11-22-1976

Bennett v. City of Fort Collins

No. 27331

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

THOMAS W. BENNETT, KARL E. CARSON, E. H. FRINK, JR., JACK A. HARVEY, J. MORRIS HOWELL, DANIEL M. OGDEN, JR., ROBERT W. SEARS AND CHARLES N. SHEPARDSON,

Plaintiffs-Appellants,

vs.

CITY OF FORT COLLINS, a Municipal Corporation, J. W. N. FEAD, CHARLES BOWLING, NANCY GRAY, MABEL E. PREBLE, MARGARET REEVES, JACK E. L. RUSSELL and EARL WILKINSON, as members of the City Council of the City of Fort Collins; VERNA LEWIS, City Clerk, MARY E. GREENWALL and MYRNA J. HILL, as members of the Board of Elections for the City of Fort Collins; and WILLIAM M. (ANDY) ANDERSON,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF THE COUNTY OF LARIMER STATE OF COLORADO

HONORABLE CONRAD L. BALL Judge

OPENING BRIEF OF PLAINTIFFS-APPELLANTS, THOMAS W. BENNETT, KARL E. CARSON, E. H. FRINK, JR., JACK A. HARVEY, J. MORRIS HOWELL, DANIEL M. OGDEN, JR., ROBERT W. SEARS AND CHARLES N. SHEPARDSON

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STATEMENT OF ISSUE

Was the change in the Charter for the City of Fort Collins whereby the City Manager is subjected to a popular vote of the citizens of said City each four (4) years simply an amendment to the Charter or is the change such a departure from the Council-Manager form of government that it must be effected by means of a charter revision rather than an amendment?

STATEMENT OF CASE

The parties hereto appear in the same order of their appearances in the trial court.

As a result of a special election held in the City of Fort Collins, Colorado, on May 23, 1972, a purported amendment to the City Charter of said City was passed whereby, among other things, said Charter provided that once a City Manager had been appointed by the City Council, said City Manager had to be subjected to a popular vote of the citizens of the City at an election to be held each four (4) years (ff.5-8). By an ordinance approved by the City Council of the City of Fort Collins in February of 1975, the first such election scheduled under the purported amendment referenced above was to be held on April 8, 1975 (f.9). The Plaintiffs referenced above then filed this suit on February 11, 1975, requesting that the Court enjoin the City from holding said election and also requesting that the Court find that the alleged charter amendment was unconstitutional. The Defendants named included the City of Fort Collins as a municipal corporation, the then present

members of the Fort Collins City Council, the then present members of the Board of Elections for the City and William M. (Andy) Anderson, hereinafter referred to as "Anderson". Mr. Anderson is a citizen of the City of Fort Collins and was an officer of the committee which petitioned the City Council to submit the purported amendment to the voters.

In their pleadings, the Plaintiffs alleged that the actions of the Defendants were unconstitutional in that they altered the form of city government without going through a charter convention. In their answer, all Defendants except Defendant Anderson agreed that the purported charter amendment was unconstitutional, but it was their position that they did not have the power to declare the purported amendment invalid for any constitutional reason. Said Defendants' asserted that only the Courts have the power to determine the validity of an amendment on constitutional grounds. The Defendant Anderson also filed an answer requesting that the Court uphold the change in the Charter as was effected by the election referenced above.

The matter was tried before the District Court in Larimer County, Colorado, and it was the finding of said Court that the change in the City Charter was not so fundamental as to constitute a complete alteration and change in the form of city government which would require that the change be done by charter convention (ff.70-89). Proper motions for alteration or amendment of the judgment or for a new trial were filed by the parties and denied by the Court. Subsequently, this appeal was taken.

SUMMARY OF ARGUMENT

1. Any material change of a City's charter can only be done through a charter convention.

2. The change in the Fort Collins city charter whereby the City Manager would be subjected to a popular vote by the citizens every four (4) years is in hopeless conflict with the unamended portions of the charter and said inconsistencies should be corrected.

3. The change in the Fort Collins City Charter whereby the City Manager would be subjected to a popular vote of the citizens every four (4) years was an alteration in the form of government and a total departure from the Council-Manager form of government and thus a material change of the City's charter. Such a change can only be effected by a means of a charter convention and therefore the change by any other means is unconstitutional.

ARGUMENT

I.

ANY MATERIAL CHANGE OF A CITY'S CHARTER CAN ONLY BE DONE THROUGH A CHARTER CONVENTION.

Section 6 of Article XX of the Colorado State Constitution gives to towns and cities such as Fort Collins the right of home rule. Said section provides that such a city or town, and its citizens thereof, shall have the powers set out in Sections 1, 4 and 5 of said Article. Said section also provides that any proposals for charter conventions shall be held in conformity with Sections 4 and 5 of said Article.

