[Cite as *Ohio Patrolmen's Benevolent Assn. v. Perrysburg*, 2011-Ohio-644.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Ohio Patrolmen's Benevolent Association, et al.

Appellants

v.

City of Perrysburg, et al.

Appellees

Court of Appeals No. WD-10-033

Trial Court No. 2009 CV 0851

DECISION AND JUDGMENT

Decided: February 11, 2011

* * * * *

Michelle T. Sullivan and Amy L. Zawacki, for appellants.

Lisa E. Pizza, David M. Smigelski, Joan C. Szuberla and Mathew Beredo, for appellees.

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PIETRYKOWSKI, J.

{¶ 1} Plaintiffs-appellants, Ohio Patrolmen's Benevolent Association ("OPBA"), Jack Otte, and Mary Karafa, appeal the May 17, 2010 judgment of the Wood County Court of Common Pleas which, in a declaratory judgment action, granted summary

judgment in favor of defendants-appellees, city of Perrysburg and city council members. Because we agree that the residency provisions are valid and enforceable, we affirm the trial court's judgment.

{¶ 2} On August 19, 2009, appellants commenced this action against the city of Perrysburg, the mayor, and city council members.[1] Appellants included the OPBA, Jack Otte, a member and director of the Sergeants' bargaining unit, and Mary Karafa, a member and director of the Communications Officers/Animal Control Officers' ("CO/ACO") bargaining unit. The complaint sought declaratory judgment that the residency restrictions in their collective bargaining agreements ("CBAs") were "invalid and inoperable" as a matter of law. As to the Sergeants' bargaining unit, the restriction provided:

{¶ 3} "The district of residency shall consist of the following area: The City of Perrysburg; Perrysburg Township; Middleton Township; that part of Webster Township lying north of Sugar Ridge Road and West of Caris Road and the westerly right of way line of Caris Road extended to its intersection with Sugar Ridge Road; the City of Rossford; the Village of Haskins; and the City of Maumee."

{¶ 4} The CO/ACO agreement simply provided that "[a]ll employees shall reside within Wood County or Lucas County." Appellees' answer was filed on October 19, 2009.

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[1]The defendants included: Perrysburg Mayor, Nelson Evans, and council members: Joe Lawless, Maria Ermie, John Kevern, Tim McCarthy, Tom Mackin, Mike Olmstead, and Joe Rutherford.

{¶ 5} On March 15, 2010, appellants filed a motion for summary judgment. In their motion, appellants argued that because the CBAs' residency provisions conflicted with R.C. 9.481, the saving clause in the agreements should have been utilized to excise the offending portions. In making the argument, appellant also relied upon R.C. 4117.10(A) which governs the relationship between the terms of CBAs and state or local law.

{¶ 6} On the same day, appellees filed a motion for summary judgment arguing that Ohio law specifically permits public employers and bargaining representatives to enter into agreements regarding wages, hours, and terms and conditions of employment. Further, appellees distinguished *Lima v. State*, 122 Ohio St.3d 155, 2009-Ohio-2597 wherein the Supreme Court of Ohio held that other than as provided in R.C. 9.481(B), municipalities could not require their employees to reside in a particular municipality.

{¶ 7} On May 17, 2010, the trial court granted appellees' motion for summary judgment and denied appellants' motion for summary judgment. The court determined that because the residency provisions were negotiated between the parties, the city had not "required" them to reside in a certain area as proscribed by R.C. 9.481. This appeal followed.

{¶ 8} Appellants raise two assignments of error for our review:

{¶ 9} "Assignment of Error No. 1: The trial court erred in failing to apply R.C. 4117.10(A) in the present case, thereby granting summary judgment in favor of

Appellees' and denying Appellants' motion for summary judgment in the declaratory judgment action.

{¶ 10} "Assignment of Error No. 2: The trial court erred in concluding the CBA residency provisions are not requirements contemplated by R.C. 9.481 because the provisions were negotiated by the parties."

