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KELLY ROSBERG AND PAUL ROSBERG, APPELLANTS, V. GERALD VAP AND ROD JOHNSON, APPELLEES.

815 N.W.2d 867

Filed July 13, 2012. No. S-11-734.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law that an appellate court independently reviews.
4. ____: ____. An appellate court gives statutory language its plain and ordinary meaning.
5. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court gives effect to the purpose and intent of the Legislature as ascertained from the entire language of a statute considered in its plain, ordinary, and popular sense.
6. **Public Service Commission: Legislature: Intent.** The Legislature did not intend service on the Public Service Commission to be read as a profession for which one must be in good standing according to the established standards of that profession.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Kelly Rosberg and Paul Rosberg, pro se.

Mark A. Fahleson and Tara L. Tesmer, of Rembolt Ludtke, L.L.P., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

Kelly Rosberg and Paul Rosberg challenge the results of elections for seats on the Public Service Commission (PSC). Kelly and Paul lost in the primaries to Gerald Vap and Rod Johnson, respectively. After the general election, the Rosbergs filed suit in the district court for Lancaster County, claiming

that Vap and Johnson were ineligible for the seats. The district court rejected the Rosbergs' claims and granted summary judgment to Vap and Johnson. We affirm.

BACKGROUND

Both of the Rosbergs ran for seats on the PSC. Paul ran for the seat in district 4. Although Paul lost in the primary and received only write-in votes in the general election, Paul claims that he received the most votes of the eligible candidates at the general election because the person who was named the winner of the election, Johnson, was ineligible. Paul claimed that because Johnson had an occupation other than public service commissioner,[1] he was not thus "in good standing" with his profession,[2] and that therefore Johnson was ineligible for the seat.

Kelly ran for the seat in district 5. Kelly lost to Vap in the primary. Nevertheless, Kelly received write-in votes in the general election. Based on the write-in votes, Kelly claimed that she received the most votes of any qualified candidates. Kelly makes the same argument as Paul. She claimed that because Vap had an occupation other than the PSC, he was not "in good standing" with his profession and therefore ineligible for the seat.

Vap and Johnson eventually moved for summary judgment. The parties submitted affidavits and exhibits in support of the motion.

Regarding Vap, the evidence showed Vap has been involved with a company called Vap's Seed and Hardware, Inc. Vap stated that although he was president, a corporate officer, and a shareholder, he had had no involvement in the day-to-day operations of the company and had received no income as president in the past 10 years. Further, he stated that the company had ceased doing business. Vap maintained that the PSC was his only occupation.

Johnson stated that he owned land that he rented to his brother in a family farming operation. But he stated that he had

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[1] See Neb. Rev. Stat. § 75-101(3) (Reissue 2009).

[2] See § 75-101(1).

no involvement in the day-to-day operations and that the PSC was his only occupation.

The Rosbergs also submitted affidavits. These affidavits predictably sought to counter those of Vap and Johnson. They generally recounted the same facts as the affidavits of Vap and Johnson but drew different conclusions from those facts—namely, that Vap and Johnson had other occupations. But in addition to Johnson's admitted landholdings, Paul also alleged that Johnson had earned money as a driver for a number of companies, although he makes no mention of how much time Johnson had dedicated to this endeavor.

The district court granted Vap and Johnson summary judgment. The district court seemingly relied on two different reasons. First, the district court ruled that § 75-101(3), which prohibits a commissioner from having another occupation, does not render a candidate ineligible to run for office. Second, even if it did, neither Vap nor Johnson had "occupations" within the meaning of § 75-101(3). According to the court, an "occupation" is a person's usual or principal work or business; it is that to which one's time and attention are habitually devoted. The court found that Johnson's renting of farmland to his brother and Vap's past involvement with Vap's Seed and Hardware were not "occupations." The Rosbergs appeal.

