

OP 24-0188

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 161

KERRY L. BURMAN, Glendive City Judge,

Petitioner,

v.

CITY OF GLENDIVE and DEB DION, Mayor,

Respondents.

ORIGINAL PROCEEDING: Writ of Prohibition
In and For the County of Dawson,
Honorable Kerry L. Burman, Presiding Judge

COUNSEL OF RECORD:

For Petitioner:

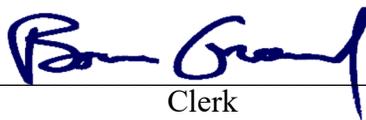
Kerry L. Burman, Self-represented, Glendive, Montana

For Respondents:

John T. Hrubes, Glendive City Attorney, Glendive, Montana

Decided: July 30, 2024

Filed:


Clerk

Justice Jim Rice delivered the Opinion and Order of the Court.

¶1 On March 26, 2024, Hon. Kerry L. Burman, Glendive City Judge, petitioned this Court for a writ of mandamus directing that the City of Glendive and Glendive Mayor Deb Dion (Respondents) immediately reinstate Mary York to the position of Clerk of Glendive City Court. York had been terminated from her employment by Mayor Dion. On March 27, 2024, this Court ordered Respondents to file a response to the petition, and to address therein “why the Clerk should not be immediately reinstated pending the outcome of this Petition.” On April 16, 2024, after Respondents filed their response, we ordered that York be reinstated to her position as Clerk in the interim, under the previous terms of her employment, pending further Order of this Court.

¶2 The petition recounts that on February 28, 2024, Mayor Dion emailed Judge Burman regarding a claim form submitted by York for an expense related to York’s attendance at a training conference. Mayor Dion expressed therein that she did not think the training was justified. Judge Burman replied to Mayor Dion the next morning, February 29, 2024, explaining that the training was vital for the clerk position, and that a scholarship had been received to cover all of the expenses associated with York’s attendance at the training, except for the registration fee, but that the registration fee had been included within the City Court’s budget. At approximately 4:50 p.m. that same day, York called Judge Burman, who was not then in the office, and advised Judge Burman that she had just been terminated from her position by Mayor Dion and escorted out of the City Court by Mayor Dion and the Assistant Chief of Police, causing York to leave court work

unfinished. No notice of the discharge had been given or any further communication initiated regarding York's position or status.¹

¶3 Judge Burman alleges Mayor Dion's actions, including the unnoticed unilateral termination of the clerk of court, deprived citizens from having full access to the City Court. Judge Burman states she fell behind in her judicial duties because she was forced to assume the clerk's duties to ensure the court remained open and available to the public, and thus contends Mayor Dion's actions interfered with the court's orderly functioning. Judge Burman argues that Mayor Dion's actions violated state statute, this Court's holding in *Carlson v. City of Bozeman*, 2001 MT 46, 304 Mont. 277, 20 P.3d 792, and the constitutional doctrine of separation of powers, because the executive branch of city government intruded upon the internal operation of the judiciary.

¶4 Respondents respond that Mayor Dion possessed statutory authority to appoint or remove all local government employees, including the Clerk of the City Court. Specific to York, Respondents contend Mayor Dion had the authority to terminate York's employment without cause because York was still in her probationary employment period, contrary to the assertion in Judge Burman's petition that York had completed her probationary period. While acknowledging that Mayor Dion's abrupt termination of York "certainly caused an issue for the City Court the day it happened," Respondents contend that "the ability of the Glendive City Court was never limited or weakened in regards to the ability to regulate its

¹ The Glendive City Court is open fulltime, but the City Judge position is parttime. The Clerk of Court works 40 hours per week, and Judge Burman is compensated for 85 hours per month.

own employees.” They argue this case is distinguished from *Carlson* because “[a]t no point did the City or Mayor Dion eliminate, infringe upon, or limit the ability of Judge Burman to regulate her own City Court employees in the course of their duties.” Respondents argue that responsibility for the continuing disruption of the court’s operation, which was occurring prior to the entry of our interim order, was caused by Judge Burman “fail[ing] to take advantage of the available contractual Clerk options” offered by Mayor Dion and “elect[ing] to initiate this proceeding instead.”

