

# Commonwealth of Kentucky

## Court of Appeals

NO. 2008-CA-002408-I

LOUISVILLE/JEFFERSON COUNTY  
METRO GOVERNMENT

MOVANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
ACTION NO. 08-CI-13417

JOHN McGUIRE AND RIVER CITY  
FRATERNAL ORDER OF POLICE  
LODGE 614, INC.

RESPONDENTS

### ORDER

### GRANTING MOTION FOR CR 65.07 RELIEF

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BEFORE: KELLER, MOORE AND VANMETER, JUDGES.

This matter is before the Court on the motion of Louisville/Jefferson County Metro Government for CR 65.07 relief from an order of the Jefferson Circuit Court temporarily enjoining the collection of increased personal usage fees on patrol cars approved for used in the 24-Hour Patrol Vehicle Program. Metro argues that the trial court abused its discretion in entering the temporary injunction because respondents McGuire and the River City Fraternal Order of Police Lodge 614 (FOP) failed to establish

the requisite element of irreparable injury set out in CR 65.04. We agree with Metro's contention.

In resolving the issue of Metro 's entitlement to the requested relief from the temporary injunction, this Court is guided by long-standing caselaw interpreting the requirements for the issuance of temporary injunctions. In *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky.App. 1978), this Court clarified the burden which must be satisfied prior to a grant of injunctive relief under CR 65.04:

CR 65.04 sets out the substantive elements for temporary injunctive relief by providing that the remedy is warranted only where it is clearly shown that one's rights will suffer immediate and irreparable injury pending trial. The purpose of these requirements is to insure that the injunction issues only where absolutely necessary to preserve a party's rights pending the trial of the merits. Although the injunction is not to be substituted for a full trial on the merits, *Oscar Ewing Inc. v. Melton, supra*, it is clear that the party must show, either by verified complaint, affidavit, or other proof, that such harm is likely to occur unless the injunction issues.

In order to satisfy the "immediate and irreparable injury" prong of this standard, *Maupin* instructs that "in the area of temporary injunctive relief, the clearest example of irreparable injury is where it appears that the final judgment would be rendered completely meaningless should the probable harm alleged occur prior to trial." *Id.* *Maupin* envisions a balancing of the equities in addition to an assessment of whether the substantive aspects of CR 65.04 have been met:

...in any temporary injunctive relief situation the relative benefits and detriments should be weighed. *Kentucky High*

*School Athletic Association v. Hopkins*, Ky.App., 552 S.W.2d 685 (1977). Obviously, this entails a consideration of whether the public interest will be harmed by the issuance of the injunction or whether its effect will merely be to maintain the status quo.

*Id.*

Finally, *Maupin* reiterates the standard by which appellate courts are to review the grant or denial of a temporary injunction:

Therefore, in light of the above discussion, applications for temporary injunctive relief should be viewed on three levels. **First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction.** Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo. Finally, the complaint should be evaluated to see whether a substantial question has been presented. If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded. However, the actual overall merits of the case are not to be addressed in CR 65.04 motions. **Unless a trial court has abused its discretion in applying the above standards, we will not set aside its decision on a CR 65.07 review.**

*Id.* at 699, emphasis added. Here, the pivotal consideration is whether the trial court abused its discretion in finding the requisite element of irreparable injury had been demonstrated by the FOP.

Since at least June 13, 2005, Metro has utilized a 24-Hour Patrol Vehicle Program, the guidelines for which are set out in the Department's Standard Operating Procedure (SOP) 4.14. The policy underpinning the program is contained SOP 4.14.1:

The department maintains a 24-Hour Patrol Vehicle Program. Use of assigned vehicles **shall be considered a privilege and not an employment right.** The Chief of Police shall have the right to assign, deny, suspend or remove any member from the 24-Hour Patrol Vehicle Program. [Emphasis added.]

The 24-Hour Patrol Vehicle Program is defined by SOP 4.14.2 as: "A program whereby officers are assigned department take-home vehicles to increase police presence in the community. Officers assigned take-home vehicles are mandated to respond, as needed, to any calls for service as well as render assistance to the public in accordance with departmental policy." SOP 4.14.3 provides that officers who have completed their one-year probationary period **may** be assigned a vehicle.

In early February, 2008, officers were notified in a press conference, via e-mail and by a memorandum from the Chief, that a personal usage fee of \$60.00 per month would be imposed on participants in the take-home vehicle program. That policy was revised in July, 2008, to a \$30.00 per month personal usage fee on all vehicles in the program, with an additional \$30.00 per month fee charged to officers if their vehicle had been approved for use in secondary employment. Those fees have been assessed and paid to this date, despite the filing of an unfair labor practice complaint and grievance concerning the right of Metro to assess them.

The impetus for the CR 65.04 proceeding below was a December 11, 2008 memorandum from Police Chief Robert C. White outlining an increase in the personal use fee charged to Metro police officers with take-home vehicle privileges from \$30.00 per month to \$100.00 per month effective January 10, 2009. The memo also notified officers who use their take-home vehicle in secondary employment of an additional fee increase from \$30.00 per month to \$60.00 per month. Finally, the memorandum stated that officers may opt-out of the take-home vehicle program by notifying their division commander that they no longer choose to participate in the program. The memo made clear that officers who decide to opt-out of the program may not participate in the program at a later date "except in unusual circumstances, and with approval of the Chief of Police."

