

PETER SGAMBATI AND JOHN ROSSI,
Petitioners,
v.
BOROUGH OF FAIRVIEW,
Respondent.

Decided December 4, 1980

Initial Decision

SYNOPSIS

John Rossi and Peter Sgambati served as auxiliary members of the Fairview Hook and Ladder Volunteer Fire Company. At the time of this action, Mr. Rossi was 52 years old and Mr. Sgambati was 51 years old. Both men filed applications to become regular members of the fire company but were rejected based on a Fairview Borough ordinance which provided that a person must be 40 years old or younger to join the company. Both men were otherwise qualified to join the fire company. Petitioners argue that the Borough ordinance is in direct conflict with New Jersey's Law Against Discrimination, *N.J.S.A.* 10:5-4 and its corresponding rule, *N.J.A.C.* 13:12-1.1(a).

The administrative law judge rejected the Borough's argument that the ordinance does not conflict with the Law Against Discrimination since the purpose of the ordinance is to safeguard the safety and welfare of the community by prohibiting the appointment of firemen over the age of 40. The judge found that the petitioners are physically fit to carry out the duties of firemen and that six members of the fire company in which they seek membership are over the age of 40.

Nor did the judge find the Borough's reliance on *N.J.S.A.* 48:14-1 *et seq.* (which allows age limits to be set for appointments to paid fire departments) controlling. The judge noted that such exemptions are for paid fire departments while the fire company in issue was a volunteer one; nor did the Borough demonstrate why the reasons for such exemptions should apply to a volunteer company.

The judge concluded that the state regulation and Borough ordinance address the same issue—the age of individuals applying for the position of volunteer fireman. Noting that the local ordinance clearly conflicted with the state regulation, the judge concluded that the ordinance clearly frustrates the objective behind the state statute and regulation and thus it is preempted by state law.

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Accordingly, the administrative law judge ordered that the Borough of Fairview amend its ordinance to eliminate the discriminatory provision regarding age and that it permit the petitioners to become regular members of the volunteer fire company.

Susan L. Reisner, Deputy Attorney General for Petitioners (John J. Degan, Attorney General of New Jersey, Attorney)

James J. Deer, Esq., for Respondent

MOSES, ALJ:

This matter was brought before the court as a result of a finding of probable cause by the Director of the Division on Civil Rights, after a review of a verified complaint filed by petitioners Sgambati and Rossi, on September 11, 1978. This finding of probable cause was made on May 9, 1979. The matter was forwarded to the Office of Administrative Law on May 29, 1980 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

A prehearing order was issued, and delineated the legal issue to be determined as follows:

Whether or not Fairview, N.J. Ordinance 76-13, §3 violates the Law Against Discrimination by discriminating on the basis of age for appointment as volunteer fireman in that Borough.

It was determined at the prehearing conference that the matter was to be decided by way of summary judgment. Both counsel agreed that no material or relevant facts were in issue.

The petitioners moved for summary judgment on the basis that Fairview, N.J. Ordinance 76-13, §3, is in conflict with the statutory directive against discrimination due to age, enacted by the Legislature. *See, N.J.S.A.* 10:5-4. The petitioners argue that the Law Against Discrimination is to be liberally construed and, because it is remedial, it "should be read with an approach sympathetic to its objectives," *National Organization for Women v. Little League Baseball*, 127 *N.J. Super.* 422, 430 (App. Div. 1974). The relevant objective here is to prohibit discrimination on the basis of age. The deputy attorney general argues that it is well settled that the Division on Civil Rights has jurisdiction over municipalities and over volunteer fire companies, *Blair v. Mayor and Council of the Borough of Freehold*, 117 *N.J. Super.* 415 (App. Div. 1971), cert. denied 60 *N.J.* 194 (1972), and that volunteer fire companies are "employers" within the meaning of the Law Against Discrimination. *See, Hebard v. Basking Ridge Fire Company No.*, 164 *N.J. Super.* 77, 83 (App. Div. 1978). The petitioners also urge that the Law Against Discrimination is *in pari materia* with those statutes which exempt municipal policemen and firemen from the law prohibiting discrimination against persons over 40 in county and municipal employment. *See, N.J.S.A.* 40A:9-3, 40A:14-12, 13, 42, 43, and 44. The deputy attorney

general argues that these specific exemptions were enacted in order to make clear that there is no inconsistency between the Law Against Discrimination on the basis of age and the necessity to impose certain age restrictions on paid firemen for special reasons, such as extensive and expensive training programs and the Police and Firemen's Retirement System. The deputy attorney general argues that the facts, which have been stipulated, show that both Mr. Sgambati and Mr. Rossi, although over 40 years old, are physically fit to serve as volunteer firemen and have attended well over 65 percent of the fires which have occurred since their participation as auxiliary members. In addition, there are six regular members of the volunteer fire company who are over 40 years old.

The deputy attorney general points out that the regulation promulgated by the Division on Civil Rights, *N.J.A.C.* 13:12-1.1(a), specifically provides that membership in volunteer fire companies shall be open to all persons without discrimination on the basis of age. This regulation was adopted in 1974, prior to the date of application of these petitioners for membership in the volunteer fire department.

