

IN THE SUPREME COURT OF OHIO

	*
STATE OF OHIO, ex rel.	*
Pike County Convention and	*
Visitor's Bureau	*
	Case No. 2020-1438
	*
Relator,	*
	Original Action in Mandamus
	*
v.	*
	*
PIKE COUNTY BOARD OF	*
COMMISSIONERS, et al.	*
	*
Respondents.	*

**MERIT BRIEF OF RELATOR PIKE COUNTY CONVENTION AND
VISITOR'S BUREAU**

Michael J. Shaheen (0042155) (Counsel of Record)
Kristina S. Herman (0092233)
SHAHEEN LAW GROUP, LLC
128 South Marietta Street
P.O. Box 579
St. Clairsville, Ohio 43950
Phone: 740-695-4448
Fax: 740-695-6511
Email: office@slgjustice.com
Counsel for Relator

Randall L. Lambert (0017987) (Counsel of Record)
Cassaundra L. Sark (0087766)
215 South 4th Street
P.O. Box 725
Ironton, Ohio 45638
Phone: 740-532-4333
Fax: 740-532-7341
rlambert@lambert-law.org
Counsel for Respondents

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I. INTRODUCTION

The question before this Court is whether Respondents, Pike County Board of Commissioners and Pike County Auditor, have the authority to terminate or limit the distribution of county lodging tax collections to Pike County Convention and Visitor's Bureau and retain and misuse said monies for purposes other than allotted. The Pike County Board of Commissioners and Pike County Auditor violated R.C. 5739.09 in issuing Commissioner's Resolution 504-20 dated July 20, 2020; Commissioner's Resolution dated February 21, 2019; Commissioner's Resolution dated February 26, 1997; and Motion No. 130-02 dated February 4, 2002 in direct contravention to the lodging tax ordinance in the Ohio Revised Code.

Respondents' issuance of said resolutions and motion was and is a facial violation of R.C. 5739.09. In addition, Respondents' complete disregard of Relator's request to immediately disburse the funds to Relator is against the legal mandate set forth in R.C. 5739.09. Respondents cannot provide one legitimate reason as to their complete and utter disregard for their actions.

Accordingly, Relator Pike County Convention and Visitor's Bureau respectfully request that the Court grant a writ of mandamus ordering Respondents to immediately disburse the funds to the CVB, and award them their reasonable court costs and attorney's fees.

II. STATEMENT OF FACTS

Relator, Pike County Convention and Visitor's Bureau ["CVB"], a registered corporation for non-profit within the State of Ohio, Entity Number 1041354, filed this original action in mandamus on November 25, 2020. The original action in mandamus seeks a judicial determination as to whether Respondents, Pike County Board of Commissioners and Pike County Auditor, have the authority to terminate the distribution of county lodging tax collections

to Pike County Convention and Visitor's Bureau and retention and misuse said monies for purposes other than allotted.

Waverly is the county seat of Pike County, Ohio. The Board of Commissioners and Auditor's offices are located in Waverly, Ohio. Pike County Board of Commissioners [“Board of Commissioners”] is a governing body for Pike County, Ohio and operates under the terms and conditions of Chapter 305 of the Ohio Revised Code. The Board of Commissioners, being a general administrative body of the county government, performs duties specifically authorized by the state legislature including, but not limited to taxing, budgeting, appropriating and purchasing authority. Pike County Auditor [“Auditor”] is the chief fiscal officer of the county and maintains the books of and for all county elected officials and other agencies. Consistent with the provisions of Chapter 305 of the Ohio Revised Code, the Board of Commissioners is responsible for conducting official business in Pike County, Ohio. The laws of the State of Ohio – in particular R.C. 5739.09 – mandate the administration and allocation of lodging tax.

