No. 112488

IN THE
SUPREME COURT OF ILLINOIS

JOSEPH M. FERGUSON, in his official capacity as Inspector General of the City of Chicago,

Plaintiff-Appellee,

v.

STEPHEN R. PATTON, in his official capacity as Corporation Counsel of the City of Chicago,

Defendant-Appellant.

On Appeal from the Appellate Court of Illinois
First Judicial District, No. 10-1152
There Heard on Appeal from the Circuit Court of Cook County, Illinois
County Department, Chancery Division, No. 09 CH 43287

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

STEPHEN R. PATTON
Corporation Counsel
of the City of Chicago
30 North LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-3173

BENNA RUTH SOLOMON
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation Counsel
J. MARK POWELL
Assistant Corporation Counsel
Of Counsel

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

The City of Chicago Inspector General's Office ("IGO") requested that the City of Chicago Department of Law produce certain documents in connection with an investigation. The Law Department produced responsive documents, some in their entirety and others with redactions of information that was subject to the attorney-client privilege, work-product protection, or both. The IGO then served a subpoena for unredacted copies of the privileged documents. After the Law Department timely objected based on privilege, the Inspector General retained counsel and sued the Corporation Counsel to compel production of unredacted copies of the documents. The Inspector General did not dispute that the information was protected by the attorney-client privilege, but argued that a City department cannot assert privilege in an IGO investigation.

The circuit court dismissed the complaint on the grounds that the privilege was available to the City in an IGO investigation and that the Inspector General lacks the capacity to sue. The Inspector General appealed. The appellate court, over a dissent, reversed and remanded. The court held that the dispute was justiciable and that the Inspector General has capacity to sue, and ordered the circuit court to review the documents in camera and make factual findings whether they are privileged. This court allowed the Corporation Counsel's petition for leave to appeal. All questions are raised on the pleadings.

ISSUES PRESENTED

1. Whether the courts lack subject matter jurisdiction over a dispute between the heads of two administrative divisions of the same municipal corporation.

2. Whether the Inspector General lacks the capacity to sue, because he is an arm of municipal government rather than a distinct legal entity; the relevant ordinance does not give him litigating authority; and a court lacks the power to appoint counsel to represent him.

JURISDICTION

The circuit court entered judgment dismissing the complaint on April 21, 2010. C. 128; A64.[1] The Inspector General filed a notice of appeal on April 27, 2010. C. 129; A22. The appellate court had jurisdiction pursuant to Ill. Sup. Ct. R. 303. On April 29, 2011, the appellate court reversed the judgment of the circuit court and remanded. A2-A21. The Corporation Counsel timely filed a petition for leave to appeal. This court allowed the Corporation Counsel's petition on September 28, 2011, A1, and has jurisdiction pursuant to Ill. Sup. Ct. R. 315.

[1] The record on appeal consists of one volume of common law record, cited as "C.__," and a report of proceedings, cited as "Tr. ___."

ORDINANCES INVOLVED

The following sections of the Chicago Municipal Code are set forth in the appendix to this brief:

Mayor's appointment powers and duties:
Municipal Code of Chicago, Ill. § 2-4-010 (2011)

Mayor's supervisory authority:
Municipal Code of Chicago, Ill. § 2-4-020 (2011)

Mayor's ordinance enforcement authority:
Municipal Code of Chicago, Ill. § 2-4-030 (2011)

Office of Inspector General:
Municipal Code of Chicago, Ill. §§ 2-56-010 to 2-56-170 (2011)

Corporation Counsel – Appointment – Powers and duties:
Municipal Code of Chicago, Ill. § 2-60-020 (2011)

STATEMENT OF FACTS

On November 4, 2009, First Deputy Inspector General Mary Hodge, through counsel the IGO had retained, filed this action in her official capacity against the City's former Corporation Counsel in her official capacity. C. 3-12. In December 2009, after the City Council confirmed Joseph Ferguson as Inspector General, he was substituted as plaintiff. C. 46.[2] The complaint alleged as follows. In January 2007, the IGO began investigating the involvement of former and current City employees in the City's award of a sole-source contract to a former City employee, and ultimately conducted

[2] The current Corporation Counsel was substituted in this court by order of October 18, 2011.