The Borough attorney argues that Fairview, N.J. Ordinance 76-13, §3, which provides that a person must be 40 years or younger to join the Fairview Volunteer Fire Department, complies with *N.J.S.A.* 10:3-1, and thus the Mayor and Council were within their purview and discretion to refuse to accept the petitioners as volunteer firemen. In fact, he argues that the ordinance in question is not in violation of the Law Against Discrimination because of the Borough's obligation to provide for the health, safety, and welfare of the community, which is the prime responsibility of the volunteer fireman. That responsibility is safeguarded by only accepting applicants under 40. Thus, he argues that there can be no discrimination when the act complained of deals with the safety, health, and welfare of the community. He does not contest the jurisdiction of the Division.

The court has reviewed the pleadings, the finding of probable cause, the prehearing order, stipulations submitted and agreed to by both counsel, the briefs filed in support of the motion for summary judgment and in opposition to said motion, the arguments contained in the briefs and the applicable law. The following facts are hereby found to be uncontroverted:

1. Petitioners John Rossi and Peter Sgambati are presently serving as auxiliary members of the Fairview Hook and Ladder Volunteer Fire Company No. 2.

2. Mr. Rossi has been an auxiliary member since 1973 and Mr. Sgambati has been an auxiliary member since 1975.

3. Mr. Rossi is presently 52 years old and Mr. Sgambati is presently 51 years old.

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4. Mr. Rossi and Mr. Sgambati applied for regular membership in the Hook and Ladder Company by letter of June 17, 1977. Both men were investigated by a committee of the Hook and Ladder Company and were recommended for regular membership on August 1, 1977 by the Company Membership Committee.

5. Both Fire Chief Gustave Peterson and his successor Paul S. Mantone refused to allow the petitioners to join the volunteer fire department as regular members or to fill out applications for the town fire department. Chiefs Mantone and Peterson based their refusals on Fairview, N.J. Ordinance 76-13, §3, which provides that a person must be 40 years old or younger to join the volunteer fire department. Chief Mantone reconfirmed the refusal by letter of December 31, 1978.

6. Chief Mantone and his predecessors and successors as fire chiefs have faithfully followed the ordinance in refusing to allow persons over 40 years old to join the volunteer fire department.

7. Both petitioners are in good health and are qualified to be regular members of the volunteer fire department. Respondent's only objection to petitioners' membership is based upon the ordinance, because petitioners are over 40 years of age.

8. The Hook and Ladder Company No. 2 presently has 20 regular members, six of whom are age 50 or older. The regular volunteer fire fighters presently serving who are over 40 years old are as competent at their firefighting duties as the regular firefighters who are under 40 years old.

9. Auxiliary firefighters are allowed to perform almost all duties of regular firefighters, including using firefighting equipment at fires, climbing ladders and entering burning buildings. They are not permitted to drive the fire trucks or to attend classes at the Fire Academy. They also do not receive the annual clothing allowance which is provided to regular volunteer firefighters.

10. Regular members of the Hook and Ladder Company are required to attend 40 percent of all fires. Since 1974, Mr. Rossi has attended, on the average, 74 percent of all fires. Mr. Sgambati has attended an average of 69 percent of all fires since 1975.

The section of the borough ordinance which is in issue states:

B. Membership—regular firemen:

1. Between 18 and 40 years of age.
2. Be a resident of the Borough for at least six months.
3. Shall not have been convicted of any crime.
4. Be in good health and sound physical condition based on a certified physician's statement and able to perform the duties of a fireman.

Petitioners argue that the ordinance is in direct conflict with the Law Against Discrimination, *N.J.S.A.* 10:5-4, and the regulation promulgated to enforce this statute, *N.J.A.C.* 13:12-1.1(a). The statute and regulation read:

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N.J.S.A. 10:5-4: Obtaining Employment, Accommodations, Privileges without discrimination; Civil Rights.

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

N.J.A.C. 13:12-1.1: Membership procedures of volunteer fire companies and first aid squads.

(a) Membership in volunteer fire companies and first aid squads shall be open to all persons who are able to perform the duties of volunteer firemen . . . without discrimination on the basis of an applicant's race, creed, color, sex, age, national origin, ancestry, marital status or physical handicap.

There is no dispute that the Division on Civil Rights has jurisdiction over municipalities and over volunteer fire companies. Nor is there any argument against the salutary purposes of the Law Against Discrimination.

It appears that the chief argument of the Borough, in maintaining that its ordinance does not conflict with the Law Against Discrimination, is that the purpose of the ordinance is to safeguard the health, safety and welfare of the community, which it does by refusing to appoint volunteer firemen who are over the age of 40. Yet, it is clear, as seen in the above findings of fact, that the petitioners are physically fit to carry out the duties of volunteer firemen, and have, in fact, been carrying out all the duties of volunteer firemen with but two minor exceptions. It is also clear that six members of the 20-member Hook and Ladder Company in which they seek membership are over the age of 50. It appears that the petitioners have fulfilled all the objective qualifications for membership which must relate directly and solely to physical and technical ability and to character fitness of an applicant to perform the vocational duties of a volunteer fireman.

