In the Supreme Court of Ohio

The State of Ohio, *ex rel.*

MICHAEL R. COX, *et al.*
Relators

v.

YOUNGSTOWN CIVIL SERVICE COMMISSION, *et al.*
Respondents

Case No. 2020-0821

ORIGINAL ACTION

MERIT BRIEF OF RELATOR MICHAEL R. COX

ORAL ARGUMENT REQUESTED

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In accordance with this Court's December 30, 2020, alternate writ and pursuant to Rules 12.05 and 12.06(A) of the Rules of Practice of the Supreme Court of Ohio, Relator Michael R. Cox ("Cox") hereby submits the following merit brief in support of his application for writ of mandamus and alternative petition for writ of *procedendo* against Respondent Youngstown Civil Service Commission ("the Commission") and the individual members of the Commission named as respondents in their respective representative capacities.

OBJECT OF THIS ORIGINAL ACTION

This is an original action[1] commenced pursuant to Sections 2(B)(1)(b), 2(B)(1)(e), and 2(B)(1)(f) of Article IV of the Ohio Constitution, O.R.C. §§ 2503.37(A) and 2731.02,[2] and Rules 12.01 through 12.10 of the Rules of Practice of the Supreme Court of Ohio, collectively conferring jurisdiction on this Court over the subject matter of Cox's amended verified complaint.

In this original action, Cox seeks the issuance of a writ of mandamus requiring the Commission and its members, Respondents James Messenger (President), John Spivey (Vice President), and Alfred Fleming (Secretary), to discharge clear legal duties specifically enjoined upon them by operation of law by (a) scheduling and conducting an evidentiary hearing on the merits of a civil service appeal that he submitted to the Commission on May 20, 2019, to challenge the action of the appointing authority of the City of Youngstown ("the City") in promoting another

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[1] This Court ruled at the time it issued its alternative writ, 2020-Ohio-6834, that this original action will not be prosecuted as a taxpayer's action and therefore no arguments will be advanced in support of Cox's claims asserted under O.R.C. §§ 733.58, 733.59, and 733.61.

[2] This Court sustained respondents' motion for judgment on the pleadings in dismissing the second count of Cox's amended verified complaint for declaratory relief under Chapter 2721 of the Ohio Revised Code and Section 2(B)(1)(f) of Article IV of the Ohio Constitution. *See* Merit Decisions Without Opinions, 2020-Ohio-6834.

member of the city's Police Department to the rank of Lieutenant based on the Commission's May 2019 certification of the results of a 2018 promotional examination for which Cox also sat and (b) deciding Cox's appeal on its merits upon entry and journalization of a written final and appealable order and serving such order on Cox in the manner prescribed by law.

Alternatively, Cox seeks a writ of *procedendo* requiring respondents, and each of them, to discharge clear legal duties specifically enjoined upon them by operation of law by proceeding forthwith (a) to schedule and conduct an evidentiary hearing on the merits of his May 20, 2019, appeal and (b) to decide such appeal on its merits upon entry and journalization of a written final and appealable order and serving such order on Cox in the manner prescribed by law.

SUMMARY OF ARGUMENT

This original action presents but one – and only one – issue for this Court's determination, *viz*., whether the respondents are obligated by the Commission's rules and by long-recognized principles of due process that protect public servants in the classified service to conduct an evidentiary hearing on Cox's May 20, 2019, civil service appeal to the Commission and ultimately issue and serve a final and appealable order disposing of such appeal. This original action arises in the context of proceedings that are stymied by the Commission's *outright refusal* to issue and serve a final and appealable order disposing of Cox's May 20, 2019, civil service appeal taken from the *certification* of an eligibility list in May 2019 that resulted in the May 14, 2019, promotion of someone other than Cox to the rank of Lieutenant in the City's Police Department.

In filings already submitted to this Court, respondents appear ready to assert a wide variety of dubious defenses to Cox's basic claim that the Commission members have failed to discharge their clear legal duties to adjudicate his May 20, 2019, appeal and serve a final and appealable order on Cox. Notwithstanding those defenses, it remains that without a final and

appealable order, Cox does not have an adequate remedy at law as he is barred by law from seeking judicial review of the Commission's action under Chapter 119 of the Ohio Revised Code and therefore unable to realize a right guaranteed to him under Section 16 of Article I of the Ohio Constitution to gain access to a court of record in this state to redress an injury to his constitutionally protected property interest in employment in the public sector.

This case has nothing to do with whether the opinions of members of the Commission are correct in that Cox's challenge to the *certification* of an eligibility list in May 2019 was untimely because he should have sought judicial review of the Commission's *establishment* of such a list in 2018. That issue is **not** before this Court. Instead, it is an issue that ultimately will be for the Mahoning County Court of Common Pleas to resolve in an administrative appeal launched under Chapter 119 of the Ohio Revised Code once the Commission issues and serves a final and appealable order disposing of Cox's civil service appeal.

Nor does this case have anything to do with the "red herring" of whether or not the Commission engaged in "quasi-judicial" behavior when it took up Cox's civil service appeal on June 17, 2019, or on any subsequent date. [3] Since a civil service appeal necessarily involves action by the Commission to *adjudicate* the dispute framed by Cox's appeal through the presentation of evidence and arguments in support of his position, and since the Commission's rules expressly provide for an evidentiary hearing to be convened to hear all relevant evidence, there can be no question but that the Commission acts under its rules to discharge duties of a "quasi-judicial"

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[3] The second paragraph of Section 3 of Rule XII of the Commission's rules allows civil service employees of the City to bring appeals before the Commission for *adjudication* when they believe they are adversely affected by actions of an *appointing authority* (as opposed to actions of the Commission) in interpreting or applying such rules in a way that may have compromised rights or privileges enjoyed by such employees under those rules. **Joint Stipulation of Facts ("Joint Stipulation")**, ¶ 4 and Joint Ex. A at 39.

nature and therefore Cox is entitled to entry and service of a final and appealable order memorializing final agency action so he can subject the Commission's final decision to the Mahoning County Court of Common Pleas for judicial review in an administrative appeal brought under Chapter 119 of the Ohio Revised Code.

This case instead has everything to do with (1) whether Cox's due process rights were violated when the Commission never made a final determination of his May 20, 2019, civil service appeal in writing and instead merely approved minutes of a meeting in which the members of the Commission expressed their opinions respecting the merits of such appeal without serving a copy of those minutes on Cox as if they constituted a final and appealable order, (2) whether the Commission's own rules require it to give Cox actual notice of its final decision in disposition of his civil service appeal, and (3) whether mere incorporation of the opinions expressed by members of the Commission on Cox's appeal in the approved minutes of a meeting, without serving a written copy of such minutes on Cox or otherwise expressly notifying him of the contents of such minutes, constitutes a final and appealable decision and satisfies the express notice requirements of the Commission's rules and/or the City's duty to honor the due process rights that the Commission owes to Cox as a public servant.

What the record reveals is that the members of the Commission pulled the functional equivalent of a "pocket veto" of Cox's civil service appeal when they expressed their opinions on that appeal during their June 19, 2019, regularly scheduled meeting, but then failed to follow up by making a final decision on the appeal and then directing the Administrator of the Commission to serve a copy of such decision on Cox.

Since it discharges duties specifically imposed on it by the Ohio Revised Code, Chapter 52 of the City's charter, and its own rules when it comes to administering and disposing

of a civil service appeal submitted to it, the Commission is subject to an order in mandamus to compel the Commission and its members to discharge their clear legal duties to complete its work on Cox's May 20, 2019, appeal, issue a final and appealable order to Cox respecting that appeal, and serve a copy of that order on Cox in the manner prescribed by the Commission's rules.