{¶ 11} Appellants' assignments of error are related and will be jointly addressed. Appellants assert that the trial court erred by granting appellees' motion for summary judgment. We review de novo the trial court's ruling on the summary judgment motions. *Conley-Slowinski v. Superior Spinning & Stamping Co.* (1998), 128 Ohio App.3d 360, 363. A movant is entitled to summary judgment pursuant to Civ.R. 56(C) when it is demonstrated "that there is no issue as to any material fact, that the moving party is entitled to judgment as a matter of law, and that reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party." *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 617; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 12} The crux of the present dispute is whether R.C. 9.481 conflicts with the terms of the CBAs and, thus, is unenforceable pursuant to R.C. 4117.10(A). If so, then the savings clauses, in the respective CBAs, would operate to invalidate the offending provisions and retain the remaining portions. R.C. 9.481 provides, in relevant part:

{¶ 13} "(B)(1) Except as otherwise provided in division (B)(2) of this section, no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.

{¶ 14} "(2)(a) Division (B)(1) of this section does not apply to a volunteer.

{¶ 15} "(b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state. For the purposes of this section, an initiative petition shall be filed and considered as provided in sections 731.28 and 731.31 of the Revised Code, except that the fiscal officer of the political subdivision shall take the actions prescribed for the auditor or clerk if the political subdivision has no auditor or clerk, and except that references to a municipal corporation shall be considered to be references to the applicable political subdivision.

{¶ 16} "(C) Except as otherwise provided in division (B)(2) of this section, employees of political subdivisions of this state have the right to reside any place they desire."

{¶ 17} R.C. 4117.10 governs the scope of a collective bargaining agreement and provides:

{¶ 18} "An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement. * * * Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees. Laws pertaining to civil rights, affirmative action, unemployment compensation, workers' compensation, the retirement of public employees, and residency requirements, * * * prevail over conflicting provisions of agreements between employee organizations and public employers."

{¶ 19} Appellants argue the fact that the parties negotiated the residency provision is "immaterial" to the applicability of R.C. 4117.10(A) because the agreement violates R.C. 9.481. In support, appellants cite *Streetsboro Edn. Assn. v. Streetsboro City School Dist. Bd. of Edn.* (1994), 68 Ohio St.3d 288. In *Streetsboro*, two teachers, along with their collective bargaining representative, filed an action against the board of education alleging that a provision in the CBA was unenforceable. Specifically, the teachers

disputed the requirement that the board of education would not be responsible for retirement costs incurred during unpaid leave. Id. at 289.

{¶ 20} Upon review, the Supreme Court of Ohio concluded that the CBA provision conflicted with R.C. 3307.512 which specifically required that the board pay to the teachers' retirement system its share of the employee purchased service credit. Id. at 290. Thus, the court held that under R.C. 4117.10(A), state law prevailed over the provision in the CBA and it was unenforceable. Id. at syllabus.

{¶ 21} Unlike *Streetsboro*, the statute at issue, R.C. 9.481, refers only to residency restrictions imposed by local law, ordinance, or resolution. In *Lima v. State*, supra, the Supreme Court of Ohio specifically addressed this issue. In *Lima*, the court concluded that because R.C. 9.481 was enacted pursuant to Section 34, Article II of the Ohio Constitution,[2] it prevailed over conflicting local residency laws. Id. at ¶ 9-16. The court stressed that enabling employees of political subdivisions to live where they desire is a matter of statewide concern and that, generally, a political subdivision could not "require" an employee to reside in a specific area. Id. at ¶ 13.

{¶ 22} We first note that R.C. 4117.08(A) broadly defines the scope of collective bargaining agreements to include "[a]ll matters pertaining to wages, hours, or terms and other conditions of employment * * *." Predating *Lima*, the 11th Appellate District,

[2]Section 34, Article II of the Ohio Constitution provides that the General Assembly may enact laws "providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall limit this power."

similarly finding that R.C. 9.481 prevailed over a local residency ordinance, noted that because a residency requirement is a proper subject of collective bargaining:

{¶ 23} "The residency ordinance undercuts the right to collectively bargain all of the terms and conditions of public-sector employment and thus actually impairs the right to contract by imposing a condition of employment rather than allowing the parties to negotiate the condition as part of the collective-bargaining agreement. Simply put, R.C. 9.481 does not impair contractual rights; it ensures a level playing field when public-sector employees negotiate a collective-bargaining agreement with a political subdivision." *Am. Federation of State, Cty. & Mun. Emps. Local # 74 v. Warren*, 177 Ohio App.3d 530, 2008-Ohio-3905, ¶ 113.

{¶ 24} In the present case, we agree with the 11th Appellate District that R.C. 4117.08(A) permits collective bargaining agreements relating to residency provisions. R.C. 9.481 limits only the ability of a municipality to enact local ordinances limiting the residency choices of its employees. The mere fact that appellants, in hindsight, could have benefited from the provisions under R.C. 9.481, as interpreted in *Lima v. State*, supra, does not negate the fact that an agreement was reached between the parties.

{¶ 25} Based on the foregoing, we find that the trial court did not err when it determined that R.C. 9.481 did not conflict with the CBAs and, thus, did not implicate R.C. 4117.10(A). Appellants' first and second assignments of error are not well-taken.

{¶ 26} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Wood County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J.
CONCUR. _____
JUDGE

Thomas J. Osowik, P.J.,
DISSENTS.

OSOWIK, P.J.

{¶ 27} I would dissent for the following reasons.

{¶ 28} After a plethora of litigation throughout the state of Ohio and endless ordinances and ballot initiatives generated by various municipalities, the legislature enacted R.C. 9.481. The enactment of this provision had the effect, intended or

otherwise, to directly collide with the ability of municipalities to enact their own regulations pursuant to the Home Rule provision of the Ohio Constitution. See Section 3, Article XVIII, Ohio Constitution (municipalities shall have power to pass such local laws "as are not in conflict with general laws").

{¶ 29} The apparent incompatibility was resolved by the Supreme Court of Ohio in *Lima v. State*, 122 Ohio St.3d 155, 2009-Ohio-2597. In *Lima*, the court upheld the constitutionality of the statute and specifically noted in its conclusion that Section 9.481(B)(2)(b) was the only manner in which any municipality could impose any residency requirement on its employees. That subsection states in pertinent part that "the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state."

{¶ 30} It is interesting that R.C. 9.481 does not eliminate completely the authority of municipalities to regulate the residency of their employees.

{¶ 31} Under R.C. 9.481(B)(2)(b), the city of Perrysburg could require, by ordinance or initiative, that is employees reside in Wood County or any other adjacent county within the state of Ohio. However, this is not what is required under the terms of the collective bargaining agreement before the court. The agreement requires residency within the city of Perrysburg, Perrysburg Township, Middleton Township, a defined part

of Webster Township, the city of Rossford, village of Haskins and the city of Maumee. Assuming that the collective bargaining agreement was adopted by the municipality by virtue of an ordinance or resolution or its enforcement would be achieved by the same measure, R.C. 9.481 and *Lima v. State*, supra, render this provision meaningless.

{¶ 32} Regardless, the pronouncement by the Supreme Court in *Lima* in its conclusion is simple and direct: "municipalities may not require their employees to reside in a particular municipality, other than as provided in R.C. 9.481(B)(2)(b)." This conclusion does not reference the use of initiative or ordinance as a basis for enforcement.

{¶ 33} Since the collective bargaining agreement does not require residency within Wood County or any other adjacent county within the state of Ohio, R.C. 9.481(B)(2)(b) is not at issue.

{¶ 34} I would therefore conclude that the residency provisions of the collective bargaining agreement conflict with R.C. 9.481 and are unenforceable and reverse the decision of the trial court.