[Cite as *Stidham v. New Miami,* 145 Ohio Misc.2d 92, 2008-Ohio-458.]

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STIDHAM,	Case No. CV 07-11-4469
Plaintiff,	(Charles L. Pater, Judge)
v.	ORDER AND ENTRY GRANTING PERMANENT INJUNCTION BUT DENYING OTHER RELIEF
THE VILLAGE OF NEW MIAMI et al.,	*(Final Appealable Order)*
Defendants.	Decided January 11, 2008

Davidson, Adams & Creach and Dennis L. Adams, for plaintiff.

Millikin & Fitton, Gregory E. Hull, and Sarah E. Gaynor, for defendant.

Pater, Judge.

{¶1} This matter is before the court on plaintiff William P. Stidham's motion for summary judgment. For the reasons set forth below, this motion is granted in part and denied in part. Plaintiff's motion is granted in so far as it requests a permanent injunction to prevent his removal from office as a member of the village council. Further, defendants are enjoined from holding a special session for the purpose of filling defendant's seat on the council, from appointing a new council member to his seat, and from preventing defendant from fulfilling his duties as a member of the council. However, plaintiff's request for damages, attorney fees, and costs is denied. This is a final, appealable order, and there is no just cause for delay.

{¶2} **Facts**. Plaintiff was an appointed member of the village council for defendant village of New Miami. At a regular meeting of the council held on November 1, 2007, plaintiff disagreed with an emergency resolution proposed by the mayor. The council voted to table the resolution, and the next day, the mayor sent plaintiff a letter charging him with misconduct and malfeasance by disrupting the meeting. Two weeks later, the council held another regular meeting, and the council voted to remove plaintiff from the council after determining that he was guilty of the charges brought by the mayor. The council advertised a vacancy on the council, and plaintiff filed this action.

{¶3} **Procedural History**. Plaintiff filed his complaint on November 20, 2007, seeking several types of relief. Plaintiff requested an order declaring that defendants be adjudged to have acted outside of their scope of authority and that required defendants to pay money damages to him in an amount in excess of $25,000. Further, he sought to permanently enjoin defendants from (a) suspending, eliminating, or removing him from membership on the village council, (b) holding a special session for the purpose of filling his seat on the council, (c) appointing a new member to fill his seat on the council, and (d) prohibiting him from voting at any and all upcoming council meetings. Plaintiff also sought attorney fees and costs.

{¶4} The complaint was accompanied by a motion for a temporary restraining order and for a preliminary injunction. On the day the complaint was filed, the court entered a temporary restraining order that prohibited defendants from holding a special session or meeting for the purpose of filling plaintiff's seat on the council and

that further prohibited defendants from appointing a new council member to plaintiff's seat.

{¶5} The court scheduled a hearing on plaintiff's motion for preliminary injunction on December 18, 2007, but, just prior to the hearing, plaintiff filed a motion for summary judgment. After discussion on the record, the hearing was rescheduled to December 20, 2007, to permit defendants a chance to apprise themselves of the arguments in the motion.

{¶6} Just prior to the December 20, 2007 hearing, defendants filed a motion to dismiss, and plaintiff filed a written response to the motion. By agreement of the parties, the matter proceeded to oral argument on the motion to dismiss.

{¶7} Defendants' position was, and still is, that the mayor and the council acted as permitted under R.C. 733.35, entitled "Mayor shall file charges against delinquent officers," and R.C. 733.36, entitled "Hearing of charges; action of legislative authority." The court denied the motion, and it granted a preliminary injunction to plaintiff. In ruling on the motion to dismiss, the court expressed its opinion that the procedure established in R.C. 733.35 and R.C. 733.36 for the removal of certain "officers" was inapplicable to "elected officers." In reaching our decision, we relied on our understanding of the United States and Ohio Constitutions, several sections of the Ohio Revised Code, and case law. Additionally, we noted that we were not only bound by but that we fully agreed with the holdings of the Twelfth District case *State ex rel. Powers v. Curtis*, Clinton App. No. CA 2002-10-039, 2003-Ohio-6104.

{¶8} The matter is now before us on plaintiff's motion for summary judgment, which has been fully briefed.

{¶9} Discussion. The essential facts of *Powers* are substantially similar to the facts before us. In *Powers*, relator Powers was appointed to fill a vacancy on a village council, but two weeks later, the council rescinded his appointment. The council's position was that Powers had been improperly nominated and that he was incompetent to serve in office because of a prior criminal conviction, so it replaced him. Powers filed an action in quo warranto, seeking to replace the replacement, respondent Curtis. Among other holdings, the Twelfth District held that the council did not remove Powers in any authorized manner. It said, "Once properly appointed or elected, Ohio law provides several possible ways a village council member may be ousted from office. For example, R.C. 733.72 *et seq*. describes a procedure involving a complaint filed with the probate judge alleging certain types of misconduct in office. R.C. 731.45 allows council itself to expel a member for disorderly conduct or violation of its rules, as well as for an unexcused absence continuing for two months. R.C. 3.07 to 3.10 provides a general, all-inclusive method for removal of a public official, including village council members."

{¶10} Having already concluded that the procedure established in R.C. 733.35 and 733.36 is inapplicable to plaintiff as an "elected officer," on the basis of *Powers*, we now find that it remains our job to evaluate whether plaintiff was removed in a manner authorized by any of the methods described in *Powers*.