multiple interviews and reviewed documents from five City departments or offices. C. 6 ¶¶ 12, 14. As part of the investigation, on August 15, 2008, the IGO requested in writing that the Law Department turn over all documents relating to the contract award. C. 6 ¶ 15. The Law Department produced responsive documents, but redacted some based on claims of attorney-client privilege and/or work-product protection. C. 6 ¶ 15; C. 22-23. The IGO responded that it believed a City department may not assert privilege in an IGO investigation. C. 7 ¶ 17. On October 8, 2009, the IGO served a subpoena on the Corporation Counsel seeking unredacted copies of the documents. C. 21. The Corporation Counsel objected to the subpoena and, following unsuccessful negotiations, refused to produce the documents without redactions. C. 6 ¶¶ 20-22. According to the complaint, this prevented the IGO from completing its investigation. C. 6 ¶ 24. The complaint sought a declaration that the Corporation Counsel may not assert privilege in response to a request for documents by the IGO as part of an "official IGO investigation"; a writ of mandamus compelling the Corporation Counsel to disclose the withheld information; and an order enforcing the subpoena. C. 9-12.

The Corporation Counsel moved to dismiss the complaint pursuant to 735 ILCS 5/2-619 and 5/2-615 (2010). C. 46-47, 52-70. The Corporation Counsel argued that dismissal was warranted because chapter 2-56 of the Chicago Municipal Code, which creates the IGO and defines its powers ("IGO

ordinance"), does not abrogate the attorney-client privilege and, in any event, the Corporation Counsel is barred by the rules of professional conduct from disclosing confidential client communications, even to the IGO, without the clients' informed consent; that the Inspector General lacks the capacity to sue; and that the court lacks jurisdiction to entertain a dispute between two officers of the same governmental entity in their official capacities. C. 56-68.

In response, the Inspector General did not doubt that the attorney-client privilege was available to the City under other circumstances, but argued that the privilege was unavailable in the context of an IGO investigation. C. 95-102. The Inspector General also argued that he has authority to sue to enforce a subpoena. C. 102-04.

The Corporation Counsel replied that Illinois law applies the privilege to a municipal corporation to the same extent as to a private entity, that the IGO ordinance expressly permits objections to subpoenas, and that the parties' interests here are adversarial rather than common. C. 112-18. The Corporation Counsel also argued that the Inspector General has no common-law authority to sue. C. 118-20.

After oral argument, Tr. 5-41; A26-A62, the court granted the motion to dismiss, concluding that the Corporation Counsel had properly invoked privilege and that the Inspector General lacks the capacity to sue, Tr. 38-41; A59-A62; C. 128; A64.

The Inspector General appealed, C. 129; A22, and the appellate court,

by a 2 to 1 vote, reversed and remanded, A2-A21. Citing cases that did not address justiciability or involve disputes between two heads of municipal departments, the court held it had jurisdiction because it had "considered analogous situations in the past," and was "willing to do so again." A8.

Next, the majority held the Inspector General had capacity to sue the Corporation Counsel and could retain his own attorney to do so. A9-A16. In reciting the applicable ordinances, the majority recognized that the Corporation Counsel is charged with conducting "all the law business" of the City. A4. The court nevertheless concluded that the prohibition of the IGO ordinance that the Inspector General "shall take no action to enforce [a] subpoena" or "to initiate prosecution" for seven days after an objection is made, indicated that "at least in the limited situation where the Corporation Counsel is served with a subpoena by the Inspector General and objects to its enforcement . . . the Inspector General may seek to enforce the subpoena in the circuit court by hiring its own counsel." A11-A13. The majority stated that requiring the Inspector General to take to the Mayor a dispute with the Corporation Counsel would "tie [his] hands." A15. The majority also ruled that the Inspector General could retain private counsel without involving the Corporation Counsel. A16. Finally, the majority declined the Inspector General's request for review of the "finding" that the attorney-client privilege was available absent information "concerning the documents at issue," such as their authors and recipients. A18. The court remanded for the "limited

purpose" of in camera review of and factfinding about the documents. A18.

The dissent observed that the Inspector General's subpoena power is "administrative, and the scope is circumscribed by the plain language of the ordinance: a dispute over enforcement ultimately lands on the desk of the mayor, who must decide how to resolve it." A20. The dissent further explained that "[t]o grant to the Inspector General the power to bypass the city's attorney and the mayor himself and seek a declaratory judgment on the nature and extent of his power is to grant to a city officer appointed by the mayor powers the city council did not (and probably could not) delegate." A20. The Municipal Code "provides that where the legislation does not explicitly provide for enforcement, the mayor is the enforcement officer." A20. The dissent also observed that "[t]he case cited by the majority in support of its conclusion" was "not persuasive." A20. There was "[n]o pronouncement" in the case law that Inspectors General are independent agencies, and Inspectors General "remain, at the city, county and state level, offices within units of government." A20. They "do not have a legal existence independent of the unit of government of which they are a part." A21.