On February 10, 1997, the Board of Commissioners drafted and approved the Pike County Hotel Lodging Excise Tax Code of Regulations. Relator's Exhibit 6, Respondent's Exhibit A. The Code of Regulations outlined the liabilities of the vendor and consumer as well as the collection of the tax for the benefit of the CVB. Thereafter, on February 26, 1997, the Board of Commissioners approved Resolution No. 738-97 to enact a two percent (2%) bed tax for Pike County starting on March 1, 1997. Pursuant to this Resolution, the tax was to be used for the “establishment, salaries, and operation of expenses of the Pike County Convention and Visitor's Bureau, except for a fee of 1/4 of 1% (.0025) of the collected tax money which the County will retain as administrative costs.” The Board of Commissioners further approved that the money collected each year is not to exceed \$20,000.00 per year, minus the .0025 retained by

Pike County for administrative costs, and was to be turned over to the Pike County Chamber of Commerce to be administered to the CVB. Relator's Exhibit 1. Subsequently, the Board of Commissioners approved, by a 3-0 vote, to add an additional one percent (1%) levy to the Pike County bed tax which would go into effect at some point in the future to be decided at the discretion of the Pike County Commissioners. A Resolution was passed by the Board of Commissioners on March 9, 1998 amending Resolution No. 738-97 by providing that the additional one percent (1%) bed tax for Pike County shall be determined to begin no sooner than five (5) years from the original resolution with all concerned parties notified one (1) year in advance before collection begins.

Thereafter, on February 4, 2002, the Board of Commissioners approved, by a 3-0 vote, Motion No. 130-02. Pursuant to Motion No. 130-02, the additional one percent (1%) bed tax would become effective March 1, 2003 fulfilling Resolution 738-97, passed on December 15, 1997. Moreover, the Motion provided that the Auditor is authorized to release \$9,000.00 to the CVB and an additional \$6,000.00 in August 2002 to be used for the Bi-Centennial. Beginning March 2003, the full three percent (3%) collected from the new motel in Waverly, Ohio and the one percent (1%) from all other hotels was held until the \$9,000.00 has been reimbursed. The bed tax collected beginning in 2004 would be adjusted to withhold one percent (1%) from the total collected and at that time the Board of Commissioners would determine the amount needed to support the CVB. Relator's Exhibit 2, Respondent's Exhibit A.

On March 1, 2003, the Board of Commissioners issued a statement clarifying Motion No. 130-02, specifically the formula for payment of lodging tax to the CVB. Pursuant to the unsigned statement, the lodging tax for all of Pike County increased by one percent (1%) for a total of three percent (3%) to be collected. One hundred percent (100%) of the tax collected by a

specific hotel in Waverly is to be retained in the reserve fund to be used to reimburse the general fund for the advance of the \$9,000.00 paid for the Bi-Centennial celebrations. Starting on March 1, 2003, the one percent (1%) increase collected from all other entities would be retained in the reserve fund. The balance of the funds collected in all the county (two percent (2%) shall continue to be paid to the CVB up to \$27,000.00 in 2003. Relator's Exhibit 3. Despite the Board of Commissioners attempt to clarify the formula for payment of the lodging tax to the CVB, it failed to address the destination of all funds after the \$9,000.00 loan was reimbursed to the general fund.

On January 14, 2019, the CVB Trustees met with the Board of Commissioners regarding the Ohio Auditor of State November 15, 2018 Report of Financial Audit, including Findings for Recovery which was released on January 3, 2019 along with an AOS Press Release reporting \$85,000.00 in undocumented spending by the former CVB Director, Sharon F. Manson. Upon learning of the same, the CVB Trustees took immediate action and began an internal investigation. Based upon the investigation, the CVB Trustees terminated CVB Director for cause on March 31, 2019 and accepted the resignation of the former Treasurer of the Board of Trustees of the CVB.

The Board of Commissioners then adopted a resolution replacing Resolution No. 738-97 dated December 15, 1997 on February 21, 2019. This resolution enacted a bed tax of three percent (3%) beginning February 21, 2019 to be wholly used for the establishment, salaries and operation expenses of the CVB except for a fee of 33.3% of the collected tax money which Pike County would retain solely for administrative costs and beautification projects at the direction of the Board of Commissioners. This resolution further provided that the money collected each

year not to exceed 66.6% per year will be turned over to the CVB on the first of each month. Relator's Exhibit 4, Respondent's Exhibit C.

