IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.: 18-0704

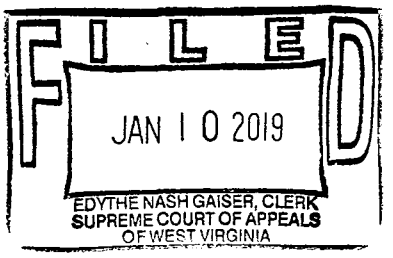
CITY OF ELKINS, Plaintiff below,
Respondent,

v.

PATRICK ELZA, Defendant below,
Petitioner.

(An appeal of a final order of the
Circuit Court of Randolph County
Civil Action No.: 17-C-144)

PETITIONER'S REPLY BRIEF



Counsel for the Petitioner, Patrick Elza

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
PO Box 800
Kingwood, WV 26537
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by denying the Petitioner relief from the fire fee on the basis that the fire fee was either a tax or an unreasonable fee.
2. The Circuit Court erred by denying the Petitioner's motion to require the City of Elkins to provide information in discovery that would be necessary to determine whether the fire fee was an unreasonable fee.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asserts that this matter is appropriate for oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, because the case involves the application of settled law, insufficient evidence, and a result against the weight of the evidence. The Petitioner asserts that this matter should be disposed of by signed opinion.

ARGUMENT

1. The Circuit Court was in error in finding that the fire fee was a reasonable fee, rather than a tax or an unreasonable fee, because the record was devoid of information sufficient to make that finding.

The Respondent, in its brief, asserts the following to encapsulate the primary issue in this case:

> In the case at hand, the issue in contention is whether the fire fee charged to the First Due area is a reasonable fee and not a tax or an unreasonable fee. The Respondent argues that the lower court ruled correctly when it held that the fire fee was a reasonable fee and, therefore, could continue to be implemented upon those living in or owning property in the First Due area.

Resp't's Br., at 6. The fatal flaw with this argument is that the Circuit Court lacked the necessary

information to come to that conclusion. It lacked that information because it refused the Petitioner's efforts to obtain a specific breakdown to show the relative fire expenses in the City of Elkins versus the First Due area. Without that information, which could be ascertained by the Respondent with reasonable diligence, the Circuit Court should not have found that the fee was reasonable. For the same reason, the Circuit Court lacked sufficient information to even determine that the fire fee was not a tax in the first place.

While we do not have a breakdown in expenses to show why the fee imposed on the Petitioner is a reasonable fee, what information we do possess cuts against that likelihood. For instance, the Respondent acknowledges that by lowering Elkins' subsidy of the Elkins Fire Department, the fire fee has resulted in increases in the Elkins general fund that can be used for other purposes. Resp't's Br., at 7. It is not the intent of a "reasonable fee" that the citizens outside a municipality fund non-fire related expenditures for city residents, but that is precisely what has happened.

The Respondent also relies on the argument that the City would have been empowered by statute to charge up to 50% more to First Due area residents as those within city limits. Resp't's Br., at 11. While it is factually accurate that the City did not push its statutory authority to the limit, it is also not relevant to the determination of whether the fee is a tax, an unreasonable fee, or a reasonable fee. That is a fact-based determination. In some circumstances, it may be possible that it would be reasonable for a city to charge the 50% premium to outside residents. However, it is impossible to know whether that is the case here, as no information sufficient to make that determination has been provided and entered into the record.

The Respondent asserts that it is "clear that the Elkins Fire Department was operating at a loss to provide service to the First Due area." Resp't's Br., at 13. This is based on neither facts nor figures, but by testimony by the Fire Chief that "and it go to a – an expense that was really depleting the volunteers of the Elkins Fire Department." (A.R.3., at p. 34). The Respondent cannot city to any facts or figures in this regard because the Respondent has failed, and the Circuit Court has allowed the Respondent to fail, to do the legwork to produce the information that would support this assertion.

2. The Circuit Court should have ordered the City to produce a breakdown in expenses between Elkins and the First Due area, as such information was specifically requested by the Petitioner and is well within the scope of reasonable discovery.

The Respondent asserts that:

> The Respondent produced the total expenses for the Elkins Fire Department but does not keep record of how the expenses are broken down between the two areas. The Respondent is not in possession of this information and is only responsible for turning over documents or information in discovery that it is in possession of. **To comport with the Petitioner's requests, the Respondent would have to generate new documentation solely for the purpose of providing the Petitioner the information** in the exact way that he would prefer it. The lower court correctly ruled that the Petitioner is not entitled to discovery that is not within the possession, custody, or control of the person the discovery requests were served upon.

Resp't's Br., at 7-8 [emphasis added].

What the Respondent has described in the boldface portion of the above quotation is well within the scope of discovery under the West Virginia Rules of Civil Procedure. It is called an interrogatory. Unlike a request for production of documents, an answer to an interrogatory under Rule 33(a) must "furnish such information as is available to the party." The Respondent has argued that it is not "in possession of" the breakdown in information. Resp't's Br. at 8. Yet

that is not the test. Unless the City of Elkins would not have been able to generate this information (i.e., if it is not "available") from its records, it is, in fact, required to "generate new documentation solely for the purpose of providing the Petitioner the information[.]" Id.

The Petitioner, who is a layperson who was acting pro se in the trial court, did not style his request as an interrogatory, but that is clearly what the request was. He reiterated the request numerous times. The Respondent has not suggested anywhere in its brief that it would be impossible to produce the information. Instead, the Respondent states that:

> The Respondent truthfully informed the Court that it was not in **possession of a breakdown of expenses** for the property in the city limits and property in the First Due area. Furthermore, even if the information was available, it was not kept in the manner asked for by the Petitioner and the Respondent is under no obligation to generate a new document that provides the information in the way that the Petitioner likes.

Resp't's Br., at 20 [emphasis added, citations omitted]. The City is not in possession of a breakdown. That does not mean that it cannot produce a breakdown.

The question comes down to whether, if the following interrogatories were provided to the City, would the City be able to successfully avoid providing an answer:

"INTERROGATORY #1: Please provide the amount in dollars for expenses incurred for services provided within the city of Elkins in the year 20XX;" and

"INTERROGATORY #2: Please provide the amount in dollars for expenses incurred for services provided in the First Due area in the year 20XX."

Those interrogatories are not impermissible discovery requests. They are relevant to the point of being dispositive to the question of the existence of a reasonable fee. If the City of Elkins truly cannot produce this information, then there is no way that it could rationally set a fee for residents of the First Due area. In the absence of this most basic information, the Circuit

Court was in error in determining that the fire fee is a reasonable fee. Therefore, this Court should remand for further factual development.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the Circuit Court, remand for entry of judgment for the Petitioner, or in the alternative, remand for additional factual development, and that the Court grant any other relief the Court deems just and proper.

Respectfully submitted,

PATRICK ELZA, Petitioner,
By counsel,

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
PO Box 800
Kingwood, WV 26537
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com