Cases



by Sophia M. Stadnyk, Senior Associate Counsel

Civil Rights

Water Disconnection & Due Process

The first plaintiff, Brown, rented a home from Tevis in the City of Barre, Vermont. Her monthly rent included water service. Tevis had an account with the City for water service. The City billed him for all of the water used by the tenants in his building, and the building had only one water meter. In early 2009, Tevis became delinquent in his payment of the water bill, as a result of which the City gave notice to him and the occupants that water service would be cut off. It was disconnected when Tevis failed to pay the arrears. The City informed Brown that she could not establish a new account in her own name because she was not the property owner. Brown made a written request for a hearing regarding the disconnection, but the City denied that request because she was not a "ratepayer." The other plaintiff, Brooks, also rented premises in the City which included water service. His landlord also failed to make the necessary payments to the City regarding water service for the building, but subsequently entered into a payment plan with the City, made monthly payments, and water service to his apartment building was not disconnected.

Vermont's Uniform Water and Sewer Disconnect Statute, 24 V.S.A. §§ 5141-5151, authorized municipalities to disconnect water service "as a delinquency collection procedure." 24 V.S.A. § 5141. The Disconnect Statute required the municipality to restore water service when an agreement was reached with the "ratepayer." 24 V.S.A. § 5146. The Disconnect Statute contained no provision pursuant to which anyone other than a "ratepayer" could obtain a restoration of service. The City implemented its water supply services through its Water and Sewer Ordinance. This required that the water department, in furnishing water, deal only with the owner of the premises; allowed the City to "withhold the water supply from any person failing or refusing to comply with any of [its] provisions or requirements"; and to treat such failure or refusal as "a relinquishment of all right to use city water." If a landlord defaulted on a payment arrangement, water service could be disconnected immediately. However, the City was willing to accept money from tenants (or others) to bring a water service account in arrears into good standing. The tenant had to further agree to pay his or her landlord's water service account going forward, or assume the obligations under the landlord's repayment plan. The City's rationale for dealing only with ratepayers and not tenants included administrative convenience (frequently changing tenants vs. identifiable property owners) and financial responsibility.

Brown and Brooks brought a 42 U.S.C. Section 1983 action, individually and on behalf of all others similarly situated, alleging that the City violated their constitutional rights in the actual or threatened termination of water service to them based upon their landlords' failure to make water payments to the City when due. As part of their constitutional challenge, they argued that Vermont's Disconnect Statute and the City ordinance were constitutionally deficient, and violated their procedural due process rights. These laws, they claimed, effectively coerced the plaintiffs and other class members into paying the debts of actual ratepayers in order to avoid water service termination, and were not rationally related to a legitimate governmental purpose. The City argued that there was no protected property interest in water service and that, as a result, no procedural due process had to be afforded to the plaintiffs. It filed a motion for summary judgment, and the plaintiffs filed a cross-motion for summary judgment.

The district court granted the motion, in part. Each of the constitutional claims depended upon the court finding a protected property interest. In this case, the plaintiffs proffered no evidence of their respective landlords' contractual intent, no document reflecting such intent, and no evidence of the account or contract between their respective landlords and the City. As a result, there was no protected property interest in water service based upon an express or implied contract. However, after examining the statutory scheme, the court found the plaintiffs had established a statutorily protected property interest in water service subject to payment and reasonable connection requirements. A review of Vermont's Disconnect Statute showed that it provided procedural due process to sufficiently protect a water user's interest in continued water service even when that water user was not a "ratepayer." Likewise, examining the City's ordinance and the City's actual practices and policies, independent of Vermont's Disconnect Statute, the court found this led to the "unmistakable conclusion that the City provides neither reasonable notice nor a reasonable opportunity to defend to the tenants who are the actual users of municipal water service." The court, therefore, denied the City's motion for summary judgment with regard to the procedural due process claim.

However, it granted the City's motion for summary judgment with regard to the plaintiffs' substantive due process claim (that the City violated their substantive due process rights by preventing reinstatement of water service unless they paid their respective landlords' debts). The plaintiffs did not assert a fundamental right to water service and the ordinance was, accordingly, subject to only rational basis review. First, the ordinance did not actually impose a requirement of payment of a landlord's outstanding arrears by a tenant as a condition precedent to water service restoration; second, the City had no official policy or custom of requiring tenants to pay for their landlords' debts. This "op-

tion" was available and the City accepted payment from anyone, but without a requirement that the payor have either an interest in the property or responsibility for the arrears. This fell far short of establishing that the City's practice was an "irrational" or "arbitrary" method of collecting payment for water services, or constituted "a gross abuse of governmental authority." Lastly, the City's ordinance did not violate the Equal Protection Clause under rational basis review. *Brown v. City of Barre*, No. 5:10-cv-81, 2012 U.S. Dist. LEXIS 96738 (D. Vt. July 12, 2012).

