1126

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MILWAUKEE DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO AND FRANK JURENA, JR.,

PLAINTIFFS-RESPONDENTS,

V.

MILWAUKEE COUNTY AND MILWAUKEE COUNTY PENSION BOARD,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Reversed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Milwaukee County and the Milwaukee County Pension Board (collectively, "the County") appeal from the circuit court order granting the request of Frank Jurena, Jr., a former employee of Milwaukee County whose employment was terminated for cause, and his union, Milwaukee District Council 48 of the American Federation of State, County and Municipal Employees (collectively, "AFSCME"), for a declaratory judgment. AFSCME had requested the circuit court to declare that "Milwaukee County employees represented by … Milwaukee District Council 48, shall have and receive the right to a [sic] deferred vested pension benefits when they are vested and terminated after 10 years of service, whether or not the said termination was for just cause." The circuit court order declared that "the practice and procedure utilized by [the County] of denying pension benefits to long-standing employees terminated for cause is an unconstitutional denial of due process and denial of equal protection of the laws."

The County argues that the matter was not ripe for declaratory relief and, therefore, that the court erred in even entertaining AFSCME's request. The County also argues that, on the merits, the circuit court erred in granting AFSCME's request. We need not determine whether the court erred in entertaining the request because, on the merits, we conclude that the court erred in granting the requested relief. Accordingly, we reverse.

Pursuant to Milwaukee County Code of General Ordinances § 201.24(4.5), the County denied deferred vested pension benefits to Jurena and other former

employees who had been terminated for "fault or delinquency."[1] The ordinance provides, in pertinent part:

> A [Milwaukee County Employes' Retirement System] member shall be eligible for a deferred vested pension if his employment is terminated for any cause, other than fault or delinquency on his part, provided that he elects not to withdraw any part of his membership account and that his pension at age sixty (60) is at least ten dollars ($10.00) per month.
>
> Notwithstanding the foregoing provisions of this section 4.5, any member whose last period of continuous membership began on or after January 1, 1971, but prior to January 1, 1982, shall not be eligible for a deferred vested pension if his employment is terminated prior to his completion of six (6) years of service. Also, notwithstanding the foregoing provisions of this section 4.5[,] any member who first became a member of the system on and after January 1, 1982, shall not be eligible for a deferred vested pension if his employment is terminated prior to his completion of ten (10) years of service.

In its amended complaint, AFSCME alleged that the County practice of denying vested pension benefits to employees terminated for just cause was "a violation of the labor agreement" and was "unconscionable." Although AFSCME did not bring a constitutional challenge to the ordinance, the circuit court elicited briefs from the parties addressing whether the ordinance effected an unconstitutional taking of property without due process. Granting AFSCME's request, the circuit court concluded, in part:

> a) [The County's] practice and procedure (which requires employees accused of misconduct to choose between collecting pension benefits or challenging the threatened discharge) denies the employee due process of law. The

[1] Milwaukee County Code of General Ordinances § 201.24(4.5) adopted, in part, Laws of 1937, ch. 201 § 5(6)(b), which provided that pension benefits were available to employees "removed or otherwise involuntarily separated from service for any cause other than fault or delinquency … after having completed twenty years of creditable service."

> Constitution of the United States prohibits the defendants from imposing a requirement on an employee that he or she waive a due process hearing on the reasonableness and propriety of his or her termination in order to assure the receipt of pension benefits accrued from years of prior service.
>
> b) Pension funds which are vested belong to the employee, not the county. The Constitution of the United States prohibits defendants from revoking vested pension funds without both of the following:
>
> i) a clear written and published policy established by a proper legislative or administrative body detailing the circumstances under which vested funds may be compromised, and
>
> ii) a full due process hearing specifically on the applicability of such policy to the facts in each individual case.

The County challenges the circuit court's conclusions, contending that the ordinance is constitutional.

The disposition of a request for a declaratory judgment is committed to the sound discretion of the circuit court. *See* ***State ex rel. Brennan v. Branch 24 of Circuit Court of Milwaukee County***, 104 Wis.2d 72, 75, 310 N.W.2d 629, 630 (Ct. App. 1981). We will uphold the circuit court's order granting declaratory relief in the absence of an erroneous exercise of discretion. *See* ***id.*** A court erroneously exercises discretion when it proceeds on an incorrect legal basis. *See* ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). Whether a statute or ordinance defining pension rights effects an unconstitutional taking of property without due process is a legal issue subject to *de novo* review. *See* ***Association of State Prosecutors. v. Milwaukee County***, 199 Wis.2d 549, 557, 544 N.W.2d 888, 891 (1996). Therefore, an order granting declaratory judgment based on a determination that an ordinance is unconstitutional is also subject to *de novo* review. *See* § 806.04(7), STATS.

To succeed, a constitutional challenge to a legislative enactment must overcome a strong presumption of constitutionality. *See* ***State v. Thiel***, 188 Wis.2d 695, 706, 524 N.W.2d 641, 645 (1994). The party challenging the constitutionality of a statute or ordinance has the burden of proving the law unconstitutional beyond a reasonable doubt. *See* ***Association of State Prosecutors***, 199 Wis.2d at 557, 544 N.W.2d at 891. We will not construe an ordinance to violate the constitution if it can be construed to be consistent with the constitution. *See* ***Demmith v. Wisconsin Judicial Conference***, 166 Wis.2d 649, 664 n.13, 480 N.W.2d 502, 509 n.13 (1992).

AFSCME maintains that the ordinance does not require that the employee lose such benefits. AFSCME argues:

> The first thing that should be noted is that the ordinance … does not say anywhere that any member of the plan should forfeit their [sic] vested rights to a pension when that member is terminated for cause. The ordinance does say that a person is entitled to a vested pension when his employment is terminated for any cause other than fault or delinquency on his part. It would seem that if the ordinance was intended to cause persons to forfeit their pensions, it would say so directly.

(record reference omitted). AFSCME, however, offers absolutely nothing to support this argument. *See* RULE 809.19(1)(e) & (3)(a), STATS., (Arguments in appellate briefs must be supported by citations to authorities and record references.). Although the ordinance is not phrased in the negative—declaring who, in AFSCME's words, "should forfeit" pension benefits—it is phrased in a manner that explicitly declares who *is* entitled to receive pension benefits, subject to the exclusion of those employees terminated for fault or delinquency.

AFSCME also maintains that the ordinance, as interpreted by the County, violates an employee's constitutional rights by allowing, without a due process

hearing, the automatic loss of pension benefits upon termination for cause.[2] AFSCME explains:

> An employee who has charges filed against him for termination, can avoid the loss of his pension by quitting his job and waiving any right to a hearing. In other words, the employee must waive his right to a due process hearing if he wants to save his pension benefit. If he demands a due process hearing over his termination, he must put his pension benefit at risk. If he insists on a due process hearing over his termination and he is not successful, he not only suffers loss of employment but loss of his vested pension benefit. That is wrong, terribly wrong.

(record reference omitted). Thus, AFSCME does not contend that an employee, terminated for fault or delinquency, could never, as a consequence, suffer the loss of pension benefits. In fact, as AFSCME concedes in its brief to this court, "It may very well be that under some circumstances, a pension could be taken away." But AFSCME contends that before suffering the loss of pension benefits, the terminated employee is entitled to a due process hearing. AFSCME, however, has provided no authority to support what, apparently, is its implicit argument: that, *in addition to the due process termination hearing available to every employee subject to termination*, a separate due process hearing must take place before a terminated employee loses pension benefits.

Is a second due process hearing, specifically addressing the loss of pension benefits, required following termination for cause? The supreme court recently reiterated: "'[D]ue process is satisfied if the statutory procedures provide an

[2] Although the circuit court's order granting declaratory judgment stated that the County's "practice and procedure" denied both due process of law and equal protection, and although the County, on appeal, separately addressed the court's equal protection conclusion, AFSCME has offered no response on the equal protection issue. Accordingly, we will not address the equal protection basis for the circuit court's conclusion. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted).

opportunity to be heard in court at a meaningful time and in a meaningful manner. Due process is flexible and requires only such procedural protections as the particular situation demands.'" ***Estate of Makos v. Wisconsin Masons Health Care Fund***, 211 Wis.2d 41, 46, 564 N.W.2d 662, 663 (1997) (quoting ***State ex rel. Strykowski v. Wilkie***, 81 Wis.2d 491, 512, 261 N.W.2d 434, 444 (1978)). Although one might argue that the nature of pension benefits is such that a due process hearing specifically focusing *on termination* is insufficient to provide a hearing "at a meaningful time and in a meaningful manner" *on loss of pension benefits*, AFSCME has not made that argument. In fact, other than simply asserting that "[t]he issue of pension is not heard when the termination case is heard," AFSCME, in its brief to this court, has offered nothing to detail the nature and scope of a termination hearing and, in particular, has not even commented on (1) whether a termination hearing considers the pension consequences for a long-term employee,[3] and (2) whether, in order to satisfy due process, a termination

[3] The circuit court record provides little if anything that is definitive in this area, though it includes certain comments at least suggesting: (1) that not all terminations automatically lead to loss of pension benefits; and (2) that some termination decisions may be influenced by consideration of pension consequences. Counsel for the County commented that "if you were discharged for mental or physical unfitness for duty, … you do not lose your benefits…. [I]f you can't show up for work because there's mental or physical impairment, … [t]hat does not impact on your pension." Further, he specifically disputed the court's understanding that, in a termination hearing under § 63.10, STATS., "the only question is whether the county's decision to terminate is legitimate." He explained that the hearing must consider "what discipline, if any, should be imposed assuming a finding of culpability," and he pointed out that counsel for AFSCME "always advises … how many years of service" an employee has worked and that, if terminated, "he or she will lose all of his [or her] pension rights." Counsel also conceded, however, that the Personnel Review Board considering termination "probably wouldn't" be interested "in the question of whether the employee … will receive pension benefits."