Thereafter, due to the alleged financial mismanagement of the CVB by the former CVB Director, the Board of Commissioners adopted Resolution No. 504-20 dated July 20, 2020 – more than sixteen (16) months after the AOS Report was released and the meeting with the CVB Board of Trustees. Resolution No. 504-20 provides in pertinent part that the portion of the County Lodging Tax approved by the Board of Commissioners pursuant to R.C. 5739.09 that was previously distributed to the CVB be directed to the Pike County Chamber of Commerce. Relator's Exhibit 5, Respondent's Exhibit E.

From the period of March 1, 2019 until July 20, 2020 when the Board of Commissioners terminated any funding to the CVB, the CVB Trustees continued to take corrective action to remedy the former CVB Director's actions. This included replacing the CVB office files and records which had been lost or destroyed by the former CVB Director; paying more than half of the \$45,000.00 of unexpected debt accumulated by the former CVB Director; and executing all planned CVB tourism activities with volunteers. Despite the CVB's continued efforts to resolve these matters, the Board of Commissioners took it upon themselves to use the AOS November 15, 2018 audit report as leverage to adopt certain resolutions in direct violation of the Ohio Revised Code and oust the current CVB Trustees.

III. ARGUMENT

Proposition of Law No. I
Mandamus is the appropriate remedy to compel compliance with R.C. 5739.09.

Jurisdiction over this original mandamus action is conferred pursuant to Art. IV, Section (B)(1)(b) of the Ohio Constitution and R.C. 2731.02. A writ of mandamus is an order, in this

case to a government body, to properly perform its duties which the law specifically enjoins as a duty resulting from its office as outlined in R.C. Chapter 201 et seq. and R.C. 5739.09. In order to grant a writ of mandamus, a court must find that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that the relator has no plain and adequate remedy at law. *State ex rel. Hedges v. Taft*, 64 Ohio St.3d 1, 591 N.E.2d 1186 (1992), citing *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41, 374 N.E.2d 641 (1978).

Mandamus cannot be used to compel the performance of a permissive act. *State ex rel. Hedges v. Taft*, 64 Ohio St.3d 1, citing *State ex rel. Niles v. Bernard*, 53 Ohio St.2d 31, 372 N.E.2d 339 (1978). Additionally, a writ cannot issue to control an officer's exercise of discretion, but it can be issued to compel him to exercise it when he has a clear legal duty to do so. *State ex rel. Martin v. Corrigan*, 25 Ohio St.3d 29, 494 N.E.2d 1128 (1986).

In this case, the Board of Commissioners and Auditor have a clear legal duty to disburse funds to the CVB pursuant to R.C. 5739.09. On February 21, 2019, the Board of Commissioners adopted a resolution replacing Resolution No. 738-97 dated December 15, 1997. This resolution enacted a bed tax of three percent (3%) beginning February 21, 2019 to be wholly used for the establishment, salaries and operating expenses of the CVB *except for a fee of 33% of the collected tax money* which Pike County will retain solely for administrative costs and beautification projects at the direction of the Board of Commissioners. Despite the resolution specifically stating the excise tax would commence February 21, 2019, the Board of Commissioners erroneously and purposefully paid the CVB on March 1, 2019 for the months of January and February at the 66.6% rate enacted in the resolution dated February 21, 2019 ultimately withholding the 33.3% due to the CVB for itself. The Board of Commissioners allege

that the CVB claims it was not paid in a timely manner; however, the issue that is before this Court is that the Board of Commissioners retroactively applied the terms of the Resolution dated February 21, 2019 for the months of January and February despite the fact that the resolution specifically states the bed tax will not start before February 21, 2019.

Thereafter, and again against the legal mandate provided in R.C. 5739.09, the Board of Commissioners adopted Resolution No. 504-20 dated July 20, 2020 which erroneously terminates funds that are required to be specifically directed to the CVB and, in turn, distributes the lodging tax to the Pike County Chamber of Commerce. The CVB has not received any funds since July 2020 due to the passage of Resolution No. 504-20. The Board of Commissioners intentionally acted in bad faith and in direct violation of R.C. 5739.09 by adopting Resolution No. 504-20.