Alternatively, since the Commission, by law, is charged with the duty to act in a "quasi-judicial" manner in reviewing Cox's May 20, 2019, civil service appeal, it is subject to a superintending order of this Court, in *procedendo*, requiring the Commission's members to proceed with scheduling an evidentiary hearing on Cox' appeal so Cox may present testimony and documents in support of his claim that the eligibility list on which the appointing authority of the Police Department relied in promoting someone other than Cox to the rank of Lieutenant was not duly prepared, approved, adopted, and certified in accordance with Rules V and VI of the Commission's rules and regulations.

STATEMENT OF FACTS

Cox is a Detective Sergeant in the Police Department of the City and sat in 2018 for a promotional examination administered by the Commission to *establish* an eligibility list for entry in the City's "Eligibility Register" specifying a hierarchy of candidates for promotion to the rank of Lieutenant.[4]

The establishment and recognition of a civil service commission in the City is mandated by operation of O.R.C. §§ 124.01(C), 124.01(E), and 124.40(A). Section 52 of the Charter of the City of Youngstown provides that "[a]ll of the provisions of the Revised Code of the State

[4] **Joint Stipulation**, ¶¶ 1, 7-9; **Cox Affid.**, ¶¶ 1 and 7.

of Ohio relating to Municipal Civil Service are … adopted and made a part of this Charter."[5] The Commission thus is the agency created by the City to carry out the provisions of the City's charter and related provisions of the state law mandating the creation of a deliberative body to adopt and administer regulations and adjudicate disputes in the context of the City's civil service system.[6]

As part of its charge under Section 52 of the City's charter and O.R.C. § 124.40-(A),[7] the Commission adopted a set of rules and regulations designed to administer the civil service system of the City. Those rules and regulations offer the City's civil servants the means by which they may seek review of actions taken *by appointing authorities* that are believed to be inconsistent with civil service guarantees or in violation of the substantive and/or procedural rights of such civil servants.[8] Those rules and regulations do **not** provide any means for civil servants to seek review of actions taken by the Commission itself unless and until an *appointing authority*[9] acts in reliance on Commission action in a way that adversely affects the rights or privileges of a person entitled

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[5] **Amended Verified Complaint**, ¶ 3, and Ex. A; **Answer**, ¶ 3; **Cox Affid.**, ¶ 2 and Cox Ex. A.

[6] **Joint Stipulation**, ¶ 3; **Cox Affid.**, ¶ 3; **Amended Verified Complaint**, ¶ 4; *see also* **Answer**, ¶ 4.

[7] Under O.R.C. § 124.40(A), the Commission and its members "shall exercise all other powers and perform all other duties with respect to the civil service of the city … as prescribed [by Chapter 124 of the Ohio Revised Code] and conferred upon … the state personnel board of review with respect to the civil service of the state; and all authority granted to… the board with respect to the service under their jurisdiction shall, except as otherwise provided by this chapter, be held to be granted to the commission with respect to the service under its jurisdiction."

[8] **Joint Stipulation**, ¶ 4 and Joint Ex. A (also readily available for review online at *https://youngstownohio.gov/sites/default/files/forms/CIVIL%20SERVICE%20RULES-04-07-18.pdf*).

[9] The second paragraph of Section 3 of Rule XII of the Commission's rules limits civil service appeals to reviews of actions taken by an appointing authority of the City and makes no mention of any possible appeal strictly from an action of the Commission itself. **Joint Stipulation**, ¶ 4 and Joint Ex. A at 39.

to protection under those rules. Thus, Cox had **no standing** under the Commission's rules to contest the mere *establishment* of the eligibility list in 2018 in this case until the appointing authority asked for *certification* of an eligibility list in May 2019 and then relied on that list in promoting someone other than Cox to Lieutenant on May 14, 2019.[10]

Rule XII of the Commission's rules and regulations imposes clear legal duties on members of the Commission (a) to receive appeals presented by members of the classified service of the City, (b) to schedule and conduct one or more hearings for the presentation of evidence and/or argument of all interested parties having a stake in the outcome of such appeals, (c) to render final judgment on such appeals in a manner consistent with all applicable state and local laws, rules, and regulations, (d) to cause such judgment to be reduced to writing in the form of a final and appealable order of the Commission, and (e) to serve such written final order on all parties to such appeals.[11]

On August 15, 2018, the Commission declared the results of the promotional examination for Lieutenant and thereupon placed Detective Sergeant William Ward ("Ward") first on an eligibility list for promotion to that rank and placed Cox third[12] in accordance with the

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[10] While the Commission's rules provide a means for lodging protests to examination questions (*id.*, Rule V, § 13, ¶ 1, at 16), making decisions in response to such protests (*id.*, ¶ 2), and grading the examination after the protest period expires (*id.*), the rules also make it plain that an eligibility list so *established* by the Commission has *no legal status* in the City *unless and until* an appointing authority asks the Commission to *certify* a list to be used in making a promotion (*id.*, Rule V, § 15, at 17, and Rule VI, § 3, ¶ 1, at 19). It is at that point that a dispute over the manner in which an eligibility list was *established* and subsequently *certified* becomes justiciable and subject to a civil service appeal brought under Section 3 of Rule XII (*id.*, Rule XII, § 3, ¶ 2, at 39).

[11] Each of these duties, prescribed by Rule XII, is spelled out in the excerpt of the Commission's rules and regulations reproduced in both Exhibit B of the **Amended Verified Complaint** and **Joint Stipulation**, ¶ 4 and Joint Ex. A at 39-40; *see also* **Cox Affid.**, ¶ 6.

[12] **Amended Verified** Complaint, ¶ 11; **Answer**, ¶ 11; **Cox Affid.**, ¶ 7.

procedure outlined in Rule V of the Commission's rules and regulations following adjudication of various protests presented by examinees to some of the questions that appeared on the examination.[13]

Ward finished two correct answers ahead of Cox and another examinee finished one correct answer ahead of Cox.[14] However, because of the relative performance of Ward, Cox, and the third examinee on four of the questions in the leadership section of the promotional examination, the correct order of finish ultimately depended on which of those four questions was considered valid, which might have been discarded as invalidly based only on the wrong version of the assigned reference text, and how the Commission's rules on breaking ties would have given an edge to Cox over each of the other two examines who were placed ahead of him.[15]

In due course, the Mayor of the City issued an order on May 14, 2019, in his capacity as appointing authority, whereby Ward was promoted to the rank of Lieutenant.[16] He did so upon first having asked the Commission to *certify* an eligibility list in accordance with Rule

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[13] This procedure is outlined in Section 13 of Rule V of the Commission's rules and regulations (reproduced in the record at **Joint Stipulation**, ¶ 4 and Joint Ex. A at 16-17).

[14] **Joint Stipulation**, ¶ 18; **Cox Affid.**, ¶ 26.

[15] **Cox Affid.**, ¶¶ 25 and 27-29; *see also id.*, ¶ 19, and **Joint Stipulation**, ¶ 30 and Joint Ex. E at 13-17. The rule on breaking ties respecting Police Department promotional examinations is set forth in the second paragraph of Section 15 of Rule V of the Commission's rules and regulations (reproduced in the record at **Joint Stipulation**, ¶ and Joint Ex. A at 17).