ASSIGNMENTS OF ERROR

The Rosbergs' brief does not separately assign and argue their claimed errors. Nevertheless, the gist of their argument appears to be that the district court erred in granting Vap and Johnson summary judgment and in concluding that they were not ineligible for the seats on the PSC.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3] In reviewing a summary judgment, an

[3] *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012).

appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[4]

[3] Statutory interpretation presents a question of law that we independently review.[5]

ANALYSIS

[4,5] This case presents an issue of statutory interpretation. We give statutory language its plain and ordinary meaning.[6] And we give effect to the purpose and intent of the Legislature as ascertained from the entire language of a statute considered in its plain, ordinary, and popular sense.[7]

The statute in question, § 75-101, establishes eligibility requirements for candidates for the PSC and also restrictions upon commissioners once they are elected. It provides:

> (1) The members of the [PSC] shall be resident citizens of this state, registered voters, and, if members of or practitioners in any profession, in good standing according to the established standards of such profession. The members of the [PSC] shall be elected as provided in section 32-509. A candidate for the office of public service commissioner shall be a resident of the district from which he or she seeks election. Each public service commissioner shall be a resident of the district from which he or she is elected. Removal from the district shall cause a vacancy in the office of public service commissioner for the unexpired term.
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> (2) No person shall be eligible to the office of public service commissioner who is directly or indirectly interested in any common carrier or jurisdictional utility in the state or out of it or who is in any way or manner pecuniarily interested in any common carrier subject to

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[4] *Id.*

[5] *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012).

[6] *Id.*

[7] See *id.*

> Chapter 75 or 86. If any commissioner becomes so interested after election or appointment, his or her office shall become vacant, except that if any commissioner becomes so interested otherwise than voluntarily, he or she shall, within a reasonable time, divest himself or herself of such interest, and failing to do so, his or her office shall become vacant.
>
> (3) A commissioner shall not hold any other office under the government of the United States, of this state, or of any other state and shall not, while such commissioner, engage in any other occupation.

The Rosbergs brought their claims under the election challenge statutes.[8] These statutes allow for a challenge to an election if, among other reasons, "the incumbent was not eligible to the office at the time of the election."[9] As victors in the election, Vap and Johnson were the "incumbents."[10]

The Rosbergs' challenge to Vap's and Johnson's eligibility for the PSC weaves together two provisions of § 75-101. First, the Rosbergs claim that during Vap's and Johnson's previous terms as commissioners, they both had occupations other than holding office as commissioners, which violated subsection (3). The Rosbergs argue that these violations meant that Vap and Johnson did not meet the eligibility requirements for holding a commissioner's office under subsection (1). As stated, subsection (1) requires a commissioner to be "in good standing" in any profession of which he or she is a member or practitioner. Thus, according to the Rosbergs, neither Vap nor Johnson was eligible for a seat on the PSC. We disagree.

Subsections (1) and (2) set out the eligibility requirements to hold the office of commissioner. In contrast, subsection (3) sets out restrictions upon those who hold that office: They may not hold another office or engage in another occupation while holding the office of commissioner. In enacting the eligibility requirements to hold the office of commissioner, the Legislature could not have meant that a person running for office must be

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[8] Neb. Rev. Stat. § 32-1101 et seq. (Reissue 2008).

[9] § 32-1101(2).

[10] See Neb. Rev. Stat. § 32-111 (Reissue 2008).

in good standing in the profession of being a commissioner. This interpretation would mean that incumbents already holding the office were subject to an eligibility requirement that did not apply to persons seeking the office for the first time. If the Legislature had intended to distinguish between incumbents seeking reelection and persons seeking election for the first time, it would have set out separate requirements. But it did not.

Instead, subsection (1) is more sensibly read to set out the requirements for any person seeking the office of commissioner. When interpreted in this manner, the Legislature obviously meant that a commissioner must be in good standing in any profession of which he or she is a member or practitioner—outside of the duties imposed upon a commissioner while holding office.

CONCLUSION

[6] Because the Legislature did not intend service on the PSC to be read as a profession for which one must be "in good standing according to the established standards of" that profession, we conclude that the district court was correct in dismissing the Rosbergs' challenges.

AFFIRMED.

STEPHAN, J., participating on briefs.

DOUGLAS COUNTY HEALTH CENTER SECURITY UNION, APPELLEE, v. DOUGLAS COUNTY, NEBRASKA, APPELLANT.

817 N.W.2d 250

Filed July 13, 2012. No. S-11-778.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Labor and Labor Relations.** Under Nebraska's Industrial Relations Act, the Commission of Industrial Relations has