DISCUSSION

¶5 As a threshold matter, we first consider whether this matter is appropriately characterized as an application for writ of mandamus. The purpose of a writ of mandamus is to compel the performance of a duty or entitlement. *Allied Waste Servs. of N. Am., LLC v. Mont. Dep’t of Pub. Serv. Regulation*, 2019 MT 199, ¶ 19, 397 Mont. 85, 447 P.3d 463 (citing §§ 27-26-101, -102, MCA). Here, while Judge Burman seeks York’s reinstatement on the ground that reinstatement is required under law, technically this relief does not seek to compel Mayor Dion to perform a duty; rather, the relief sought would prohibit Mayor Dion from performing the act of terminating York’s employment.

¶6 “The writ of prohibition is the counterpart to the writ of mandate.” Section 27-27-101, MCA. A writ of prohibition “arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.” Section 27-27-101, MCA. This Court may issue a writ of prohibition when there is no plain, speedy, and adequate remedy in the ordinary course of law. Section 27-27-102, MCA. The procedures

governing mandamus found in Title 26, Chapter 26, of the MCA, apply, with certain exceptions, to proceedings for writs of prohibition. Section 27-27-104, MCA. Here, a writ of prohibition, if warranted, would appropriately provide the relief Judge Burman requests. While we have held that a writ of prohibition will not provide relief where the challenged action has already occurred, because we cannot prohibit an actor from performing an already completed act, *see In re District Court Budget Order*, 1998 MT 4, ¶ 8, 287 Mont. 137, 952 P.2d 427, the interim reinstatement of York to the Clerk of Court position rendered the act of termination incomplete and susceptible to prohibition. Therefore, we undertake consideration of Judge Burman’s petition as an application for writ of prohibition pursuant to the applicable statutes.

¶7 Mayor Dion disputes certain facts alleged in the petition, including whether York was still within her probationary period, but none of the disputed facts raise a factual question “essential to the determination” of the relief sought by the petition. *See* § 27-26-303(1), MCA (If there is a question of fact “essential to the determination” of the matter, the court may order the question to be tried to a jury.). This is not wrongful discharge from employment litigation, but rather a writ proceeding that considers whether Mayor Dion exceeded her “jurisdiction” or authority to terminate York’s employment as Clerk of Court under the governing legal authorities. *See* § 27-27-101, MCA (A writ of prohibition arrests the proceedings when such proceedings “are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.”). This can be resolved as a question of law upon undisputed facts.

¶8 Judge Burman argues that Mayor Dion’s effort to terminate York violated § 3-1-111, MCA, and this Court’s application of that statute in *Carlson*. Respondents argue *Carlson* is distinguishable because Mayor Dion’s actions did not impair Judge Burman’s power to control the conduct of the court’s ministerial officers, and that Mayor Dion was authorized to terminate York under § 7-3-213(3), MCA, which provides that, under Glendive’s commission-executive form of government, the executive has the power to “appoint, with the consent of a majority of the commission, all department heads and remove department heads and may appoint and remove all other department employees[.]”

¶9 In *Carlson*, the City of Bozeman passed an ordinance that placed the supervision of the Clerk of the Municipal Court under the supervision of the city department of finance. *Carlson*, ¶ 25. *Carlson*, the Municipal Court Judge, challenged the ordinance as conflicting with § 3-1-111, MCA, and constitutional separation of powers, under which the Municipal Court had authority to control the conduct of its ministerial officers, including the Clerk. *Carlson*, ¶ 26. The Court first determined that the Clerk was a ministerial officer of the Municipal Court, and reasoned:

A municipal court is empowered by statute to “. . . control, in furtherance of justice, the conduct of its ministerial officers.” Section 3-1-111(5), MCA. If the court were to be divested of this control, it would be powerless to regulate its own calendar, prioritize the time of its clerks to meet the needs of the court, or compel the clerks to obey its orders. In short, its power to conduct business would be impaired. Because BMO 2.06.030 would usurp the power of the municipal court to conduct its business, in violation of § 3-1-111, MCA, it is invalid. The District Court is affirmed on this issue.