[16] **Joint Stipulation**, ¶ 20; **Amended Verified Complaint**, ¶ 14; **Answer**, ¶ 14; *see also* **Cox Affid.**, ¶ 10. Sections 6 and 12 of Rule VI of the Commission's rules and regulations required the appointing authority to promote the candidate placed highest on the eligibility list by the Commission. **Joint Stipulation**, ¶ 4 and Joint Ex. A at 21 (last sentence of Section 6) and 23. While Cox learned of Ward's promotion on May 14, 2020, the record reflects that Ward was notified of his promotion in a letter dated May 16, 2020, declaring his promotion to be retroactive to May 14, 2020. *See* **Respondents' Presentation of Evidence**, Ex. 11.

VI[17] and then followed the mandatory provisions of the second paragraph of Section 6 of Rule VI to promote Detective Sergeant Ward.

On May 20, 2019, *i.e.*, six (6) days after the appointing authority announced Ward's promotion, Cox perfected an appeal to the Commission from the Mayor's May 14, 2019, order asserting errors and improprieties in the process by which the Commission adjudicated various examinee protests to certain examination questions when it established the eligibility list that was later certified and used by the appointing authority on May 14, 2019.[18]

Section 3 of Rule XII of the Commission's rules and regulations provides, in relevant part, that "an employee [who] disagrees with an action of the Appointing Authority" has "ten (10) days within which to file a written appeal of that action to the … Commission" measured "from the point in time when the action was taken, when the employee became aware of the action, or when the employee should have become aware of the action of the Appointing Authority."[19] Once an appeal is lodged, Rule XII requires the Commission to hear the appeal and "[u]pon the

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[17] *Id*. There are good reasons for this two-step procedure. Mere *establishment* of an eligibility list based on the results of a promotional examination does **not** mean that each person on such list will remain qualified for promotion when *certification* is requested by the appointing authority. For example, an employee may die, or may move away, or may become disabled and therefore unwilling to accept promotion, or may become disqualified by criminal conviction or another impediment, or may have been demoted and therefore no longer qualifies for promotion to a higher rank, or may ask not to be considered for promotion. Thus, entry of an eligibility list in the City's "Eligibility Register" does **not** guarantee that all names on that list will be *certified* when it comes time for an appointing authority to make a promotion. *See also* Section 2 of Rule VI of the Commission's rules (reproduced in the record at **Joint Stipulation**, ¶ 4 and Joint Ex. A at 18-19).

[18] **Joint Stipulation**, ¶ 21 and Joint Ex. B; **Amended Verified Complaint**, ¶ 15; **Answer**, ¶ 15; **Cox Affid.**, ¶ 11.

[19] *See* second paragraph of Section 3 of Rule XII of the Commission's rules (reproduced at **Joint Stipulation**, ¶ 4 and Joint Ex. A at 39.

completion of [its] hearing, the Commission may render its decision immediately, or may take the matter under advisement and render its decision within a reasonable time thereafter," all while obligating the Commission to dispose of the appeal upon giving "[a]ll parties to a Civil Service Commission hearing [notice] in writing of the Commission's decision."[20]

Cox initiated his civil service appeal based on the Commission's May 2019 *certification*[21] of the results of a promotional examination conducted nearly a year earlier.[22] Even if the Commission believed that Cox's appeal was untimely because he supposedly had the right to pursue a civil service appeal or seek judicial review of the decision to *establish* an eligibility list in 2018 and did not do so, its *outright refusal* to issue and serve a final and appealable order disposing of Cox's appeal now precludes Cox's ability to see if a court agrees with his position that the Commission's rules denied him standing to perfect any civil service appeal of the Commission's action in 2018 until the appointing authority sought the Commission's *certification* of an eligibility list on which he then could rely to promote somebody to the rank of Lieutenant.[23]

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[20] *Id.*, Rule XII, § 3, ¶ 6 (reproduced at **Joint Stipulation**, ¶ 4 and Joint Ex. A at 40.

[21] The certification process is outlined in Section 3 of Rule VI of the Commission's rules (reproduced at **Joint Stipulation**, ¶ 4 and Joint Ex. A at 19).

[22] **Joint Stipulation**, ¶ 21 and Joint Ex. B; **Amended Verified Complaint**, ¶ 15; **Answer of Respondents to Amended Verified Complaint ("Answer")**, ¶ 15 and Ex. 3.

[23] Although this issue is **not** before this Court in this original action, Cox contends that the Commission's rules specifically did **not** confer standing on him to contest the *establishment* of an eligibility list in 2018 because such list, under those same rules, had *no legal status* until the appointing authority asked the Commission to *certify* a list of candidates, in ranked order, who would be eligible for promotion. Cox asserts, therefore, that since the City's appointing authority, as a matter of law, could **not** have relied on any *certification* of an eligibility list until May 14, 2019, when he promoted Ward to the rank of Lieutenant, Cox had *no standing* to challenge the *certified* eligibility list as inconsistent with the Commission's rules until action actually was taken to rely on that list in making a promotion. *Compare* Rule V (*establishment* of an eligibility list following administration of a promotional examination) *and* Rule VI (*certification* of an eligibility list when a promotion is to be made), reproduced in the record in **Joint Stipulation**, ¶ 5 and Joint Ex. A.

All the Commission did with respect to Cox's civil service appeal was to address it informally at its regularly scheduled meeting on June 19, 2019, and then make references to the opinions of the Commission's members in the approved minutes of that meeting.[24] No evidentiary hearing ever was convened as required by the Commission's rules.[25] No final and appealable order ever was entered upon the journal of the Commission's proceedings[26] or served on Cox,[27] again as required by the Commission's rules.

The record is *devoid* of any evidence that a copy of the minutes of the Commission's June 19, 2019, meeting at which Cox's May 20, 2019, civil service appeal was discussed ever were served on Cox as if constituting the Commission's final and appealable order. Indeed, even a year later, when Cox hired his undersigned counsel so he could perfect a Chapter 119 challenge to seek judicial review, the Commission expressly declined to fashion a final and appealable order and serve it on Cox[28] despite the urging of the Law Department of the City to do so in protection of Cox's due process rights.[29]

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[24] **Amended Verified Complaint**, ¶ 19; **Affidavit of Michael R. Cox**, January 21, 2021 ("**Cox. Affid.**"), ¶ 14; **Affidavit of Jonathan Huff**, January 21, 2021 ("**Huff Affid.**"), ¶ 32 and Huff Ex. 15. The minutes of the Commission's regularly scheduled meeting of June 19, 2019, are reproduced in **Respondents' Presentation of Evidence**, Ex. 15.

[25] **Amended Verified Complaint**, ¶¶ 19 and 23; **Cox Affid.**, ¶ 25.

[26] **Amended Verified Complaint**, ¶ 27; **Cox Affid.**, ¶¶ 15, 17, and 24.

[27] **Amended Verified Complaint**, ¶ 27; **Cox Affid.**, ¶¶ 15, 17-18, and 24.

[28] **Amended Verified Complaint**, ¶ 27; **Cox Affid.**, ¶ 24.

[29] **Amended Verified Complaint**, ¶ 25; **Answer**, ¶ 25; **Cox Affid.**, ¶ 20 and Cox Ex. C.