ARGUMENT

In this lawsuit, the Inspector General retained private counsel and sued the Corporation Counsel, attempting to cast aside the vital and well-established attorney-client privilege. The case lacks a valid legal basis and the circuit court properly dismissed it. There is no jurisdiction over the

dispute, and the Inspector General lacks capacity to sue. The appellate court's contrary decision is unsupportable.

As an official-capacity suit by one appointed head of a municipal office against another, both of whom lack legal existence independent from the City, this is an intra-municipal dispute over which the courts lack jurisdiction. Instead, such disputes must be resolved internally by the Mayor. The appellate court erroneously found the action justiciable, relying, without explanation, on cases that did not address justiciability and involved the county or elected officials. But this dispute is not comparable; the structure of county government is materially different from that of a municipal corporation, and this case involves appointed officials whom the Mayor supervises.

The Inspector General also lacks authority to bring suit. Nothing in the IGO ordinance grants the Inspector General independent legal existence or the power to bring lawsuits for the City. Rather, the Municipal Code vests all authority over the City's legal affairs in the Corporation Counsel alone. In finding capacity to sue, the appellate court ignored the grant of exclusive litigating authority to the Corporation Counsel and read authority into the IGO ordinance that the City Council did not include. The Inspector General must adhere to the limits that the City Council imposed, and has ample tools to perform his functions effectively without the power to sue. Likewise, because the Corporation Counsel alone has litigating authority under the

Code, there was no basis for the appellate court's related determination that the Inspector General could retain an attorney without the involvement of the Corporation Counsel.

This court reviews a dismissal under section 2-619 de novo. See, e.g., Wackrow v. Niemi, 231 Ill. 2d 418, 422 (2008). Under this standard, the judgment of the appellate court should be reversed and the Inspector General's complaint should be dismissed. The appellate court's decision improperly makes courts the arbiters of internal governmental disputes, upends settled statutory construction principles, and runs afoul of fundamental rules and constitutional limitations regarding the organization of a municipal corporation.

I. THIS IS A NONJUSTICIABLE INTRAMUNICIPAL DISPUTE.

Whether claims are justiciable is a question of law that is reviewed de novo. See Lyons v. Ryan, 201 Ill. 2d 529, 534 (2002). By holding that the courts have jurisdiction over this suit between two parts of City government, the appellate court's decision contravenes the rules that a party cannot be both plaintiff and defendant in the same case and that intramunicipal disputes are nonjusticiable.

A. The Courts Lack Jurisdiction Over A Suit By One City Department Against Another City Department.

In Tanner v. Solomon, 58 Ill. App. 2d 134 (1965), one member of a municipal board sued the other board members for declaratory relief, alleging they had permitted applicants who did not meet applicable criteria to become

police officers or to become eligible for such positions. See id. at 135-36. The court held that the plaintiff, who sued in his capacity as a member of the board rather than as a taxpayer, did not have an interest sufficient to confer standing. See id. at 138. Rather, he raised an "intra-agency dispute[ ]," in which "judicial interference" was inappropriate. Id. And, since standing is a "component of justiciability," In re Estate of Wellman, 174 Ill. 2d 335, 344 (1996), which must exist for the court to have subject matter jurisdiction, see, e.g., Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 199 Ill. 2d 325, 334 (2002), it follows that a court lacks jurisdiction to entertain intramunicipal disputes.

This case, too, pits members of the same legal entity against each other. The Inspector General brought suit in his official, not individual, capacity; and he has sued the Corporation Counsel in that officer's official, not individual, capacity as well. To begin with an issue on which even the Inspector General has offered no disagreement, a complaint filed against a municipal officer in his official capacity is an "action against the governmental entity of which the [official] is a part." Schlicher v. Board of Police & Fire Commissioners, 363 Ill. App. 3d 869, 883 (2006); see also, e.g., City of Elmhurst v. Kegerreis, 392 Ill. 195, 204 (1945). Thus, it is clear that this suit against the Corporation Counsel in his official capacity is a suit against the City. It is equally clear that the City, like any party, "'may not be both plaintiff and defendant in an action.'" City of Chicago v. Beythel

Outcast Church, 375 Ill. App. 3d 317, 320 (2007) (quoting Hume v. Town of Blackberry, 131 Ill. App. 3d 32, 35 (1985)). Accordingly, for the Inspector General or his office to maintain a suit against the City, he must somehow have a legal existence separate from the City as a whole. As we now explain, there can be no question that the IGO, like any other division of City government, lacks that separate legal existence. This lawsuit, therefore, is effectively an action by and against the City.

