STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1714

Michael John Hearn,
Relator,

vs.

City of Woodbury,
Respondent.

Filed May 20, 2013
Affirmed
Kalitowski, Judge

City of Woodbury

Roger Magnuson, James K. Nichols, David Faith, Dorsey & Whitney LLP, Minneapolis, Minnesota (for relator)

Mark J. Vierling, Kevin S. Sandstrom, Eckberg, Lammers, Briggs, Wolff & Vierling, PLLP, Stillwater, MN (for respondent)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Relator Michael John Hearn challenges a hearing officer's decision to affirm respondent City of Woodbury's (the city) denial of Hearn's application for a massage-therapist license. Hearn argues that the hearing officer misapplied the city's massage-therapist ordinance and that the ordinance is unconstitutional. We affirm.

D E C I S I O N

I.

"City council action is quasi-judicial and subject to certiorari review if it is the product or result of discretionary investigation, consideration, and evaluation of evidentiary facts." *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 303 (Minn. App. 2007) (quotation omitted). Our "review is limited to 'questions affecting the jurisdiction of the board, the regularity of its proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without evidence to support it.'" *Id.* (quoting *Dietz v. Dodge Cnty.*, 487 N.W.2d 237, 239 (Minn. 1992)). "[W]e will not retry facts or make credibility determinations, and we will uphold the decision if the [city council] furnished any legal and substantial basis for the action taken." *Id.* (quotation omitted); *see also City of Mankato v. Mahoney*, 542 N.W.2d 689, 692 (Minn. App. 1996) (stating that "[r]outine municipal decisions should be set aside only in those rare instances where the decision lacks any rational basis"). "The interpretation and application of a city ordinance is a question of law, which we review de novo." *Staeheli*, 732 N.W.2d at 307.

In November 2011, the city enacted an ordinance requiring massage therapists to be licensed. Hearn argues that the hearing officer erred in applying the following ordinance provision:

> (b) *A massage therapist shall not be issued a massage therapist license* or any license issued may be revoked *upon the following grounds*:

> (1) *The applicant has a conviction for or was charged with, but convicted of a lesser charge or is under a stay of adjudication relating to a crime involving* a violation of any massage therapy-related regulation in any other jurisdiction, any prostitution-related offense, criminal sexual conduct, indecent exposure, surreptitious intrusion, disorderly house as defined by Minnesota Statutes, *theft*, felony drug offense, any crime of violence as defined by Minnesota Statutes, *or any other similar crime or offense within five years of the date of the application*[.]

Woodbury, Minn., City Code § 11-503(b)(1) (2011) (emphasis added).

Hearn applied for and was denied a massage-therapist license in part based on two prior theft charges. In 2008, Hearn was charged with misdemeanor theft; the charge was later dismissed. Hearn correctly argues that the hearing officer could not affirm the city's denial of his application for a massage-therapist license based on the 2008 charge. But in 2009, Hearn was again charged with misdemeanor theft. That charge was later amended to misdemeanor disorderly conduct, and Hearn pleaded guilty.

Hearn argues on appeal that the hearing officer incorrectly determined that misdemeanor disorderly conduct is a "lesser charge" of misdemeanor theft, and therefore, erred by affirming the city's denial of his application for a massage-therapist license based on the 2009 conviction. But we need not address Hearn's "lesser-charge" argument because we affirm the hearing officer's decision on alternative grounds.

The massage-therapist-license application asks whether the applicant has "ever been convicted of or charged with a felony, crime, or violation of any ordinance other than a minor traffic violation." Hearn answered "no." But Hearn admitted at the hearing that he had previously been charged with theft and convicted of disorderly conduct. The

hearing officer correctly noted that Hearn's answer on the application "would be a misrepresentation/omission under Section 11-503(B)(7), and would be an additional ground requiring the City to deny his license." The ordinance referenced by the hearing officer provides that an applicant *shall not* be issued a massage-therapist license if "[t]he applicant provided false, misleading[,] or misrepresented information on the application." Woodbury, Minn., City Code § 11-503(b)(7) (2011).

We conclude that Hearn's misrepresentation on his license application provided a legal and substantial basis requiring the hearing officer to affirm the city's decision. Thus, we affirm the hearing officer's decision based on Hearn's misrepresentation on his application.

II.

The constitutionality of an ordinance is a question of law, which we review de novo. *Thul v. State*, 657 N.W.2d 611, 616 (Minn. App. 2003), *review denied* (Minn. May 28, 2003). City ordinances are presumed constitutional; the burden of proving that they are unconstitutional is on the party bringing the challenge. *Minn. Voters Alliance v. City of Mpls.*, 766 N.W.2d 683, 688 (Minn. 2009).

Hearn argues that the massage-therapy ordinance is unconstitutional because it violates the Due Process Clause, the Equal Protection Clause, and his right to pursue private employment. We disagree.