As an administrative agency of a political subdivision of the State of Ohio, the Commission speaks only through its journal entries.[30] Yet, while the Commission discussed Cox's appeal at its regularly scheduled meeting on June 19, 2019, it did **not** schedule any evidentiary hearing, as required by its rules and regulations,[31] and never caused a final and appealable order to be issued and served in disposition of Cox's appeal, opting instead for merely expressing their opinions regarding the issues raised in Cox's appeal in lieu of issuing such order.. [32]

After unsuccessfully attempting to persuade the State Personnel Board of Review to conduct a *discretionary* review of the Commission's failure to take up his appeal and render a final judgment in disposition of it,[33] Cox grew frustrated by the Commission's persistent failure to take up his May 20, 2019, appeal and hired his undersigned counsel on May 5, 2020, to demand

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[30] *Howard v. Ohio State Racing Commission*, 145 N.E.3d 1254, 1262-63, 2019-Ohio-4013, 2019 WL 4756976, ¶ 34, *citing State ex rel. Ewart v. Industrial Commission*, 76 Ohio St.3d 139, 142, 666 N.E.2d 1125, 1128 (1996), *and Hurless v. Mead Corporation*, 29 Ohio App.2d 264, 269, 281 N.E.2d 38, 41 (1971).

[31] Section 3 of Rule XII of the Commission's rules and regulations provides that each party to an appeal "may call witnesses to testify," under subpoena, if necessary, and that the Commission itself "may call witnesses other than those called by either party if the circumstances of the case require it," but the appellant must be allowed to "present his/her case first" while "confin[ing] the evidence and testimony to the reason(s) stated for the appeal on file with the Commission" unless "the appellant, since filing the reason(s) for the appeal, has discovered new reason(s) to support the appeal," whereupon "the appellant shall state those reasons to the Commission as soon as possible." *Id.*, ¶¶ 4-5. These provisions, collectively, impose on the Commission the duty to convene a hearing to take evidence and argument respecting Cox's May 20, 2019, appeal.

[32] **Amended Verified Complaint**, ¶ 19; **Cox Affid.**, ¶ 14; **Huff Affid.**, ¶ 32 and Huff Ex. 15.

[33] **Joint Stipulation**, ¶¶ 27 and 28; ;**Cox Affid.**, ¶ 15; **Amended Verified Complaint**, ¶ 20; **Answer**, ¶ 20.

entry of a final and appealable order so he could seek judicial review of the Commission's decision in the Mahoning County Court of Common Pleas under O.R.C. §§ 119.12 and 124.34(B).[34]

A motion seeking such relief was submitted to the Commission on May 13, 2020.[35] In responding to Cox's new counsel's motion for entry of a final and appealable order, the Senior Assistant Law Director of the City *agreed* in a letter addressed to the Commission that the failure to issue and serve a final and appealable order in disposition of Cox's May 20, 2019, appeal had to be addressed and corrected,[36] commenting, in relevant part, as follows:

> The Commission did address Cox's appeal in the June 19, 2019[,] meeting, the minutes of which were approved by this Commission in July of 2019. However, Cox does not appear to have received those minutes and therefore [the] Commission did not render a final decision on this matter as to Cox's appeal.
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> * * *
>
> In this instance, the Commission should issue a full decision denying Cox's original appeal and listing each and every reason for such denial. Cox will then have an opportunity to appeal that decision to the Court of Common Pleas.

Indeed, at a hearing conducted by the Commission on such motion on May 20, 2020, the Senior Assistant Law Director reiterated this stance even though he moderated his view somewhat by raising, for the first time, the question of whether the Commission actually was acting in a "quasi-judicial" fashion when it addressed Cox's appeal at its June 19, 2019, regular meeting.[37]

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[34] **Amended Verified Complaint**, ¶ 21.

[35] **Joint Stipulation**, ¶ 29 and Joint Ex. E; **Cox Affid.**, ¶ 19 and Cox Ex. B; **Amended Verified Complaint**, ¶ 21.

[36] **Cox Affid.**, ¶ 20 and Cox Ex. C; **Amended Verified Complaint**, ¶ 25.

[37] **Cox Affid.**, ¶ 22.

On June 17, 2020, the Commission again considered Cox's motion for entry of a final and appealable order and his contemporaneously filed motion for reconsideration of the opinions informally expressed by the Commission's members during its June 19, 2019, regularly scheduled meeting.[38] After emerging from an executive session convened to discuss Cox's motions, the Commission announced that no final and appealable order would be ordered even though the city's Senior Assistant Law Director, in writing, had urged the Commission to do so.[39] Cox's undersigned counsel thereupon asked the Commission to confirm expressly that its decision was to decline to serve on Cox a final and appealable order in writing and the President of the Commission, in response and with the concurrence of the Commission's other two members, stated that the Commission had taken up Cox's motions merely as an "agenda item," meaning that no ruling to sustain or overrule Cox's motions would be forthcoming and no final and appealable order in disposition of those motions or the merits of Cox's May 20, 2019, appeal would be served on Cox.[40]

STANDARDS OF REVIEW

The standards for granting relief in mandamus are well established in the law. Assuming a relator demonstrates a lack of a plain and adequate remedy in the ordinary course of the

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[38] **Joint Stipulation**, ¶ 30; **Amended Verified Complaint**, ¶ 27; **Answer**, ¶ 27; **Cox Affid.**, ¶ 24.

[39] **Cox Affid.**, ¶ 24; **Amended Verified Complaint**, ¶ 27.

[40] *Id.*; *see also* **Respondents' Presentative of Evidence**, Ex. 19, at 13, *ll*. 5-17, and at 15, *ll.* 19-24.

law[41] that is complete, beneficial, and speedy,[42] the standard for review of **Count One** of Cox's amended verified complaint for a writ of mandamus is codified in O.R.C. § 2731.01, *viz.*, a writ "commanding the performance of an act [may be directed where] the law specially enjoins as a duty resulting from an office, trust, or station." In other words, mandamus is a decree to be issued to compel a public official to do something he or she already is under an obligation to do.[43] So while mandamus will not operate to *control* discretion to be exercised by a public official, the remedy will *compel* the exercise of that discretion where the public official has a duty to act and fails to do so to the detriment of the relator.[44]

When it comes to directing an inferior tribunal to proceed to entry of a final and appealable order or judgment, the remedies of mandamus and *procedendo* are somewhat interchangeable. The standards pertaining to a petition for a writ of *procedendo*, as asserted in **Count Two** of relator's amended verified complaint, require Cox to establish (1) a clear legal right to require an inferior tribunal to proceed, (2) a clear legal duty to proceed, and (3) the lack of an

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[41] *State ex rel. Pontillo v. Public Employees Retirement System Board*, 98 Ohio St.3d 500, 503, 787 N.E.2d 643, 648, 2003-Ohio-2120, ¶ 23; *State ex rel. Village of Chagrin Falls v. Geauga County Board of Commissioners*, 96 Ohio St.3d 400, 401, 775 N.E.2d 512, 515, 2002-Ohio-5584 ¶ 8.

[42] *State ex rel. Schroeder v. City of Cleveland*, 150 Ohio St.3d 135, 138, 80 N.E.3d 417, 420, 2016-Ohio-8105, ¶ 18, *citing State ex rel. North Main Street Coalition v. Webb*, 106 Ohio St.3d 437, 441, 835 N.E.2d 1222, 1232, 2005-Ohio-5009, ¶ 41, *and State ex rel. Smith v. Cuyahoga County Court of Common Pleas*, 106 Ohio St.3d 151, 153, 832 N.E.2d 1206, 1209, 2005-Ohio-4103, ¶ 19.

[43] *State ex rel. Wanamaker v. Miller*, 164 Ohio St. 174, 175, 128 N.E.2d 108, 109, (1955).

