

Play by the Rules, Especially if They Are Your Rules: NC Supreme Court Creates New Constitutional Claim for Governmental Employees

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'We hold it to be self-evident that all persons ... are endowed by their Creator with certain inalienable rights; that among these are life, liberty, [and] the enjoyment of the fruits of their own labor'

--- Article I, Section 1, North Carolina Constitution

On March 2, 2018, the North Carolina Supreme Court issued a remarkable decision that skewered a municipality for not abiding by its own personnel procedures. In the case of *Tully vs. City of Wilmington*, a municipal employee claimed that he had been harmed by his employer's violation of its own policy when it refused to let the employee contest the denial of a job promotion arising from an allegedly botched scoring of an examination—an examination he was required to pass to get the promotion. The court held that the employee had stated a viable claim that his rights under Section 1 of Article I of the N.C. Constitution had been violated.

That was a first.

The North Carolina Supreme Court doesn't create new grounds of legal action every day, and never before has it recognized this constitutional claim for a governmental employee. The creation of this claim in *Tully* has significant implications for state agencies, counties, cities, and towns throughout North Carolina.

The Facts, Ma'am

Officer Tully appears to have been an impressive employee. He held both associate's and bachelor's degrees focused on criminal justice, and an Advanced Police Certification from the North Carolina Criminal Justice Education and Training Standards Commission. He had investigated more than 50 homicides and served as lead investigator in at least 12 of those cases, with a 100% clearance rate.

In 2011, the same year he was named "Wilmington Police Officer of the Year," Tully sought promotion to the rank of sergeant, but he did not receive a passing score on the required written examination. When he received a copy of the official examination answers, he discovered that the official answers were based—no kidding—on outdated law instead of the prevailing law at the time, on which he had based his answers.

Understandably, he filed a grievance regarding the discrepancy through the city's internal grievance process,

but was told that the test answers were not a grievable item. In fact, a supervisor told him that, "[e]ven if you are correct, there is nothing that can be done."

Did the Police Department Have Relevant Policies? You Bet

The city's policy manual provided that the policies were intended to establish "uniform guidelines that govern promotional procedures within the Wilmington Police Department and ensure procedures used are job-related and non-discriminatory." It also stated that the Police Department was required to work to "ensure that fair and professional standards were utilized for the purpose of promoting sworn police employees" and that the city's objective was "to provide equal promotional opportunities to all members of the Police Department based on a candidate's merit, skills, knowledge, and abilities"

The grievance and appeals policies provided that "[c]andidates may appeal any portion of the selection process" and that, "[i]f practical, re-application, re-testing, re-scoring and/or re-evaluation of candidates may be required if an error in the process is substantiated."

The Denial of the Fruits of Tully's Labor

Tully obviously disagreed with the city's refusal to reconsider the test results and he sued, claiming that he'd been harmed by "an error in the process" and that he never had a true opportunity to grieve the denial of his promotion. He claimed, in part, that the city, by denying his promotion based on his answers on the sergeant's test (which were apparently correct even though they differed from the "official answers") and then refusing to let him contest that denial, had deprived him of "the fruits of his own labor" in violation of the North Carolina Constitution. The trial court was not persuaded and granted the city's motion to dismiss all of Tully's claims.

Tully appealed to the North Carolina Court of Appeals, which reversed the trial court—giving Tully a win—and clarified that Tully's claims were not based upon an assertion that he was entitled to receive a promotion, but simply that he was entitled to a non-arbitrary and non-capricious promotional process in accordance with the rules set forth in the policy manual.

The North Carolina Court of Appeals acknowledged that the case presented an issue of first impression under North Carolina law, but concluded that "it is inherently arbitrary for a government entity to establish and promulgate policies and procedures and then not only utterly fail to follow them, but further to claim that an employee subject to those policies and procedures is not entitled to challenge that failure." The court, in other words, called the city out for an alarming, but common, error among employers: ignoring its own policies.

Nonetheless, the city persisted and appealed to the North Carolina Supreme Court.

The North Carolina Supreme Court Decision

Officer Tully again prevailed before the North Carolina Supreme Court, which, with respect to the city's alleged violation of the "fruits of their own labor" clause, affirmed the decision of the lower appellate court. The court held that the city's actions implicated the employee's right under Article I, Section 1 of the state constitution "to pursue his chosen profession free from actions by his governmental employer that, by their very nature, are unreasonable because they contravene policies specifically promulgated by that employer for the purpose of having a fair promotional process."

The constitutional language in question provides that it is "self-evident that all persons" have "certain inalienable rights," which include "the enjoyment of the fruits of their own labor." Such lofty language has been the law of the land for at least 150 years, but not until *Tully* was it self-evident that it meant that an

employee of a governmental entity could sue because the entity had "arbitrarily and capriciously denied him the ability to appeal an aspect of the [employer's] promotional process" in violation of an aspirational passage of the North Carolina Constitution. Based on *Tully*, it is now a legitimate claim.

The Bottom Line

In its decision, the supreme court ruled that Tully had stated a claim under Section 1 of Article I of the North Carolina Constitution, in part because he had claimed that the city's actions were "unreasonable because they contravene policies specifically promulgated by that employer for the purpose of having a fair promotional process." The court recognized that there was sparse authority in this area of the law, but then described the requirements to state such a claim, holding that:

[T]o state a direct constitutional claim grounded in this unique right under the North Carolina Constitution, a public employee must show that no other state law remedy is available and plead facts establishing three elements: (1) a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest; (2) the employer violated that policy; and (3) the plaintiff was injured as a result of that violation. If a public employee alleges these elements, [then] he has adequately stated a claim that his employer unconstitutionally burdened his right to the enjoyment of the fruits of his labor.

The court expressed no opinion as to whether Tully could prove all of that and win his case, but his claim survived based on the court's finding that he had asserted "a claim for the deprivation of his right to the enjoyment of the fruits of his labor under Article I, Section 1 of the North Carolina Constitution."

Tully therefore won the opportunity to go back to the trial court and try to hold the city accountable for denying his promotion, meaning that the city will have to continue to defend itself or settle the case. In either scenario, city management will be required to devote more time to the case and spend more of the taxpayers' money, both of which the city, presumably, would have preferred to avoid.

Conclusion

Does *Tully* create new risks for governmental employers across the state? It sure does.

In light of *Tully*, North Carolina governmental employers should identify and review their personnel policies pertaining to their promotional processes and decide whether they are sufficiently clear. If they are not, then they should be revised until they are; and, in any case, governmental employers should ensure that all supervisory staff involved in implementing those policies know about and understand them, and know how to ensure that they are properly and consistently applied. Employers that fail to do so may find themselves defending a high-profile lawsuit—a lawsuit that could be lost and that could cause great disruption, embarrassment, and expense. No governmental employer wants to be involved in a lawsuit, and certainly not one in which it may be required to learn far more about North Carolina constitutional law than it ever wanted to know.

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