{¶11} 1) R.C. 733.72 et seq. R.C. 733.72 et seq. permit an elector of a municipal corporation to file a complaint in probate court against a member of a legislative authority under a procedure that requires the signatures of four other electors. The probate judge is to summon a jury, which is to be impaneled, and a trial

is to proceed as described in R.C. 733.75. If the accused member is found guilty, removal is to proceed as described in R.C. 733.76. Obviously, this procedure was not followed in this instance.

{¶12} 2) **R.C. 731.45**. The procedure established in R.C. 731.45 is more problematic. It is entitled "Rules; journal; expulsion of members," and it provides as follows: "The legislative authority of a municipal corporation shall determine its own rules and keep a journal of its proceedings. It may punish or expel any member for disorderly conduct or violation of its rules, and declare his seat vacant for absence without valid excuse, where such absence has continued for two months. No expulsion shall take place without the concurrence of two thirds of all the members elected, and until the delinquent member has been notified of the charge against him and has had an opportunity to be heard."

{¶13} Without particular reference to R.C. 731.45 and instead with reference to R.C. 733.35, defendants argued during the motion to dismiss (and they continue to argue) that plaintiff was properly removed under a procedure that facially meets the requirements of R.C. 731.45. This is because the procedure described in R.C. 733.35, which defendants insist is correct, and the procedure described in R.C. 731.45 appear to be substantially similar. They have cited two Ninth District cases that agree with their position that R.C. 733.35 authorized the procedure they followed in their removal of defendant. The cases are *Roseman v. Reminderville* (1984), 14 Ohio App.3d 124, and *Reese v. Boston Hts.* (Jan. 22, 1992), Summit App. No. 15156. In *Reese*, the court of appeals held that the language of R.C. 733.72 provided an "alternative procedure" for removal of an elected officer but that this did not mean that

the procedure followed by the village in the case before it was erroneous. In both *Reese* and *Roseman,* an elected officer had been removed under the procedure established in R.C. 733.35. Reese held that "R.C. 733.35 does give a village council jurisdiction to remove an elected clerk-treasurer from office."

{¶14} In ruling on the motion to dismiss, we explained that we think that R.C. 733.35 does not apply to the removal of an elected or appointed "officer," and we expressed our opinion that both *Roseman* and *Reese* were incorrectly decided. We believe that R.C. 733.35 and 733.36 deal with the misbehavior of an "officer" who is not an elected or appointed "member" of a legislative authority.

{¶15} By contrast, R.C. 731.45 is entitled in part "Expulsion of Members," and we think that it does deal with the expulsion of officers who are elected or appointed "members" of a legislative authority. Therefore, on its face, R.C. 731.45 would appear to permit the action that defendants took against plaintiff. However, we believe that such an interpretation of this section would violate the constitutional principles of separation of powers, just as the application of R.C. 733.35 and 733.36 to plaintiff would. Accordingly, we choose to adopt the interpretation of R.C. 731.45 explained by the Sixth District in *Rogers v. Wakeman* (1995), 107 Ohio App.3d 456, 669 N.E. 2d 32.

{¶16} In *Rogers*, an elected village council member brought a declaratory judgment action against a village, a mayor, and a village council, seeking reinstatement and an injunction to bar the village from filling her seat while the case was pending. The village council had charged Rogers with disorderly conduct and malfeasance, and it had voted four to one to remove her from office. The trial court

declared that Rogers could not be expelled from office by other council members, and it ordered her reinstated.

{¶17} On appeal, the village argued that R.C. 731.45 had been misinterpreted, but the Sixth District held, "[T]his statute, when read in its entirety, merely empowers a village council to regulate its own proceedings. * * * [T]he statute provides for the expulsion of a member of council from a meeting by two-thirds vote of the remaining members of council. Because a member of council is an elected official of the citizens of the municipality, it is implicit in the statute that the expulsion is effective only while the disorderly conduct is occurring." Id. at 460, 669 N.E.2d 32. We agree and conclude that RC 731.45 did not permit or support the expulsion of plaintiff from the council under the procedure that defendants followed.

{¶18} 3) R.C. 3.07. R.C. 3.07 is entitled "Forfeiture of office for misconduct," and it and the sections that follow it establish that any person holding office in the state, a municipal corporation, a county or a subdivision may be removed for certain misconduct upon complaint and hearing. R.C. 3.08 creates the procedure and requires that the complaint, which is to be filed in common pleas court, be signed by 15 percent of the vote cast. R.C. 3.09 permits an appeal to the court of appeals, and R.C. 3.10 provides for the subpoena of witnesses and the payment of fees. Obviously, this procedure was not followed in this instance.

{¶19} Because we can find no support for defendants' actions in removing plaintiff in the way that they did, we find that plaintiff is entitled to summary judgment on his request for a permanent injunction that prevents his removal from office, that prohibits defendants from calling a special session for the purpose of filling his seat,

that prohibits the appointment of another in his place, and that prohibits defendants from interfering with his ability to fulfill his duties as a member of the council.

{¶20} Despite this conclusion, we do not find that plaintiff's requests for damages, attorney fees, and costs are well taken. There has been no evidence presented of any damage to plaintiff other than his removal from office, which we have remedied, and there has been no showing that defendants' actions were taken for any malevolent purpose other than mere mistake.

So ordered.