The court finds the discussion and reliance by both counsel on sections of *N.J.S.A.* 48:14-1 *et seq.*, which allows age requirements to be set for appointments to paid fire departments at the municipal level, inapposite to the instant matter. It is not necessary to address the issue of whether or not those exemptions for paid fire departments, the reasons for which are not clear and have not been argued in any meaningful fashion, should be applicable to the instant case.

The crux of this matter is whether the municipal ordinance mandating age 40 as the cutoff age for membership in a volunteer fire company is contrary to

the laws of the State of New Jersey. Municipalities have broad powers to make and enforce ordinances concerning matters of local interest so long as these ordinances are “not contrary to the laws of this state or of the United States.” *N.J.S.A.* 40:48-2; *See, N.J. Const.* (1947) Art. IV, §VII, par. 11. Concurrent exercises of power by state and local governments are adjusted by the courts through the application of principles of preemption. “Preemption is a judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State.” *Overlook Terrace Management Corp. v. Rent Control Board of West New York*, 71 N.J. 451, 461 (1976). In assessing whether a local ordinance is incompatible with a legislative enactment, it is important to determine whether the State and the municipality have addressed the same subject matter. If this is the case, then preemption will be found where the legislative enactment declares that it will be exclusive. Where there is no express preemptive intent, the courts look to other factors.

Such factors include a decision that preemption will apply where the nature of the issue requires uniform statewide treatment. *See, Warren Park Estates, Inc., v. Township Committee of East Windsor*, 136 N.J. Super. 180, 183-184 (App. Div. 1975). A local ordinance will also be invalidated where the state regulation is so pervasive or comprehensive that it precludes a coextensive exercise of power by the municipality. Finally, “a legislative intent to preempt a field will be found . . . where the local regulation conflicts with the state statutes or stands as an obstacle to a state policy expressed in enactments of the Legislature.” *Garden State Farms, Inc. v. Mayor Louis Bay, II*, 77 N.J. 439, 450 (1978).

A question of conflict can arise where an ordinance permits what the State forbids and vice versa. In *Warren Park Estates, supra*, at 183, the court struck down a local building code provision which mandated copper electrical wiring, where the Public Utilities Commission had effectively made aluminum electric wiring the applicable standard. The court’s application of preemption was premised upon the need for uniformity and the existence of conflict. Where a municipality enacted a Sunday closing ordinance which conflicted with a state statute, the court found that the former was void. *Auto-Rite Supply Co. v. Woodbridge Township*, 25 N.J. 188 (1957).

The court in *Overlook, supra*, also invalidated a municipal rent control ordinance which restricted rental increases approved and ordered by the New Jersey Housing Finance Agency. The court determined that the state scheme preempted the ordinance largely because of the existence of conflict. 71 N.J. at 463-64. Implicit in both *Overlook* and *Warren Estates* is the notion that the preemptive effect of a state regulation is not diminished because it takes the

form of a code provision or an agency order. A code provision, promulgated pursuant to statutorily delegated authority, can preempt a local ordinance in the same way that a statute can.

In the instant matter, both the state regulation and the local ordinance address the same issue—the age of persons applying for the position of volunteer fireman. Clearly the local ordinance conflicts with *N.J.A.C.* 13:12-1.1(a); that regulation disallows discrimination on the basis of age while the ordinance specifically authorizes it. The existence of a conflict and the fact that the ordinance obviously frustrates the objectives behind the regulation and the underlying statute warrant a finding that the ordinance is preempted by the state law. The court must conclude that Fairview, N.J. Ordinance 76-13, §3, which sets a maximum age requirement of 40 for membership in the volunteer companies of Fairview, is in conflict with the Law Against Discrimination and the regulations promulgated thereunder. Therefore, the Borough of Fairview must amend its ordinance to eliminate the discriminatory provision regarding age, and it must permit these petitioners to become regular members of Hook and Ladder Volunteer Fire Company No. 2 of the Borough of Fairview.

The Borough had not shown that the health, safety, and welfare of the community would be deleteriously affected by appointment of these men, who are over age 40. However, this decision is not to be construed to hold that no upper age limit can ever be set in regard to initial membership or mandatory retirement of volunteer firemen.

It is therefore **ORDERED** that the Motion for Summary Judgment made by petitioners is **HEREBY GRANTED**. And it further **ORDERED** that the Borough of Fairview amend its ordinance to eliminate the discriminatory provision in regard to age limits for membership.

And it is further **ORDERED** that the petitioners, Sgambati and Rossi, be admitted to membership in Hook and Ladder Company No. 2 of the Borough of Fairview.

After reviewing this Initial Decision the Division on Civil Rights
on April 27, 1981 issued the following Final Decision

I concur in the decision recommended by Judge Moses and hereby adopt it as my Findings of Fact and Conclusions of Law, and make the same a part of this Order as though it was set forth in full herein.