At the hearing conducted on FOP's motion for injunctive relief, the following facts were established: 1) that nowhere in the collective bargaining agreement between Metro and the FOP is the take-home vehicle program addressed--the only reference to the program is contained in the various revisions of the standard operating procedures; 2) that all officers including Sergeant McGuire, who is President of the FOP and one of its bargaining representatives, were aware of the implementation of the personal usage fee prior to the completion of the bargaining process; 3) that both Metro and the FOP had an opportunity to address the take-home vehicle program during the bargaining process; 4) that Sergeant McGuire acknowledged that the program was in fact orally discussed at the bargaining table, although no written proposal regarding the fees

was submitted by either side; 5) despite the filing of a grievance and an unfair labor practice complaint, the initial personal usage fee is currently being collected and was not a part of the injunctive relief sought below; 6) that the disposition of the patrol cars assigned to officers who opt-out of the program will be evaluated as part of a comprehensive plan to insure that sufficient patrol cars are available for the various duty shifts; 7) that under this comprehensive plan, some vehicles may be reassigned to officers on a waiting list for the program and some may eventually be sold; 8) that Metro might realize a budgetary saving<sup>1</sup> of as much as \$1,600,000.00 by implementation of the personal usage fees; and 9) that a Kentucky Department of Labor hearing on the FOP's unfair labor practice charge is scheduled for February 10-11, 2009.

Metro insists in its CR 65.07 motion that because the imposition of the personal usage fee is subject to simple mathematic calculation, and is thus necessarily subject to reimbursement, the trial court abused its discretion in concluding that the FOP had established the essential element of irreparable injury. It also maintains that the balance of the equities tips in its favor because of its impact upon the public interest. Metro asserts that revenue lost through the injunction cannot be recouped and will very likely result in other drastic cuts in personnel and/or services due to the current budgetary crisis.

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<sup>1</sup>Although Metro describes the increased fees as "savings," it seems clear that the increased fees are in fact an income-generating program.

In response, FOP predicates its claim of irreparable injury primarily on loss of its bargaining process rights, on the possibility that the sale of the patrol cars will result in permanent loss of the program due to the current budgetary climate, and on the loss of the police presence in the community that the take-home program was intended to foster.

Having carefully reviewed the video recording of the proceedings before the trial court in light of the record and arguments advanced in the CR 65.07 motion and response, we are convinced that the trial court abused its discretion in issuing the temporary injunction.

In *Price v. Paintsville Tourism Commission*, 261 S.W.3d 482, 484 (Ky, 2008), our Supreme Court had occasion to reiterate the *Maupin* criteria in terms which are particularly *apropos* to the inquiry before this Court:

This rule [CR 65.04] has been construed as requiring the trial court to deny injunctive relief unless it finds (1) that the movant's position presents "a substantial question" on the underlying merits of the case, *i.e.* that there is a substantial possibility that the movant will ultimately prevail; (2) that the movant's remedy will be irreparably impaired absent the extraordinary relief; and (3) that an injunction will not be inequitable, *i.e.* will not unduly harm other parties or disserve the public. *Cyprus Mountain Coal Corporation v. Brewer*, 828 S.W.2d 642 (Ky.1992) (citing *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky.App.1978)). Although a trial court's ruling granting or denying injunctive relief is reviewed under the abuse of discretion standard, *id.*, **our case law is adamant that injunctions generally will not be granted "when the remedy at law is sufficient to furnish the injured party full relief."** *Id.* at 645.

In accord with a like restriction on injunctive relief, the rule in federal practice has long been that despite individual hardship the loss of one's job and one's income pending disposition of a wrongful termination case does not amount to "irreparable injury" justifying a temporary injunction. **On the contrary, "income wrongly withheld may be recovered through monetary damages in the form of back pay."** *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 579 (6th Cir.2002). [Emphasis added.]

So it is in the instant case. Nothing in the pleadings in this Court nor in the record of the proceedings below can be construed as supporting the FOP's claim of irreparable injury. Any income which may ultimately be found to have been wrongly withheld can be restored though an award of back pay.

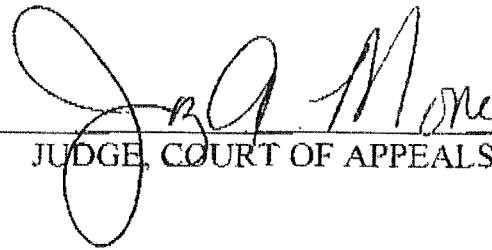
Nor do we find availing the FOP's insistence that the injunction is essential to preserving its collective bargaining rights. Those exact rights were implicated when the city imposed the initial \$30/\$30 fees and yet the FOP apparently believed that impairment of those rights could be adequately redressed through the unfair labor practice proceeding it lodged with the Labor Cabinet. As far as we can tell from the record, no injunctive relief was sought concerning those fees and FOP admits that they are not part of the injunctive relief sought below. It was not until Metro notified the FOP of an increase that the FOP alleged that an injunction was essential to the preservation of its collective bargaining rights. It is clear to us, then, that the real issue is money: whether the officers in the program should be required to pay the increase while the collective bargaining complaint is pending.

Finally, at this stage of the proceedings, given the language in SOP 4.14.1 and the absence of any reference to the take-home program in the collective bargaining agreement, we question whether the FOP has demonstrated the likelihood of injury to a concrete personal right. Given all these factors, and under the undisputed facts adduced at the temporary injunction hearing, we find no basis for a finding of irreparable injury.

We are thus convinced that the trial court abused its discretion in entering a temporary injunction based on its clearly erroneous finding that the FOP had demonstrated a likelihood of immediate and irreparable injury. Accordingly, the Court ORDERS that Metro's motion for CR 65.07 relief be GRANTED. The injunction put in place by the December 24, 2008 order of the Jefferson Circuit Court is hereby VACATED.

ENTERED: \_\_\_\_\_

1/20/2009

  
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JUDGE, COURT OF APPEALS