Since we hold this city ordinance invalid on the grounds set forth above, we decline to address whether it is also an unconstitutional violation of separation of powers.

Carlson, ¶¶ 29-30.

¶10 We have also recognized that a court has inherent power to conduct its operations, while correspondingly recognizing that this power is not unlimited, and our decisions have reflected this careful balance. In a case decided prior to the 1975 enactment of § 7-3-213(3), MCA, we held that this power extended to the selection of proper employees to perform the court's work:

The people are entitled to the best service the court can afford, not only in the work done by its members individually and collectively, but also by the employees under its control. They are entitled to have its business conducted with dispatch; hence attentive and effective industry in its employees is indispensable. For the accomplishment of this end the court is entirely and solely responsible, and, if there be shortcoming or failure, either in the intellectual or mechanical quality of its work, it alone is to blame.

In view of these considerations, it is manifest that the power to select the proper employees could not with propriety, be vested elsewhere than in the court itself

State ex rel. Schneider v. Cunningham, 39 Mont. 165, 170, 101 P. 962, 964 (1909). In *State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 137 P. 392 (1913), we held that action by the county commissioners to hire a clerk for the district court was not a violation of the separation of powers, reasoning that “the power of the district court to appoint its own assistants in any event [was] not assailed” by the commissioners’ action, and that:

The separation of the government into three great departments does not mean that there shall be “no common link of connection or dependence, the one upon the other in the slightest degree” [citation omitted]; it means that the powers properly belonging to one department shall not be exercised by either of the others [citation omitted].

Hillis, 48 Mont. at 330-31, 137 P. at 395-96.

¶11 In *Board of Comm'rs v. Eleventh Jud. Dist. Ct.*, 182 Mont. 463, 597 P.2d 728 (1979), this Court determined the withholding of funding for a court staff position by county commissioners was arbitrary and capricious. Citing *Hillis* for the principle that “District Courts are clothed with all the power and authority necessary to render their jurisdiction effective,” the Court held that the District Court had properly used its inherent powers to ensure funding for the position. *Board of Comm'rs*, 182 Mont. at 470, 597 P.2d at 732. However, we cautioned that the holding was “narrowly confined to this particular situation,” urged courts to use “judicious restraint” in such financial issues, and exhorted that “[t]he constantly changing demands upon the judicial system must be worked out in a spirit of independent identity and balance among legislative, executive, and judicial branches of government by reasonable interaction tempered with respect for the limitations of their power.” *Board of Comm'rs*, 182 Mont. at 470-71, 597 P.2d at 732; *see also Board of County Comm'rs v. Mont. First Jud. Dist. Ct.*, 2000 MT 258, ¶ 44, 301 Mont. 496, 10 P.3d 805 (“Unwillingness of county commissioners to recognize the reality of a district court’s function in fulfilling constitutional mandates leads to nothing but trouble.”).

¶12 In *Butte-Silver Bow Local Gov't v. Olsen*, 228 Mont. 77, 743 P.2d 564 (1987), the District Court issued an order granting salary increases to eight judicial employees after collective bargaining negotiations with the County reached an impasse. On appeal, this Court concluded that the District Court had erred by exercising its inherent powers because no emergency existed, as the lack of salary increase caused no apparent impairment to court operations and the lack of funds had not stopped or threatened to stop “the efficient and orderly administration of justice and court business.” *Butte-Silver Bow Local Gov't*, 228