[44] *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 119, 122, 914 N.E.2d 397, 401, 2009-Ohio-4805, ¶ 17.

adequate remedy in the ordinary course of the law if the inferior tribunal fails to proceed.[45] Such a writ compels the inferior tribunal to proceed with exercising its discretion as required by law.[46]

As digested above, uncontroverted sworn statements in Cox's affidavit of January 21, 2021, and his allegations in Paragraphs 19, 21, 22, and 27 of his amended verified complaint confirm that the Commission has *refused outright* to journalize and serve a written final and appealable order in disposition of Cox's May 20, 2019, civil service appeal, claiming (illogically) that no final order was necessary because the Commission never took up Cox's appeal in an evidentiary hearing, but rather merely as an "agenda item."[47] This is not unlike a trial judge[48] who is

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[45] *State ex rel. Dawson v. Summit County Court of Common Pleas*, 146 Ohio St.3d 435, 436, 57 N.E.3d 1146, 1148, 2016-Ohio-1597, ¶ 7, *State ex rel. Huntington National Bank v. Kontos*, 145 Ohio St. 3d 102, 105, 47 N.E.3d 133, 136-37 (2015), 2015-Ohio-5190, ¶ 16.

[46] *State ex rel. Sherrills v. Cuyahoga County Court of Common Pleas*, 72 Ohio St.3d 461, 462, 650 N.E.2d 899, 900, 1995-Ohio-26, *citing State ex rel. Hansen v. Reed*, 63 Ohio St.3d 597, 600, 589 N.E.2d 1324, 1326-27 (1992), *quoting State ex rel. Davey v. Owen*, 133 Ohio St. 96, 106, 12 N.E.2d 144, 149 (1937).

[47] The President of the Commission expressed the views of all members during the Commission's June 17, 2020, meeting, as follows:

> … [T]here isn't going to be any order … because there hasn't been a hearing. There hasn't been evidence presented. There hasn't been under oath testimony. There hasn't been all those kind of things that we have when we have a hearing. This has been an agenda item all the time. And we speak through our minutes. And there is authority, good authority that we can speak through our minutes.

Respondents' Presentation of Evidence, Ex. 19, at 72, *ll.* 6-15. Of course, the record in this original action also reflects that there was no hearing and no evidence was presented precisely because the Commission failed or refused to set Cox's May 20, 2019, civil service appeal down for an evidentiary hearing so he could present his evidence.

[48] *State ex rel. Sawicki v. Lucas County Court of Common Pleas*, 126 Ohio St.3d 198, 200, 931 N.E.2d 1082, 10186, 2010-Ohio-3299, ¶ 10; *see also Bozsik v. Hudson*, 110 Ohio St.3d 245, 246, 852 N.E.2d 1200, 1201, 2006-Ohio-4356, ¶ 11, *citing State ex rel. Rodak v. Betleski*, 104 Ohio St.3d 345, 347, 819 N.E.2d 703, 705-06, 2004-Ohio-6567, ¶¶ 14.

compelled by mandamus or *procedendo* to act on a request or motion to journalize a sentencing decision as required by an applicable statute because no party could appeal the court's judgment absent journalization or a trial judge who fails to act for nearly a year on a motion to rescind a guilty plea on the grounds that the moving party is not entitled to a ruling, but is compelled by mandamus or procedendo to proceed with entering a judgment to confirm that conclusion and journalizing the same so an appeal from that judgment could be perfected.[49]

Cox is presently in the same situation.

For the reasons that follow, having exhausted every other possible avenue to persuade the Commission to act by journalizing and serving a final and appealable order that disposes of his appeal, Cox respectfully submits that he is entitled to immediate relief in the form of a writ of mandamus and/or a writ of *procedendo* to compel the Commission and each of its members to get on with hearing his May 20, 2019, civil service appeal on the merits and handing down and serving a final and appealable decision on such appeal (whatever that decision may be) so he can get on with the task of perfecting an administrative appeal to the Mahoning County Court of Common Pleas to seek judicial review of the propriety of such decision.[50]

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[49] *State ex rel. Staffrey v. D'Apolito*, 188 Ohio App.3d 56, 61, 934 N.E.2d 388, 390, 2010-Ohio-2529, ¶ 9.

[50] *Id.*

LAW AND ARGUMENT

I. COX IS ENTITLED TO A WRIT OF MANDAMUS DIRECTING RESPONDENTS TO DISCHARGE THEIR CLEAR LEGAL DUTIES TO RENDER A FINAL AND APPEALABLE DECISION ON HIS CIVIL SERVICE APPEAL AND TO CAUSE SUCH DECISION TO BE SERVED ON HIM.

Proposition of Law No. 1

> When a local administrative agency discharges quasi-judicial powers in administering and deciding a civil service appeal and fails to render a final decision on such appeal within a reasonable time and in compliance with such agency's rules and Ohio law and serve the same on all parties to such appeal, relief in the form of a writ of mandamus will lie to compel such agency (1) to complete the administration and adjudication of such appeal, (2) to enter a final and appealable order upon such agency's journal of proceedings that disposes of such appeal, and (3) to cause such order to be served upon all parties to such appeal in a timely manner reasonably calculated to assure its delivery.

Until the Commission issues and serves a written final and appealable order disposing of Cox's May 20, 2019, appeal, Cox has no adequate remedy at law inasmuch as his pathway to seeking judicial review of the Commission's refusal to take up his appeal on its merits is blocked.[51] The Commission's failure to issue a written decision constituting a final and appealable order and then serving the same on Cox in accordance with the law erects an insurmountable subject matter jurisdiction barrier to seeking judicial review in the form of an administrative appeal that "cannot be waived."[52]

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[51] *Bench Billboard Co. v. City of Dayton*, Case No. 13015, 1992 WL 80772, *7 (2nd App.Jud.Dist., Apr. 10, 1992) (a court of common pleas lacks jurisdiction to hear an administrative appeal "unless there is a final order from which to appeal").

[52] *See Galloway v. Firelands Local School District Board of Education*, Case No. 12-CA-01-0208, 2013-Ohio-4264, ¶ 6 (9th App.Jud.Dist.); *Leist v. Mad River Township Board of Trustees*, 2016-Ohio-2960, 2016 WL 2840917, ¶ 6 (2nd App.Jud.Dist.) (common pleas court had no jurisdiction over administrative appeal until township trustees journalized and served a final and appealable order).

Cox is entitled under Section 3 of Rule XII of the Commission's rules and regulations to an evidentiary hearing on his May 20, 2019, civil service appeal during which he may present evidence and cross-examine witnesses offering testimony against his interests in such appeal. At a minimum, however, Cox wishes to seek judicial review of the Commission's decision not to sustain (or even take up) his May 20, 2019, appeal on the merits, whether because the Commission's members believe his appeal was not timely filed or for any other reason. By operation of O.R.C. §§ 119.12, 124.34(B), and 2505.07, Cox's administrative appeal must be perfected within 30 days of "the entry of a final order of an administrative … commission," but without the Commission's entry of a final order in his case, Cox cannot open the door to the courthouse to seek judicial review of the Commission's determination of his civil service appeal.

The final and appealable order to which Cox is entitled by operation of O.R.C. §§ 124.34 and 124.40(A) and Section 3 of Rule XII of the Commission's own rules and regulations (1) must dispose of the merits of Cox's May 20, 2019, appeal on some grounds, (2) must sustain or overrule Cox's May 13, 2020, motion for entry of a final and appealable order, and (3) must sustain or overrule Cox's May 13, 2020, motion for reconsideration (including his request that the Commission convene an evidentiary hearing so evidence can be presented, witnesses can be cross-examined, and arguments for and against the merits of Cox's appeal can be advanced and considered in the course of making a record that later may be subjected to judicial review in the form on a Chapter 119 administrative appeal).