Sections 4 and 5 of Article XX of said State Constitution provide that a charter convention is necessary to alter the form of government. Said sections set forth the procedures to be followed in such a charter convention. These procedures were not followed in changing the Fort Collins charter as set forth above.

Therefore, it is clear that under the Colorado State Constitution, any material change in a city's charter must be done through a charter convention and cannot be done simply through the amendment process. It is the position of the Plaintiffs-Appellants that the change in the Fort Collins city charter referenced above was an attempt to alter the form of government simply by going through the amendment process when said action was a material change in the City's charter and should have been done through a charter convention. Thus, said actions were in violation of the constitution of the State of Colorado.

II.

THE CHANGE IN THE FORT COLLINS CITY CHARTER WHEREBY THE CITY MANAGER WOULD BE SUBJECTED TO A POPULAR VOTE BY THE CITIZENS EVERY FOUR (4) YEARS IS IN HOPELESS CONFLICT WITH THE UNAMENDED PORTIONS OF THE CHARTER AND SAID INCONSISTENCIES SHOULD BE CORRECTED.

Article I, Section 1 of the charter of the City of Fort Collins establishes Fort Collins as a home rule municipal corporation. Article I, Section 2 of said charter provides that as a form of government, Fort Collins shall use the council-manager government (f.129).

In both Article II, Section 5 and Article III, Section

1 of the Fort Collins city charter, it is provided that the City Council shall have the authority to appoint and remove the City Manager. However, said charter further provides in Article III, Section 4 that the City Manager can also be removed by a majority vote of the electors of the City to be held each four (4) years (f.129). It is the position of the Plaintiffs-Appellants that these provisions are in hopeless conflict with each other in that the section providing that the City Manager can be removed by a popular vote is inconsistent with the other portions of said charter and should be corrected.

III.

THE CHANGE IN THE FORT COLLINS CITY CHARTER WHEREBY THE CITY MANAGER WOULD BE SUBJECTED TO A POPULAR VOTE OF THE CITIZENS EVERY FOUR (4) YEARS WAS AN ALTERATION IN THE FORM OF GOVERNMENT AND A TOTAL DEPARTURE FROM THE COUNCIL-MANAGER FORM OF GOVERNMENT AND THUS A MATERIAL CHANGE OF THE CITY'S CHARTER. SUCH A CHANGE CAN ONLY BE EFFECTED BY A MEANS OF A CHARTER CONVENTION AND THEREFORE THE CHANGE BY ANY OTHER MEANS IS UNCONSTITUTIONAL.

It is also the position of the Plaintiffs-Appellants that the provision allowing the City Manager to be subjected to said popular vote drastically alters the form of government for the City of Fort Collins to the point that said form of government can no longer be considered to be a true council-manager form of government and that said change was such a drastic departure from the previous form of government for the City that such a change could not be properly effected without the City going through a charter convention.

Plaintiffs' Exhibit "D" is a deposition of William N. Cassella, Jr., taken by stipulation between all parties

involved. Mr. Cassella is the executive director of the National Municipal League which is a citizens' organization providing guidance in the form of model constitutions, charters, and laws either to citizens or officials to assist in the improvement of the structure and operations of local and state government (f.132).

As is shown at Page 8 of said deposition, Mr. Cassella feels there are basic principles of a council-manager form of government. First, all of the powers of the City are vested in a single Board of elected representatives normally referred to as the City Council. Second, said Council hires a City Manager who holds office at the Council's pleasure. Third, there is no mayor in the sense of a chief administrator. Finally, the legal essence of the plan lies in the relationship between the elected Council and the appointed administrator, the Manager. As Mr. Cassella indicated at Page 15 of said deposition, the normal council-manager form of government abandons all attempts to choose administrators by popular election. The theory is that it is difficult for the voters to gauge the excellence of administrative ability in a candidate. Therefore, the elector as such does not participate in the administrator's choice or removal. Mr. Cassella feels this has been an essential element of the council-manager form of government since its first adoption in 1912. As indicated at Page 17 of the deposition, Mr. Cassella feels that placing the manager as an individual before the electorate in actuality pushes him into a partisan arena and distorts his relationship

with the Council to which he is directly responsible. At Page 22, Mr. Cassella indicates that the essential principle of a council-manager form of government is that the City Council has the sole responsibility for the selection and removal of the City Manager.