Mont. at 81, 743 P.2d at 566. The Court explained that “[a]n unreasoned demand for budgetary consideration is a threat to the image of and public support for the courts. . . . A true financial emergency exists when the local government refuses to pay legitimate court expenses and as a result, trials must be postponed, jurors and witnesses cannot be paid and salaries for judges and court personnel cannot be provided for.” *Butte-Silver Bow Local Gov’t*, 228 Mont. at 81, 743 P.2d at 566. Similarly, in *Clark v. Dussault*, 265 Mont. 479, 487, 878 P.2d 239, 244 (1994), the Court rejected the Justice Court’s argument that constitutional separation of powers exempted its suspension of a court employee on performance-related grounds from the County’s grievance procedure, reasoning that “we are not persuaded that the County Commissioners’ hearing of a grievance constitutes an exercise of authority belonging to the judicial branch.”

¶13 Following this precedent, our decision here again rests upon the careful application of the statutes, the recognition of a court’s need to provide “efficient and orderly administration of justice and court business,” and the undisputed facts. Respondents’ position that, while Mayor Dion “caused an issue for the City Court the day it happened,” no hardship was created for the City Court, is belied by the record. The removal of the Court’s only employee was undertaken during the workday, without notice, when the court was open for business, and the parttime judge was not in the office. York was escorted from the office with work in progress, leaving confidential information and unfinished court work unattended. It bears mentioning that the City’s job description for York’s position, attached to her affidavit, consists of multiple pages of a single-spaced listing of duties, of which the following is a partial list: enter all proceedings, court notes, and related

documents in hard copy and Full Court Enterprise computer system; docket all incoming filings, citations, complaints, and bonds; maintain accurate and complete case records and dockets; prepare correspondence, memoranda, and reports to criminal justice agencies, including FBI, CJIN, MANS and other criminal history inquiries; process and route e-filed documents; operate computer, calculator, printer, copy machine, fax machine, and scanner; process and distribute mail using postage machine; maintain judge's and court's calendar and prepare daily schedule, including scheduling of appointments; prepare and proofread orders; maintain files of records and correspondence, including those documents required to be confidential; answer phone calls, provide general information to the public, including complex information on such matters as orders of protection, and check in parties for court appearances; maintain juror list and perform all jury-related functions; set up courtroom and attend court hearing to provide minute entries for all hearings; and receive and record payment of court fines, bail, penalty assessments, and fees. York's removal required Judge Burman to immediately undertake York's duties to keep the court operating, while sacrificing her own duties, and we find no fault in her decision to continue to do so and seek judicial relief, rather than accept Respondents' offer to place a new person in the office, on a contract basis, to step in and undertake the clerk's many duties.

¶14 We agree with Respondents that § 7-3-213(3), MCA, grants general authority for the city executive to hire or fire all employees, including within the Clerk of Court's office. However, such authority must be exercised consonant with the adjacent authorities governing operation of courts, including § 3-1-111, MCA, applied in *Carlson*, so that the court's "power to conduct business [is not] impaired" by way of the executive's actions.

Carlson, ¶ 29. As even stated by the City Policy, also attached to York’s affidavit, “[t]he Mayor and/or his/her designee will execute personnel actions when necessary and consistent with all allocable laws, regulations and this policy.” Glendive City Policy, B-9. Clearly, this was not done here, and as a result the City Court’s operation was disrupted and hindered. Indeed, the common thread that runs through all of our prior cases is recognition of the need for the branches of government to work in coordination with each other to avoid the kind of situation that occurred here.

CONCLUSION

¶15 This petition for writ of prohibition is GRANTED. Respondent Mayor Deb Dion’s proposed action of unilaterally terminating the employment of the Clerk of Glendive City Court, upon this record, is ARRESTED.

The Clerk is directed to provide a copy of this Opinion and Order to Petitioner Hon. Kerry L. Burman, to Respondents City of Glendive and Glendive Mayor Deb Dion, and to Mary York personally.

DATED this 30th day of July, 2024.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR