[Cite as *Akron Firefighters Assn. IAFF Loc. 330, AFL-CIO v. Akron*, 2016-Ohio-7092.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

AKRON FIREFIGHTERS ASSOCIATION IAFF LOCAL 330, AFL-CIO, et al. Appellees v. CITY OF AKRON, et al. Appellants	C.A. No. 27923 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2015-01-0619

DECISION AND JOURNAL ENTRY

Dated: September 30, 2016

CARR, Presiding Judge.

{¶1} Appellant, the City of Akron, appeals an order that found a charter amendment awarding residency preference points unconstitutional and in violation of R.C. 9.481. This Court reverses.

I.

{¶2} In 2006, the Ohio legislature enacted R.C. 9.481, which provides, as a general rule, that political subdivisions cannot require residency within a particular geographic location as a condition of employment. In 2009, the Ohio Supreme Court upheld the constitutionality of the statute. *Lima v. State*, 122 Ohio St.3d 155, 2009-Ohio-2597. One year later, the City of Akron amended its charter to provide that City residents who pass a civil service examination receive a 20% preference bonus on top of their passing score. The Akron Firefighters Association, IAFF Local 330 ("the Union") filed a declaratory judgment action against the City on behalf of its members who had taken a promotional examination in anticipation of the

promotion of numerous employees to the ranks of captain and lieutenant. The Union also sought a preliminary injunction prohibiting use of the preferences, alleging that both the residency preference and a similar preference related to veterans violated Article XV, Section 10 of the Ohio Constitution and, with respect to the residency preference, that the charter amendment violated R.C. 9.481.

{¶3} When the trial court set the case for a hearing on the request for a preliminary injunction, the City moved to limit the scope of the hearing to legal questions on the basis that the constitutionality of the preferences raised only legal issues. After a limited hearing, the trial court denied the preliminary injunction with respect to the veteran's preference, but granted it with respect to the residency preference. In so doing, however, the trial court also questioned whether an individual with both standing and alleged harm had been identified. The trial court put the parties on notice that it would be critical to the proceedings to identify "a non-resident member who has been passed over by another member who received the residence preference points." In light of the trial court's order, the Union moved to continue the briefing schedule until two weeks after the City provided examination results. The trial court denied the motion, echoing the City's earlier position that "the issues to be addressed for purposes of the final disposition of this matter are purely legal issues[.]"

{¶4} The Union moved for summary judgment. The City responded in opposition and filed a cross-motion for summary judgment within the same filing, arguing, among other things, that the Union could not prevail because it failed to present evidence that the residence preference operated as a residency requirement in fact. When the Union filed its combined reply brief and brief in opposition to the City's motion, it urged the trial court to disregard the City's argument or, in the alternative, to deny the City's motion for summary judgment on the basis that

a genuine issue of material fact remained. The City replied that summary judgment was appropriate because the Union failed to contradict its Civ.R. 56(C) evidence.

{¶5} After the summary judgment briefing was complete, the trial court returned to the issue of the examination results which, up to that point, had not been filed or provided to the Union. In a series of orders, the trial court ordered the City to file the results. The City objected and, ultimately, notified the trial court that it would not create records that did not already exist and that it "[did] not intend to take any further action" until the trial court ruled on its objections. At this point, the Union moved the trial court to delay ruling on the motion for summary judgment in order to provide time to conduct discovery in response to the City's arguments and for the City to submit the examination results, captioned as a motion under Civ.R. 56(F).

{¶6} On June 18, 2015, the trial court gave the City one week to file existing examination results that had already been filed under seal in a federal lawsuit involving similar parties. When the City requested clarification, the trial court once again ordered the lists to be filed. After conducting a status conference on the issue, the trial court reached the same result in another order:

> When this case was filed, the defendant, the City of Akron, argued that there were only legal issues to consider and that no evidence need be taken in the then pending motion for preliminary injunction. Of course, if evidence of harm were to be considered, the most relevant evidence would be the results of testing examinations for promotions in the Akron Fire Department that took place in February 2015. But when the case was filed, the test had not been taken and the results were not available during the first several months in this case.
>
> At that point, the court agreed with the city that it would not be possible or necessary to consider evidence to rule on that motion. * * * At several points during the proceedings, the court has indicated that test results would need to be provided to the court at the appropriate time. To date, the court has received no evidence from the City of Akron concerning the test results of the exams in February 2015. The court notes that those test results have been provided in an action pending in the United States District Court for the Northern District of Ohio.

* * *

> In its motion for summary judgment, the city is now arguing that the plaintiffs, the union and the three named firemen, have submitted no evidence that results of the tests cause an unfair advantage to either residents or veterans. At the same time, the city has objected to the court's orders to produce those test results. The plaintiffs claim this is unfair because they relied upon the statements of the court that the test results would be produced to the court and they have not been. The court agrees that not to remedy this situation would be unfair to the plaintiffs.
>
> In short, the city cannot have it both ways.
>
> The city made those test results relevant based upon its cross-motion for summary judgment.

{¶7} The City filed the examination results under seal five days later. The trial court then granted the Union's motion for summary judgment in part, concluding that the residency preference violated both the Ohio Constitution and R.C. 9.481, but granted the City's motion with respect to the veteran's preference. The City appealed.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED BY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE CLAIM THAT THE RESIDENCY SCORING PREFERENCE IN SECTION 106A OF THE CITY OF AKRON CHARTER AND AKRON CIVIL SERVICE RULE 2 VIOLATES SECTION 10, ARTICLE XV OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED BY DECLARING THAT THE RESIDENCY SCORING PREFERENCE IN SECTION 106A OF THE CITY OF AKRON CHARTER AND AKRON CIVIL SERVICE RULE 2 IS UNCONSTITUTIONAL IN ITS ENTIRETY BASED UPON HOW IT APPLIED TO ONE PROMOTIONAL EXAMINATION.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT ERRED BY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE CLAIM THAT THE RESIDENCY

SCORING PREFERENCE IN SECTION 106A OF THE CITY OF AKRON CHARTER AND AKRON CIVIL SERVICE RULE 2 VIOLATES OHIO REVISED CODE 9.481.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED BY DECLARING THAT THE RESIDENCY SCORING PREFERENCE IN SECTION 106A OF THE CITY OF AKRON CHARTER AND IN AKRON CIVIL SERVICE RULE 2 VIOLATES OHIO REVISED CODE 9.481 IN ITS ENTIRETY BASED UPON HOW IT APPLIED TO ONE PROMOTIONAL EXAMINATION.

{¶8} The City's four assignments of error argue that the trial court erred by granting summary judgment to the Union and denying the City's motion for summary judgment. One of the City's arguments is that the trial court erred by considering the evidence submitted under seal after summary judgment briefing had concluded. In that respect, we agree.

{¶9} Under Civ.R. 56(C), "[s]ummary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 10. The substantive law underlying the claims provides the framework for reviewing motions for summary judgment, both with respect to whether there are genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986); *Byrd* at ¶ 12. The burden of demonstrating that there are no genuine issues of material fact falls to the moving party. *Byrd* at ¶ 10, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 294 (1996). "Once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party 'may not rest upon mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule,

must set forth specific facts showing that there is a genuine issue for trial.'" *Id.*, quoting Civ.R. 56(E).

{¶10} Civ.R. 56(F) provides a mechanism for discovery when a party who opposes summary judgment "cannot * * * present by affidavit facts essential to the party's opposition[.]" By its terms, the Rule contemplates that a motion will be filed after the motion for summary judgment is served, but before a response is filed. In those circumstances, the party that intends to oppose a motion for summary judgment may request a continuance to permit discovery in order to adequately respond. The request must be supported by affidavit and must demonstrate with specificity that a continuance is necessary. *McPherson v. Goodyear Tire & Rubber Co.*, 9th Dist. Summit No. 21499, 2003-Ohio-7190, ¶ 15.

{¶11} In this case, the Union chose to respond the merits of the City's arguments in its combined reply brief in support of its own motion for summary judgment and response to the City's motion for summary judgment. In so doing, the Union argued that if the City's argument regarding the impact of the preferences were to be given any weight, "then a material fact exists between the parties and there should be proceedings beyond the current dispositive briefs to examine the Akron Fire Department's civil service promotional lists and scoring." The Union filed its motion for a continuance under Civ.R. 56(F) after the briefing on the parties' cross-motions for summary judgment had been completed. Considered under that Rule, the motion was improperly filed, and to the extent the trial court granted the motion, that would be error.

{¶12} This situation is not so easily resolved, however. Although the trial court referenced the Union's motion in a status conference before it ordered the City to file the examination results, it fluctuated in stating that its order would grant the motion. When the trial court did order the City to file the responses, it did not reference Civ.R. 56(F). The trial court's

remedy also did not have the effect of granting a Civ.R. 56(F) motion: it did not delay summary judgment briefing or order additional briefing, and it did not provide discovery to either side. Instead, over the objections of the City, it ordered the examination results to be filed under seal for consideration by the court without additional briefing by the parties and, indeed, without service upon the Union. In other words, the examination results were filed for the consideration of the trial court alone as additional evidence in the context of the summary judgment proceedings. The trial court considered this evidence in determining whether the respective moving parties had demonstrated a genuine issue of material fact, and it considered this evidence in determining whether either party was entitled to judgment as a matter of law. Within the context of Civ.R. 56, this was error. In reaching this conclusion, however, we make no determination regarding the merits of the motions for summary judgment.

{¶13} In making this determination, this Court is mindful that the examination results at issue were contested throughout the proceedings. We note only that had they been produced earlier – or had the trial court granted the Union's motion to continue the summary judgment proceedings at the outset – this case would likely have progressed in a different manner. The City has not challenged the propriety of the trial court's order requiring the examination results to be filed under seal, and that matter is not before this Court. Likewise, the Union did not appeal the trial court's decision to grant summary judgment to the City with respect to the veteran's preference, so that aspect of the trial court's judgment is also beyond the scope of this opinion.

{¶14} The City's assignments of error are sustained.

III.

{¶15} The City's assignments of error are sustained to the extent described in this opinion. The judgment of the Summit County Court of Common Pleas that granted summary judgment to the Union is reversed, and this matter is remanded for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

DONNA J. CARR
FOR THE COURT

MOORE, J.
CELEBREZZE, J.
CONCUR.

(Celebrezze, J., of the Eighth District Court of Appeals, sitting by assignment.)

APPEARANCES:

ARETTA K. BERNARD and STEPEHN W. FUNK, Attorneys at Law, for Appellants.

EVE V. BELFANCE, Director of Law, and MICHAEL DEFIBAUGH, Assistant Director of Law, for Appellee.