Merely expressing opinions about the timeliness or merits of Cox's appeal and including such opinions in the Commission's minutes does **not** suffice. Instead, a final and appealable order must be rendered, such order must find its way into the Commission's journal of proceedings, and the Commission must cause a copy of such order to be delivered to Cox in a manner

consistent with the Commission's own rules and principles of due process that attend every employment relationship with a public servant having a constitutionally protected property right in his or her employment in the public sector.[53]

Respondents have failed to discharge these duties. Such failure leaves Cox without an adequate remedy at law to challenge the propriety of the Commission's failure to act on his May 20, 2019, appeal in court by means of an administrative appeal, as his pathway to court under Chapter 119 is blocked for want of a final and appealable order. Relief in the form of a writ of mandamus therefore is available to Cox on the facts in the record of this original action.

While the intermediate appellate judicial districts are split on whether the 30-day period for perfecting an administrative appeal begins to run when a commission *mails* its final order to an interested party or when an interested party actually *receives* a copy of the commission's order in the mail or by delivery in hand,[54] it is clear that all courts agree that merely reciting

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[53] *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538-41, 105 S.Ct. 1487, 1491-93, 84 L.Ed.2d 494 (1985) (civil service employees enjoy due process rights to protect their property interest in public sector employment); *see also Manning v. Clermont County Board of Commissioners*, 55 Ohio App.3d 177, 180, 563 N.Ed.2d 372, 375 (1989).

[54] **Holding notice to be effective when mailed**: *601 Properties, Inc. v. City of Dayton*, Case No. 11620, 1990 WL 2892, *3 (**2nd** App.Jud.Dist., Jan. 19, 1990); *McPhillips v. City of Cleveland*, Case No. 60687, 1991 WL 125693, *1 (**8th** App.Jud.Dist., July 3, 1991); *Cornacchione v. Akron Board of Zoning Appeals*, 118 Ohio App.3d 388, 392, 692 N.E.2d 1083, 1086 (**9th** App.Jud.Dist.1997); *Safety 4th Fireworks, Inc. v. Liberty Township Board of Trustees, et al.*, 142 N.E.3d 118, 120, 2019-Ohio-3435, ¶ 28 (**12th** App.Jud. Dist.); *but see DHSC, L.L.C. v. Ohio Department of Job & Family Services*, 2012-Ohio-1014, 2012 WL 830962, ¶ 31 (**12th** App.Jud.Dist., March 13, 2012) (holding that due process requires actual *receipt* of the agency's notice before the appeal deadline can begin to run). **Holding notice to be effective when received**: *Guysinger v. Board of Zoning Appeals of City of Chillicothe*, 66 Ohio App.3d 353, 358, 584 N.E.2d 48, 51 (**4th** App.Jud.Dist.1990); *Sturdivant v. Toledo Board of Education*, 157 Ohio App.3d 401, 406, 811 N.E.2d 581, 585, 2004-Ohio-2878, ¶ 20 (**6th** App.Jud.Dist.); *Manholt v. Maplewood Joint Vocational School District Board of Education*, Case No. 91-P-2410, 1992 WL 207800, * 2 (**11th** App.Jud.Dist., Aug. 21, 1992).

or announcing a decision on any matter in its minutes is **not** sufficient to start that 30-day clock and that some overt effort to *notify* the parties to the agency's final action must be made. Indeed, in the very case on which respondents relied in their motion for judgment on the pleadings in asserting that the Commission's minutes can serve as such notice, the Fourth Appellate Judicial District identified the five "mandatory minimum requirement[s]" of any written notice of a final agency decision:

> 1. the case number, the applicant, and a brief description of the matter before the administrative board;
>
> 2. a designation as a final decision;
>
> 3. a clear pronouncement of the board's decision;
>
> 4. the signatures of the entire board, the voting majority of the board, or the signature of the clerk for the board expressly certifying that the decision constitutes the action taken by the board; [and]
>
> 5. a date indicating when the decision *was mailed* to the applicant.

A.M.R. v. Zane Trace Local Board of Education, 971 N.E.2d 457, 465-66, 2012-Ohio-2419, ¶ 23 (emphasis supplied), *citing with approval American Aggregates Corporation v. Clay Township*, Case No. 16311, 1997 WL 282334, at *5-6 (4th App.Jud.Dist., May 30, 1997) (unreported), holding:

> With respect to the last requirement – the date upon which the decision was mailed to the applicant – *due process demands notice of the date of mailing* in order to comply with our holding in *601 Properties, Inc.* that the time in which to perfect an appeal begins to run on the date that the final decision is mailed to the applicant. By complying with these formalities, an administrative board ensures that the document received by the applicant clearly constitutes a final decision of the board and is, therefore, a final appealable order. *Of course, the resolutions and ordinances of the political subdivision may require further formalities with which the board must comply*. [Emphasis supplied.]

The Fourth Appellate Judicial District has it exactly right. What good is a due process right to actual notice of final agency action of the sort that would trigger a right to perfect an administrative appeal seeking judicial review until the agency gets around to *sending* a written notice of that action to the parties involved that will serve as a mandatory jurisdictional prerequisite for getting inside the courthouse door? While Cox would contend that such a written notice should **not** be considered effective until the agency can establish that it was actually *received* in some fashion, in the case before this Court, the record plainly shows not only that Cox did **not** receive *any* written notice of the Commission's disposition of his May 20, 2019, appeal, but also that the Commission did **not** even bother to follow its own rules or heed its own counsel's admonition to prepare such a notice and send or give it to Cox in some manner and then expressly *refused* to do so! Instead, the record in this original action – including all of the exhibits attached to Respondents' Presentative of Evidence – is *devoid* of any proof that any effort was made by or for the Commission to give Cox notice of any final action taken on his civil service appeal. Such record indeed contains no evidence that the Commission saw to it that Cox would receive a copy of the minutes of its June 19, 2019, meeting at which Cox's appeal was discussed and opinions relating to whether it was timely or not were bandied about without formal action being taken to dispose of such appeal.

As digested above, merely approving the minutes of a meeting at which a civil service appeal was decided does **not** mean that the due process guarantees of the civil servant were satisfied in this case unless the Commission can show what it did to get written notice of that decision into Cox's hands so he could satisfy the mandatory jurisdictional prerequisite of showing that a final and appealable order was entered so an administrative appeal could be initiated.

Against the great weight of case law, respondents argued in support of their motion for judgment on the pleadings that the Commission's members could approve the minutes of a meeting and then contend later that the due process guarantee of actual notice of its final decision was satisfied by merely placing those minutes in a journal or minute book somewhere in the city's offices.[55] *This is decidedly not the case.* Instead, for the minutes to constitute evidence that Cox was notified of the nature and finality of the Commission's final decision on his civil service appeal, the cases cited above establish that the Commission must demonstrate what measures it reasonably took to get a copy of those minutes into Cox's hands along with some affirmative confirmation or representation that such minutes constituted the final and appealable action of the Commission on Cox's appeal. Since the record reflects that the Commission did **not** do this, the mere *existence* of the minutes of the Commission's June 19, 2019, meeting without some corroborating evidence that a copy of those minutes actually made its way into Cox's hands **cannot** serve as an adequate defense to this original action in mandamus (or in *procedendo*).

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[55] Cox does **not** contend that the minutes of the Commission's June 19, 2019, regular meeting could not have served the purpose of furnishing official written notice of the final decision on his appeal. However, a copy of those minutes actually would have had to have been mailed or otherwise delivered to Cox in compliance with the Commission's own rules. *The May 20, 2020, letter of the city's Assistant Law Director reproduced in the record of this original action confirms that this did **not** happen.* **Cox Affid.**, ¶ 20, Ex. C. Until the Commission serves a final order, Cox has no adequate remedy available to him at law by perfecting an administrative appeal under O.R.C. §§ 119.12, 124.34(B), and 2505.07, as it is the entry *and service* of the Commission's final order that will confirm for the Mahoning County Court of Common Pleas that the Commission is done with Cox's civil service appeal and that all issues based on the record of the administrative proceedings conducted in respect of such appeal will **not** result in reconsideration or an order vacating or modifying that order so that the question of such order's validity, enforceability, or completeness is ripe for judicial review under Chapter 119 of the Ohio Revised Code. Thus, relief in mandamus (or *procedendo*) is obligatory because the lack entry and *service* of a final and appealable order by the Commission presently precludes Cox's access to an adequate remedy at law and realization of his right to seek redress from adverse agency action as guaranteed by Section 16 of Article I of the Ohio Constitution.

The whole point of this original action is to allow Cox to avail himself of a remedy at law specifically laid out in Chapter 119 of the Ohio Revised Code, *viz.*, an administrative appeal. Cox cannot get in the front door with such an appeal without a final and appealable order in hand. The Commission's minutes themselves – *without more* – do **not** constitute a final and appealable order in the absence of some evidence showing the requirement of Section 3 of Rule XII of the Commission's own rules prescribing actual served on Cox was satisfied. Since nothing in the record refutes Cox's allegation that he did not receive the Commission's minutes or any other notice[56] of the Commission's final and appealable decision, it follows that he is entitled to the relief he seeks in this original action.

This Court has addressed this issue before in the context of another proceeding seeking a different form of extraordinary writ in the context of an employment dispute involving a civil servant. In *State ex rel. Hanley v. Roberts*, 17 Ohio St.3d 1, 476 N.E.2d 1019 (1985), the question before this Court was whether the relator in a *quo warranto* action had an adequate remedy at law by means of an administrative appeal from a civil service commission challenge the decision to promote one candidate over the relator on the basis of the commission's certified results of an examination administered to candidates for promotion to the rank of Chief of Police.

Sounds familiar?

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[56] Indeed, Section 3 of Rule XII of the Commission's own rules expressly obligates the Commission to send some form of *written* notice to Cox, as one of the parties to his civil service appeal, once a final decision is reached concerning the merits of such appeal … even if only to declare that it is not an appropriate appeal under the city's civil service rules, or Cox did not bring his appeal in a timely manner under those rules, or seeks relief the Commission is powerless to grant, or has to be dismissed for any of a myriad of other possible reasons other than upon convening an evidentiary hearing, taking evidence, and deciding Cox's appeal on its merits.

This Court in *Hanley* first had to address the issue of whether relief in *quo warranto* could lie or was foreclosed because a final and appealable order would mean that the relator may have had an adequate remedy at law in the form of an administrative appeal and therefore his access to an extraordinary writ may have been foreclosed. In a decision that pre-dated legislative refinements that have expanded the array of ways a municipality can give actual notice of a final administrative decision for purposes of determining when an appeal could be perfected under Chapter 119 or Chapter 2506 of the Ohio Revised Code, this Court laid down a clear marker that remains the law of this state: "We … hold that pursuant to [the former version of O.R.C. § 2505.07], the decision of an administrative agency must be journalized before an appeal from such decision may be taken." *Id.*, 17 Ohio St.3d at 5, 476 N.E.2d at 1022. This Court then went on to say that *quo warranto* was a remedy available to the relator in *Hanley* because his pathway to an administrative appeal was foreclosed by the lack of a final and appealable order. So, while subsequent legislative action expanded the ways in which an administrative decision could become final and appealable, whereby such a decision no longer must be "journalized" in any particular manner, it remains that *Hanley* continues to serve as the law of this state in holding that notice of a final and appealable order – in *some* form – is a prerequisite to an administrative appeal and that relief in the form of an extraordinary writ will lie when the absence of such a final and appealable order forecloses the possibility of pursuing an adequate remedy at law in the form of an administrative appeal.[57]

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[57] While *quo warranto* theoretically is a possible remedy in Cox's case, such relief is **not** consistent with the object of Cox's civil service appeal. Cox does **not** to claim that he was automatically entitled to the promotion and that the promoted candidate now must be removed from his present position. Instead, Cox wants the Commission to take up the object of his civil service

Footnote continued on next page …

II. COX IS ENTITLED TO A WRIT OF *PROCEDENDO* DIRECTING RESPONDENTS TO DISCHARGE THEIR CLEAR LEGAL DUTIES TO CONDUCT SUCH PROCEEDINGS IN ADMINISTERING COX'S CIVIL SERVICE APPEAL IN THE MANNER PRESCRIBED BY THE COMMISSION'S RULES AND RENDER A FINAL AND APPEALABLE DECISION ON SUCH APPEAL BEFORE CAUSING SUCH DECISION TO BE SERVED ON COX.

Proposition of Law No. 2

> When a local administrative agency discharges quasi-judicial powers in administering and deciding a civil service appeal and fails to conduct an evidentiary hearing on such appeal and does not render a final decision disposing of such appeal within a reasonable time and in compliance with such agency's rules and Ohio law and serve the same on all parties to such appeal, relief in the form of a writ of *procedendo* will lie to compel such agency (1) to conduct an evidentiary hearing and complete the process of administering and adjudicating such appeal, (2) to enter of a final and appealable order upon such agency's journal of proceedings that disposes of such appeal, and (3) to cause such order to be served upon all parties to such appeal in a timely manner reasonably calculated to assure its delivery.

Alternatively, Cox seeks to enforce his right to a hearing on his May 20, 2019, civil service appeal and entry of a final and appealable order by means of relief in the form of a writ of

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Footnote continued from previous page …

appeal and review of all of the evidence bearing on various challenged examination questions in light of whether, in particular, challenges to questions in the leadership section of the examination were properly resolved as the eligibility list was being approved. *See* **Cox Affid.**, ¶¶ 25 and 28-29. Cox's contention in the proceedings before the Commission is **not** that he necessarily is the one who will get the promotion, but rather that principles of due process requires that the promotion should have been made on the strength of an *objective* determination of which of the challenged questions would be *validated* as being based on material found in the assigned version of a reference text and which had to be *invalidated* as having been the by-product on an error committed when the author of the examination relied on an *earlier* version of a reference text assigned by the City for the candidates for promotion to use in preparing for the examination. **Joint Stipulation**, ¶¶ 14-15; **Cox Affid.**, § 25; *see also id.* ¶ 19 and Cox Ex. B at 13-17. Thus, while *quo warranto* is one *possible* remedy, mandamus and *procedendo* are remedies more in line with the object of Cox's civil service appeal. After all, what he wants is a test result determined in a principled fashion that is fair to *all concerned* and **not** one that was the by-product of an artificial, arbitrary decision to grant credit for *all* of the contested questions and thereby deny the candidate (Cox) who scored the best on the four questions cited by the examination's author as suspect the advantage he would have enjoyed had the Commission not merely acted with expediency, instead of fundamental fairness, by giving full credit for each of the challenged questions irrespective of whether the answers to some or all of those questions in fact could have been gleaned upon studying the version of the reference text that the City had assigned. **Cox Affid.** at ¶¶ 28-29.

procedendo inasmuch as the Commission has failed to conduct a required evidentiary hearing on such appeal or to issue an order offering any rationale it may have for denying Cox the opportunity to present his case in such a hearing before serving such order on Cox.