Additionally, counsel for the County, responding to the circuit court's question probing the due process implications of the "stark choice" facing an employee who risks the loss of pension benefits by contesting termination, disputed that loss of pension rights was automatic. Counsel answered:

> [W]ere a person who had otherwise met eligibility requirements been separated for cause for their own delinquency or neglect on the job, that should they [sic] consequently make application [for

(continued)

hearing must do so. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" argument). Ultimately, AFSCME offers nothing to counter the County's contention that "if an employee were to jeopardize any pension eligibility," such eligibility could only be lost after the employee had been afforded the right to a dismissal hearing pursuant to § 63.10, STATS., and that such a hearing, with its attendant appeal process, satisfies due process. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted).

> pension benefits], that is the discretionary item for the decision to grant a benefit … by the pension board which is a separate municipal corporation created by the legislature and that they [sic] also have an appeal process there.

Subsequently, the circuit court requested additional briefs and arguments. Then, at the final hearing, counsel for the County again addressed this subject:

> When Mr. Jurena would apply for benefits, what [the pension board] would do is examine his record of county service. They would see a discharge from the Personnel Review Board.
>
> However, the fact that he was discharged alone may not serve to deny him a pension benefit. It would depend upon the nature of his separation.
>
> For example sometimes we have [a person] at the Personnel Review Board who [has] developed … a physical inability to perform his job and other than his resigning, we have no way to otherwise remove him from county service other than seeking his removal … through Chapter 63 rules, and the Personnel Review Board if he is discharged from service because of a physical disability, he would not lose his pension benefits. So it's more than just being discharged. There would have to be an examination done of the reason behind the discharge.

Thus, conceivably, the *second* due process hearing AFSCME implicitly seeks may already exist. From the circuit court record, however, we cannot know. But what we do know is that the uncertainty surrounding the facts and law developed in the circuit court, in combination with the brevity and inadequacy of AFSCME's arguments on appeal (the arguments in AFSCME's brief total three and one-half pages), precludes affirmance of the declaratory judgment.

Although, as AFSCME argues, the loss of pension benefits may seem "terribly wrong" in some cases involving long-term employees, that perceived inequity does not mean that due process has been denied. It simply means that, as AFSCME acknowledges, an employee facing discharge may need to confront a difficult dilemma: whether resigning, and preserving pension benefits, is preferable to contesting termination and risking the loss of benefits. AFSCME, however, offers no authority to suggest an employee, knowing the pension consequences of termination, is denied due process simply because he or she must make a difficult choice.

AFSCME focuses only on the pension property interest of vested employees terminated for cause. The determination of whether a law effects an unconstitutional taking of pension benefits, however, must also focus on the pension property interest of *all* employees who have a property interest in the integrity of the pension trust. As the supreme court recently explained, "[E]ach vested member and retiree of the [Milwaukee] County [Pension] Plan has a property interest in their retirement system." ***Association of State Prosecutors***, 199 Wis.2d at 558, 544 N.W.2d at 891; *see also* ***id.*** at 563, 544 N.W.2d at 893 ("Vested County Plan beneficiaries have protectable property interests in the integrity and security of their retirement fund."). Therefore, while a long-term employee, facing termination, has a property interest in a vested pension, all other employees have a property interest in preserving the pension trust and assuring that its funds not be paid out improperly. *See* ***id.*** at 557-60, 544 N.W.2d at 891-92.

Accordingly, as the County argues, because both the definition and dimension of pension benefits are statutory creations, "the contingency placed upon receipt of a county pension draws from the same wellspring as the pension

itself." Thus, while AFSCME may be able to offer its equitable argument to the legislature, or put its proposal for a second due process hearing on the collective bargaining table,[4] AFSCME has failed to establish that the ordinance is unconstitutional.

By the Court.—Order reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[4] We also note that AFSCME has not responded to the County's argument that the issue on appeal "has been the specific focus of collective bargaining" and, as expressed in the County's supplemental memorandum of law in the circuit court, that "[t]he union chose to drop the specific contract demand for which they [sic] now seek declaratory relief in exchange for other contractual considerations."