Due Process

The Due Process Clause of the Minnesota Constitution provides that the government cannot deprive a person of "life, liberty, or property without due process of

law." Minn. Const. art. I, § 7. When legislation does not affect a fundamental right, substantive due process requires only that the legislation bear a rational relation to public purpose it seeks to promote. *Doll v. Barnell*, 693 N.W.2d 455, 463 (Minn. App. 2005), *review denied* (Minn. June 14, 2005). The city "must have a public interest in regulating an activity and . . . the regulation imposed must be reasonable and appropriate for accomplishing its purpose." *State v. Stewart*, 529 N.W.2d 493, 497 (Minn. App. 1995). "Generally, the protection of health, morals, safety, or welfare are legitimate purposes." *Thul*, 657 N.W.2d at 617.

Here, evidence in the record shows that the city passed the ordinance to protect the public's safety. A public safety commander testified that the ordinance prohibits theft because it is a crime massage-therapy customers are particularly vulnerable to. We conclude that protecting massage-therapy customers from crime is a legitimate public purpose.

In addition, the ordinance is rationally related to protecting the public's safety. The provision at issue requires the city to deny licenses to applicants who, within the last five years, have been (1) convicted of theft, or (2) charged with theft but convicted of a lesser charge. We conclude that it is not irrational for the city to determine that the public is safer if recent criminals are restricted from practicing massage therapy. *Cf. e.g.*, *City of Elko v. Abed*, 677 N.W.2d 455, 459, 466 (Minn. App. 2004) (upholding a city ordinance that temporarily denies an applicant a license to establish a "sexually oriented business" if the applicant has a past conviction of certain enumerated sex crimes), *review denied*

(Minn. June 29, 2004). Thus, the massage-therapist ordinance does not violate Hearn's substantive due-process rights.

Equal Protection

The Equal Protection Clause of the Minnesota Constitution provides that "[n]o member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Minn. Const. art. I, § 2. This guarantee generally requires that the government treat similarly situated persons alike. *Kottschade v. City of Rochester*, 537 N.W.2d 301, 306 (Minn. App. 1995), *review denied* (Minn. Nov. 15, 1995). But "[t]he government may treat similarly situated persons differently when a distinction in treatment bears a rational relation to a legitimate government objective." *Id.* (quotation omitted). The rational-basis test requires that (1) the distinctions that separate those included within the class from those excluded must not be arbitrary or fanciful; (2) the classification must be genuine or relevant to the purpose of the law; and (3) the purpose of the statute must be one that the government can legitimately attempt to achieve. *Wegan v. Vill. of Lexington*, 309 N.W.2d 273, 280 (Minn. 1981).

Although Hearn bears the burden to prove that the ordinance does not meet the rational-basis test, he improperly attempts to shift his burden to the city. Hearn argues that the city failed to show that the effect of discriminating against him is to protect public health, safety, or welfare. Because Hearn has not shown that the classification here is not relevant to protecting public health, safety, or welfare, his equal-protection claim fails.

Right to Pursue Private Employment

The Minnesota Constitution provides that "[t]he enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people." Minn. Const. art I, § 16. This provision has been interpreted to protect fundamental rights not enumerated in the constitution. *See, e.g.*, *In re Medworth*, 562 N.W.2d 522, 523 (Minn. App. 1997) (stating that the right to establish one's home is inherent).

An individual has a property interest in pursuing private employment. *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 1411 (1959) (recognizing that an individual has a protected property interest in holding specific private employment and following a chosen profession free from unreasonable governmental interference). But this right is not absolute. *Pomrenke v. Comm'r of Commerce*, 677 N.W.2d 85, 91 (Minn. App. 2004), *review denied* (Minn. May 26, 2004). "Generally speaking, pursuant to its police power a municipality may regulate by license any business or trade which may injuriously affect the public health, morals, safety, convenience, or general welfare." *City of St. Paul v. Dalsin*, 245 Minn. 325, 329, 71 N.W.2d 855, 858 (1955); *Pomrenke*, 677 N.W.2d at 92 ("[B]efore a reviewing court can hold that an exercise of the police power . . . is unconstitutional, it must find that the exercise has no substantial relationship to public health, safety, morals, or general welfare.").

Here, the ordinance temporarily restricts applicants with a particular criminal history—or applicants who misrepresent their criminal history on the application—from obtaining a massage-therapist license, in order to protect the public. Such restrictions by a municipality are reasonable as long as they are not unnecessary, unreasonable, or

oppressive. *Dalsin*, 245 Minn. at 330, 71 N.W.2d at 858-59. And we have held that similar regulations are a legitimate exercise of police power. *See, e.g.*, *Pomrenke*, 677 N.W.2d at 92 (holding that the department of commerce can deny a license to a residential-mortgage servicer if the applicant engages in fraudulent acts). Thus, we conclude that the ordinance does not unconstitutionally infringe on Hearn's right to pursue private employment.

Affirmed.