Respondents have clear legal duties under Section 3 of Rule XII of the Commission's rules and regulations as well as O.R.C. §§ 124.34(B) and 124.40(A) either (1) to convene an evidentiary hearing to accept evidence on the merits of Cox's May 20, 2019, civil service appeal and then to issue a final and appealable order in disposition of such appeal or (2) to enter a final and appealable order explaining why Cox is not entitled to an evidentiary hearing or why his appeal must be dismissed.

Respondents have failed to discharge either of these duties. This leaves Cox without any ability to seek judicial review of the Commission's failure to act on his appeal as he has no final and appealable order of the sort needed to invoke a common pleas court's jurisdiction under Chapter 119 of the Ohio Revised Code. A writ of *procedendo* compelling the Commission to take up and decide Cox's civil service appeal will enable him to realize rights guaranteed to him by the City's civil service rules and then seek judicial review of any adverse decision ultimately journalized and served on him in disposition of his appeal.

Relief in *procedendo* is the mirror image of relief in prohibition. The Court has declared that prohibition will lie as a remedy to prevent a court or officer from exercising judicial *or quasi-judicial* power where refusal of the writ would result in injury for which there would be no adequate remedy at law.[58]

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[58] *State ex rel. McKee v. Cooper*, 40 Ohio St.2d 65, 67, 320 N.E.2d 286, 288 (1974).

Perhaps the question raised by respondents in their motion for judgment on the pleadings respecting whether *procedendo* will lie in cases where a court is asked to order a local administrative agency to get on with discharging its quasi-judicial duty to adjudicate a dispute properly before it could be regarded as a narrow issue of first impression for this Court. However, it only makes common sense that courts in Ohio must have the authority to issue a writ of *procedendo* to compel an agency exercising quasi-judicial powers to proceed with disposition of a matter properly before it.

The fact that no case has come before this Court wherein *procedendo* is cited as the "mirror image" of relief sought in prohibition does **not** mean that *procedendo* is not an appropriate remedy on the record of this original action. After all, in the context of judicial officers, a writ of *procedendo* will issue when a court has unnecessarily delayed proceeding to judgment[59] or where the inferior court's failure or refusal to dispose of a pending action is the specific "ill [the] writ is designed to remedy."[60] That is precisely the relief that Cox needs in light of the Commission's abject disregard of its clear legal duties under its own rules when it comes to disposing of Cox's appeal upon entering and serving a final and appealable order. Even so, if this Court were to conclude that *procedendo* technically is not available as a power for a court to use in forcing an administrative agency (rather than a court of record) to exercise quasi-judicial powers, such a determination would offer all the more reason for allowing Cox to proceed in mandamus in this original action, as – either way – he lacks a complete and adequate remedy at law without some

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[59] *State ex rel. Bunting v. Haas*, 102 Ohio St.3d 161, 163, 807 N.E.2d 359, 360, 2004-Ohio-2005, ¶ 8.

[60] *State ex rel. Levin v. City of Sheffield Lake*, 70 Ohio St.3d 104, 110, 637 N.E.2d 319, 324 (1994).

court intervention in this case and Section 16 of Article I of the Ohio Constitution guarantees him access to some court of record of this state to redress his grievance against the Commission.

CONCLUSION AND RELIEF REQUESTED

Cox does not seek this Court's intervention to control the discretion of the respondents in disposing of his May 20, 2019, appeal to the Commission, but rather to order respondents to discharge their clear legal duties to proceed with the entry of a final and appealable order upon concluding all proceedings required for the disposition of such appeal on its merits.[61] The Commission has refused over a period of more than a year to conduct a hearing on Cox's May 20, 2019, civil service appeal or to enter and serve a final and appealable order disposing of the same, thereby unnecessarily delaying the proceedings on his civil service appeal and denying him prompt access to the Mahoning County Court of Common Pleas to secure judicial review of the Commission's action on such appeal.[62]

Enough is enough! Only the extraordinary writ(s) of mandamus and/or *procedendo* will force the Commission to act on Cox's civil service appeal and open the gateway to judicial review of the way in which the Commission came to establish an eligibility list in 2018 and then certify it a year later when the Mayor of the City decided to promote someone in the Police Department to the rank of Lieutenant.

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[61] *See State ex rel. Ratliff v. Marshall*, 30 Ohio St.2d 101, 102, 282 N.E.2d 582, 584 (1972).

[62] *State ex rel. Rodak v. Betleski*, *supra*, 104 Ohio St.3d at 347, 819 N.E.2d at 705-06, 2004-Ohio-6567, ¶¶ 13-14 (writ of procedendo issued to compel trial judge to rule on long-pending motions in a civil action); *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 119, 515 N.E.2d 914, 916 (1987); *State ex rel. Doe v. Tracy*, 51 Ohio App.3d 198, 199, 555 N.E.2d 674, 677 (1988); *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna*, 73 Ohio St.3d 180, 184, 652 N.E.2d 742, 746, 1995-Ohio-98 (writ of procedendo was justified after trial court refused repeated requests over an extended period of time to set a trial date).

For all of the foregoing reasons and those digested in other memoranda filed in this original action and supported by evidence in the record and recited in his amended verified complaint, Cox asks this Court to issue a writ of mandamus compelling respondents, and each of them, to discharge clear legal duties specifically enjoined upon them by O.R.C. § 124.40(A) and the Commission's own rules and regulations by (a) scheduling and conducting an evidentiary hearing on the merits of Cox's May 20, 2019, civil service appeal and/or (b) deciding such appeal on its merits upon entry and journalization of a written final and appealable order and causing such to order be served on Cox in the manner prescribed by law.

Alternatively, or additionally, Cox asks this Court to issue a writ of *procedendo* compelling respondents, and each of them, to discharge clear legal duties specifically enjoined upon them by O.R.C. § 124.40(A) and the Commission's own rules and regulations to proceed forthwith (a) to schedule and conduct an evidentiary hearing on the merits of Cox's May 20, 2019, civil service appeal and (b) to decide such appeal on its merits upon entry and journalization of a written final and appealable order and causing such order to be served on Cox in the manner prescribed by law.

Cox further asks this Court to tax the costs of this action to respondents and to award reimbursement of all reasonable attorney fees and expenses incurred in connection herewith.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021, and in accordance with Rule 3.11(C)-(1) of the Rules of Practice of the Supreme Court of Ohio, a copy of the foregoing was served on counsel for respondents [*method(s) of service checked*] □ by ordinary U. S. Mail, first-class postage prepaid, addressed to respondents' counsel, Monica L. Frantz and Diana M. Feitl, Attorneys at Law, Roetzel & Andress, L.P.A., 1375 East Ninth Street, 10th Floor, Cleveland, Ohio 44114 (**Facsimile Telephone No. 216-623-0134**), □ by facsimile transmission to the facsimile telephone number(s) referenced above, □ by delivery in hand to the offices of counsel at the addresses referenced above, ■ by electronic transmission(s) addressed to *mfrantz@ralaw.com,* and *dfeitl@ralaw.com*.

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