As is shown at Pages 24 through 26, Mr. Cassella had the opportunity to review the Fort Collins city charter in its present form. It was his opinion that Article III, Section 4, of said charter completely alters the form of government in that it is in conflict with the basic principle of a council-manager form of government whereby the Council has the sole power to appoint and remove the City Manager. It was Mr. Cassella's opinion that since the amendment changed the form of government, a charter convention should have been held because the change was more than an amendment of an insignificant detail. There was a total change in the form of government.

There are Colorado cases which address the problem of whether a change to a charter is simply an amendment or is actually a revision of the charter, but, there are no Colorado cases which deal with the specific facts which are present in the case at hand. However, an identical situation to that presently in Fort Collins was the subject of a lawsuit in another jurisdiction. This question was determined in the case of City of Midland vs. Arbury, 38 Mich.App. 771, 197 N.W.2d 134 (1972).

In the Midland case, there was a proposed amendment to the city charter passed by the electorate which provided

that the City Manager could be removed from office by the electors of the city. The City of Midland, Michigan filed the suit against the Defendant arguing that it was unconstitutional to change the city charter in the manner set forth because the change was, in fact, a charter revision rather than an amendment. The Defendant, who was a circulator of the petition requesting said change, contended that the proposal was simply an amendment and therefore was not unconstitutional. As indicated at page 135 of the opinion, the Appellate Court quoted a portion of the Trial Court's written opinion as follows:

> "This opinion is not intended to, nor does it, hold that the electorate cannot change the charter of the City of Midland to provide for the recall of the city manager, as well as other administrative officers, if they so desire, but this change should be accomplished by revision of the charter and creation of a different form of city government. Such a change would obviously not be a council-city manager form of government.
>
> For the reasons herein before stated, a judgment may be entered declaring the revision of the city charter to be illegal and of no effect. (emphasis added)"

In affirming the lower Court's decision, the Michigan Court of Appeals stated at page 136:

> ". . . basically, revision suggests fundamental change, while amendment is a correction of detail."

In quoting another portion of written opinion from the trial court, the Court of Appeals stated at page 136:

> "The effect of the amendment providing for the recall of the City Manager, in the opinion of this Court, changes the fundamental concept of Commissioner-City Manager

government. The charter places certain responsibilities upon the City Manager. These, amongst others, consist of recommendations from him to the Council and vest him the entire administration of the City subject to the directives and policy decisions of the Council. If the city manager is not performing his function correctly, he can be removed under the charter by the City Council in accordance with the procedures therein set up. Under the amendment, a city manager who is performing his duties properly, legally and in exact accordance with his instructions could be recalled merely because he had incurred the disfavor of the electorate. The effect of this provision means that the city manager would no longer be controlled by the City Council but would be obliged to curry favor with the public under penalty of being recalled. In short, he could have two masters and it would be impossible for him to serve both properly. The net result of this provision, permitting the recall of the city manager, is to effectively destroy the city manager form of government, in the opinion of the Court. If the directives given to the city manager by the City Council are not in accordance with the wishes and desires of the public, then, the proper procedure would be the recall of the Council who are elected by the public and answerable to the public for the actions of the city manager under thier direction."

The Court of Appeals indicated that the change referenced above would be much more than mere amendment of the charter; it would constitute a substantial revision of the charter and thus should be effected only through a means of a charter convention.

It is the position of the Plaintiffs-Appellants that a ruling similar to that given in the Midland case should be made in the case at hand. The purported amendment to the city charter has caused a drastic change in the form of government for the City. It is clear from the law

cited in this brief that such a change can only be effected through means of a charter convention. Such a convention was not held, but rather, the change was treated simply as an amendment to the Constitution. Since the change was much more than a simple amendment, said change should not be allowed to stand, but rather, the Court should direct that if such a change is desired, the same should be done through a charter convention.

CONCLUSION

It is the position of the Plaintiffs-Appellants that the change to the Fort Collins city charter as set forth above was not proper and the same should be set aside by this Court. First, the change in the charter is in hopeless conflict with the unamended portions of said charter and has left the charter with a number of inconsistencies. The Plaintiffs-Appellants feel that these inconsistencies should not be allowed to remain in the city charter.

Also, it is clear that the change in the city charter was not effected through the proper process. The change alters the form of government for the City of Fort Collins to the point where the City no longer has a Council-Manager government. Such a change is more than an amendment, it is a total revision of the City's government. Such a change cannot be done simply through the amendment process but must be done through a charter convention.

It is the position of the Plaintiffs-Appellants that the actions of the City of Fort Collins and its citizens in making the change in the charter referenced above through

the amendment process was a violation of the Colorado State Constitution and should not be allowed by the Colorado Supreme Court. Therefore, the Plaintiffs-Appellants pray that this Court find that the change in the charter was done improperly and therefore is unconstitutional and null and void,

Respectfully submitted,

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