A municipality is organized as a corporation, see, e.g., Johnston v. City of Chicago, 258 Ill. 494, 499 (1913); Kinzie v. Trustees of the Town of Chicago, 3 Ill. 187, 1839 WL 2873, at *1 (1839); see generally 1 Eugene McQuillin, The Law of Municipal Corporations § 2.07.10 (3d Ed. 1999), that is, a "single legal entity independent of its officers," Darby v. Pasadena Police Department, 939 F.2d 311, 313 (5th Cir. 1991).

As such, municipalities derive their existence from the State. 1 McQuillin, supra, §§ 2.02, 2.03; see also, e.g., City of Trenton v. State of New Jersey, 262 U.S. 182, 189 (1923) (municipal corporation is a "political subdivision of the State" that "exists by virtue of the exercise of the power of the state through its legislative department") (internal quotations omitted). As a special charter municipality, Chicago was established by and retains the governing structure Illinois imposed by charter in the nineteenth century, even though the Illinois Constitution of 1970 added home-rule powers. See Maureen A. Flanagan, Municipal Charters, The Electronic Encyclopedia of Chicago

(Chicago Historical Society 2005), http://encyclopedia.chicagohistory.org/pages/231.html; see also Maureen A. Flanagan, Charter Reform in Chicago 157 (1987) (Chicago "still has a nineteenth-century type of municipal government"). And the City's charter makes clear the City is a single legal entity: "The inhabitants of said city shall be a corporation by the name of the City of Chicago; and by that name sue and be sued, complain and defend in any court . . . ." Second Charter (the Consolidating Act of February 14, 1851), reprinted in 2 Edmund J. James, The Charters of the City of Chicago 132 (1898) (available at http://www.archive.org/stream/charterscitychi00illigoog#page /n6/mode/2up); cf. 65 ILCS 5/2-2-12 (2010) (city incorporated under Illinois Municipal Code is body "politic and corporate" that may sue and be sued in corporate name).

To be sure, a municipality may create departments or offices to conduct certain activities on behalf of the municipality, see 3 McQuillin, supra, § 12.39, and home-rule municipalities are empowered to "provide for [their] officers, their manner of selection and terms of office," either through a referendum or as "otherwise authorized by law," Ill. Const. art. VII, § 6(f). But simply creating an office or department is not sufficient to make it a legal entity separate from the municipal corporation itself; rather, the department or office must become a corporation in its own right. See 3 McQuillin, supra, § 12.40 (municipal department that is not a corporate body cannot be sued or sue); see also, e.g., Braxton v. National Capital Housing

Authority, 396 A.2d 215, 216-17 (D.C. App. 1978) (per curiam) ("A noncorporate department or other body within a municipal corporation is not sui juris."); Des Moines Park Board v. City of Des Moines, 290 N.W. 680, 681 (Iowa 1940) (city park board lacked "independent or corporate existence").

Consistent with these principles, the courts have repeatedly held that City departments have no legal existence independent from the City itself. See, e.g., Lewis v. City of Chicago, 496 F.3d 645, 656 (7th Cir. 2007) (City was "real party in interest" in suit naming Chicago Police Department as defendant) (citing Chan v. Wodnicki, 123 F.3d 1005, 1007 (1997)). See also, e.g., Dr. Martin Luther King, Jr. Movement Inc. v. City of Chicago, 435 F. Supp. 1289, 1294 (N.D. Ill. 1977) (Department of Streets and Sanitation does not "enjoy independent legal existence"); Stevanovic v. City of Chicago, 385 Ill. App. 3d 630, 631 (2008) (noting dismissal of Chicago Fire Department "because it is not a legal entity separate from the City"). Cases discussing other municipalities are to the same effect. See also, e.g., Paredes v. City of Odessa, 128 F. Supp. 2d 1009, 1013 (W.D. Tex. 2000) (police department was "not a separate legal entity apart" from municipality); Luysterborghs v. Pension & Retirement Board, 927 A.2d 385, 387-88 (Conn. Super. Ct. 2007) (since state law did not treat municipal departments as distinct legal entities, municipal pension board was not a juridical entity); City Council v. Bowen, 649 So. 2d 611, 616 (La. Ct. App. 1994) (city council was part of larger body politic).