Retaining Seized Firearms

The opinion in a case previously discusseed in the Cases column of the March/April 2012 issue of *Municipal Lawyer*, *Houston v. City of New Orleans*, No. 11-30198, 2012 U.S. App. LEXIS 5370 (5th Cir. Mar. 15, 2012), has been withdrawn. On May 22, 2012, an en banc panel of the U.S. Court of Appeal for the Fifth Circuit vacated that ruling, substituted a new opinion, and remanded the matter without argument in a ruling reported at *Houston v. City of New Orleans*, 682 F.3d 361 (5th Cir. 2012).

In this action, brought pursuant to 42 U.S.C. § 1983, Errol Houston, Jr., had claimed that the City of New Orleans, the District Attorney, and other defendants had violated his Fourteenth Amendment rights (to keep and bear arms, incorporated from the Second Amendment, and to due process) by retaining his lawfully-seized firearm after the district attorney had entered nolle prosequi (an abandonment of prosecution) on the charges brought against Houston. Almost a year after his arrest, and following his requests for the return of his firearm being denied by the district attorney's office and the police department, Houston filed his action. In an amended complaint, Houston added claims for retaliation and unlawful arrest, claiming he had been again arrested by New Orleans police officers (those charges also "nolle prossed") after he filed suit.

The en banc panel turned to the well-established maxim that federal courts did not decide constitutional issues where there was an adequate state-law basis to resolve the dispute. In this case, two state statutes addressed the ability to retain lawfully seized property – La. Rev. Stat. 40:1798 ("Firearms; disposal by law enforcement agencies") and La. Rev. Stat. 15:41 ("Disposition of property in connection with criminal proceedings"). The first required the law enforcement agency to return the seized or forfeited firearm to the owner unless it was contraband, was used to violate the law, or was one that the owner could not lawfully possess. The second statute provided that, in default of any specific provision, property seized in connection with a criminal proceeding which was not needed as evidence (or no longer needed as evidence) was to be returned to the owner, unless it was contraband. "There is no authority for the government to hold the property when, by its own act, it has ceased active 'use' or 'need' for the 'evidence'. Accepting, as we must, the truth of the well-pleaded allegations in Houston's complaint, the government's refusal to restore the firearm to Houston following the second nolle prosequi (if not earlier) arguably placed it in violation of these state-law provisions..." The matter was remanded for determinations of, among other things, whether the government had active "use" or "need" for Houston's firearm. (Thank you to Christopher A. Conte, Legislative Counsel, NRA/ILA, for his note about this case.)

Constitutional Law

Commerce Clause—Market Participant

"The basic question before us is whether the State of Michigan acts in a proprietary capacity as a 'market participant' rather than as a government regulator when it contracts with a private bridge company to divide up the work of building new ramps and roads that will connect various interstates with the Ambassador Bridge," located between the United States and Canada. In this case, the State, through its Department of Transportation (MDOT), entered into a contract with the Detroit International Bridge Company (DIBC), to construct new and improved approaches to the Ambassador Bridge, privately owned by the DIBC, from interstate roads in Michigan. The project was called the "Gateway Project," and the contract specified that the State and DIBC had separate construction jobs to perform. The State used State and federal highway funds to complete its share of the work. The State had subsequently sued DIBC over parts of the work, which meant that the newly-constructed freeway ramps leading up to the bridge remained closed because, the State alleged, to open them prior to completing the Gateway Project construction would be unsafe, jeopardize federal funding, and interfere with the ongoing construction.

The plaintiffs were trucking companies that shipped goods across the border between the United States and Canada. They sued the State, characterizing the MDOT's refusal to open the ramps as a "Closure Order," and claiming that this refusal-closure order violated the Commerce Clause because it blocked the free flow of travel between the interstate highways and the Ambassador Bridge. (In fact, however, the ramps had never been open.) The district court granted the State's motion to dismiss the claims, and the plaintiffs appealed.

The U.S. Court of Appeals for the Sixth Circuit affirmed. "We hold that, for purposes of the Commerce Clause and the plaintiffs' statutory claims, the State is acting in a proprietary capacity here and, like the private bridge company, takes the role of a market participant." The State was participating in the road construction market in order to improve transportation across a privately-owned river crossing. It was not protecting local commerce by discriminating against out-of-state or foreign commercial interests. "To the contrary, it is ensuring the completion of a contract, financed in part by State funds and federal funds that the State has the authority to administer, that will actually *encourage* the flow of commerce across state and international lines." *Mason & Dixon Lines Inc. v. Steudle*, 683 F.3d 289 (6th Cir. 2012).

Personnel & Employment

Employee Speech Rights

James Griffin was a 26-year veteran of the New York City Police Department (NYPD), and a former Detective First Grade. In 2005, another Detective First Grade, O'Keefe, failed to follow standard NYPD operating procedures in investigating a homicide. The Investigation Unit (IU) scheduled a hearing to

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