

**FINAL ORDER GRANTING DEFENDANTS’MOTION FOR SUMMARY
JUDGMENT AND DECLARATORY JUDGMENT NEGATIVE TO PLANTIFFS**

I. Statement of Case

Plaintiffs Officer Tammy Kaser (“Officer Kaser”) and Fraternal Order of Police Lodge No. 86, Inc. (“FOP”) (collectively “Police”) seek declaratory judgment interpreting Section 253-207 (“Code Section”) of the Code of the Consolidated City of Indianapolis to require promotion of Indianapolis police officers solely according to promotional list ranking. Defendants Jerry Barker, Indianapolis Civilian Police Merit Board and the City of Indianapolis (“City”) argue the Code Section allows the chief of police to use discretion for promotion from promotional list rankings. The court finds the Code Section clearly allows the chief of police to use discretion to promote police officers, that courts cannot make policy, and otherwise, proper remedy is City-County Council. ¹

II. Issue

Does the Code Section allow the City to use discretion to promote police officers?

III. Factual and Procedural History

Around 2000, Officer Kaser went through the promotion process prescribed by the Code Section, including psychometric procedures, written examination, structured interview, and other performance evaluations. She was ranked Number 23 out of 52 in the 2000-01 promotion list. She remains unpromoted. On February 20, 2002, an officer ranked Number 40 below Officer Kaser, and others, was promoted.

In April 2002, this action was commenced as a declaratory action.

On July 18, 2003, the City filed its motion for summary judgment.

The court heard oral arguments on September 4, 2003. The Police and City agree that final judgment on the merits is now appropriate.

IV. Law

Under I.C. 34-14-1-1, the Court has the power to declare rights, status, and other legal relations in the form of a declaratory judgment either affirmative or negative in form and effect.

Summary judgment is proper if the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. T.R. 56 (C). The moving party must establish the “absence of any genuine issue of fact as to a determinative issue.” Jarboe v. Landmark Community Newspaper, Inc. (1994), Ind., 664 N.E.2d 118, 123. If there is sufficient evidence to establish the elements of a determinative defense, the burden shifts to the plaintiff to make sufficient showing to establish the existence of a genuine issue for trial regarding such defense. Shell Oil Co. v. Lovold Co. (1998), Ind., 705 N.E.2d 981. On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001).

Code Section 253-207 (j) states: “Promotions shall be made by the chief of police with the approval of the merit board.... the chief shall promote the candidate receiving the highest promotion score *who, in the opinion of the chief and the merit board, is best qualified for the position.*” (emphasis supplied)

¹ The Court declines to rule on the standing of FOP here since the merits are otherwise resolved.

Under Indiana law, a court must interpret a statute to ascertain and give affect to the intent of the legislature. In determining legislative intent, the language of the statute itself must be examined, including the grammatical structure of the clause or sentence in issue. If possible, affective meaning must be given to every word, and no part of the statute is to be held meaningless if that part can be reconciled with the rest of the statute. A statute is to be examined and interpreted as a whole, given common and ordinary meaning to words used in English language and not overemphasizing a strict literal or selective reading of individual words. Foremost Life Insurance Company V. Indiana Department of Insurance (1980), Ind., 409 N.E. 2d 102. An unambiguous statute must be held to mean that it plainly expresses, and that given it's plain and obvious meaning. Indiana Department of State Revenue V. Horizon Bancorp (1994), Ind., 644 N.E. 2d 870.

Indiana courts have interpreted some statutory language to provide no discretion in the promotion of public safety personnel. For example, Pastrick v. Armenta (1982), Ind. App., 438 N.E. 2d 762 held the legislative intent prohibited discretion in promotion of a fire chief where the state statute says: "... All appointments to and promotions in said department shall be made solely on merit..." In addition, Murray v. Hamilton County Sheriff's Department (1997), Ind. App., 690 N.E. 2d 335 found a valid county rule precluded discretion in promoting deputy sheriffs when it provided: "Eligible employee who makes the highest grade consisting of the total from the written examination, the service writing, and the length of service shall be promoted to the vacancy." But Murray also found Indiana statutory language clearly allows county sheriff departments to use discretion, if they wish, to promote applicants when it uses the following language:

“ . . . the sheriff and the board shall jointly prepare a list naming only those applicants *who, in the opinion of the sheriff and the board* best met the prescribed standards and perquisites...” (emphasis supplied)

Id. at 340; I.C. 36-8-10-10(b).

When a legislature makes a conscious choice to include or exclude certain provisions, reversing that choice is a fundamental matter of separation of powers. The court is not free to legislate its own policy. Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission (1999), Ind., 715 N.E. 2d 351, 358.

V. Analysis

The parties agree there is no dispute of fact here, so the issue of law for summary judgment or declaratory judgment is whether the Code Section allows City to use discretion to promote Indianapolis police officers.

First of all, the Code Section is clear and its plain meaning is obvious. It expressly allows the chief of police, with approval of the merit board, to promote those “who, in the opinion of the chief and the merit board, is best qualified for the position,” like the Indiana statute allowing discretion in county sheriff’s departments. The court simply cannot read any other meaning from these words. In addition, the language is clearly distinct from other legislative language in Indiana cases that have prescribed promotions solely on merit ranking. Pastrick v. Armentia, *supra*; Murray v. Hamilton County Sheriff’s Department, *supra*. The language in these cases shows no language allowing any discretion of anybody in the promotion process. Courts have interpreted such language as clear and requiring merit promotion. But, the language of the Code Section here allows the “opinion of the chief” to make promotions. It is clear, and can only be interpreted, to allow discretion.

While this Code Section is clear, it must also be noted that some authorities find police officers have the “toughest job in America.” *Peak, Kenneth J. Justice Administration* (Pearson/Prentice Hall) 4th Ed. 2004. The promotion process was written and made law by the City-County Council of the Consolidated City of Indianapolis, not the courts. The Court should not make policy or infringe in the role of other branches of government. Indiana Bell Telephone Co. V. Indiana Utility Regulatory Commission, supra. Officer Kaser, and others passed over in promotion, may have worthy arguments that the Code Section is bad policy and should be changed. On the other hand, the majority of the City-County Council may have worthy arguments that it is good policy for Indianapolis. These arguments are only relevant in the chambers of the City-County Council, not a court of law. Courts are limited to applying the law as made by the City-County Council. As the law is clear here, the court can only apply it as written.

VI. Conclusion

The Code Section allows the City to use discretion to promote Indianapolis police officers.

VII. Order

The City’s motion for summary judgment is granted.

Declaratory judgment is entered negative to Police.

Dated this 9th day of October 2003

David J. Dreyer, Judge
Marion Superior Court