This original action to secure a writ of mandamus is now necessary to compel the Board of Commissioners and Auditor to do their clear legal duty, where no valid excuse can be given for not doing so, and immediately furnish the withheld 2019 and subsequent funds from the collected lodging tax to the CVB pursuant to R.C. 5739.09. More fundamentally, the issuance of a writ of mandamus in this case will subject the Board of Commissioner's deliberations and decision-making to healthy, indeed necessary public scrutiny. Either that scrutiny will give the public needed assurance that the Board of Commissioner's decisions are prudent, lawful and productive, or it will expose imprudence, incompetence, illegality or dishonesty. In either event, the benefit to the public will be palpable. The Board of Commissioners violated R.C. 5739.09 with the adoption of the Resolution dated February 21, 2019 and Resolution No. 504-20. Not until nearly nine (9) months after CVB's request for the Board of Commissioners to immediately disburse the funds, did the Board of Commissioner rescind Resolution No. 504-20. However, it

should be noted that the Board of Commissioners did not direct any of the funds due to the CVB to the currently existing CVB. Therefore, this action has become necessary to compel the Board of Commissioners and Auditor to do its clear legal duty. Any efforts it undertook to comply after Relator filed suit cannot excuse its original malfeasance. *See State ex rel. Cincinnati Enquirer v. Health*, 121 Ohio St.3d 165, 2009-Ohio-590, 902 N.E.2d 976, at ¶ 11.

Proposition of Law No. II

The Board of Commissioners and County Auditor do not have the authority to terminate or limit the distribution of county lodging tax collections to a Convention and Visitor's Bureau, and retain and misuse said monies for purposes other than allotted in R.C. 5739.09.

In 1967, municipalities and townships were given authority to levy a three percent (3%) lodging tax. *See R.C. 5739.08(A)*. Thereafter, in 1980, the legislature authorized a county permissive lodging tax which the primary purpose of this tax is to fund the operations of convention and visitors bureaus operating in the county. At least 66.6% of the funds derived from county enactment of this tax must be placed in a separate fund and used to make contributions to fund convention and visitors bureaus operating within the county. A uniform percentage, not to exceed 33.3%, is distributed by the county to municipal corporations and townships that are not levying any lodging tax and that have hotels to which the county lodging tax applies.

R.C. 5739.09 mandates the administration and allocation of lodging tax. Specifically, R.C. 5739.09(A)(1) provides:

A board of county commissioners may, by resolution adopted by a majority of the members of the board, levy an excise tax not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests. The board shall establish all regulations necessary to provide for the administration and allocation of the tax. The regulations may prescribe the time for payment of the tax, and may provide for the imposition of a penalty or interest, or both, for late payments, provided that the penalty does not exceed ten per cent of the amount of tax due, and the rate at which interest accrues does not

exceed the rate per annum prescribed pursuant to section 5703.47 of the Revised Code. Except as otherwise provided in this section, the regulations shall provide, after deducting the real and actual costs of administering the tax, for the return to each municipal corporation or township that does not levy an excise tax on the transactions, a uniform percentage of the tax collected in the municipal corporation or in the unincorporated portion of the township from each transaction, *not to exceed thirty-three and one-third per cent.* Except as provided in this section, the remainder of the revenue arising from the tax shall be deposited in a separate fund and shall be spent solely to make contributions to the convention and visitor's bureau operating within the county, including a pledge and contribution of any portion of the remainder pursuant to an agreement authorized by section 307.678 or 307.695 of the Revised Code. (Emphasis Added).

R.C. 5739.09(A)(1) authorizes a board of county commissioners to levy an excise tax not to exceed three percent on transactions by which lodging by a hotel is or is to be furnished to transient guests. Except as provided in divisions (A)(2), (3), (4), and (5) of R.C. 5739.09¹, after deductions for the cost of administering the county hotel lodging excise tax have been paid, and payments to municipal corporations and townships not levying a hotel lodging excise tax have been made, the board of county commissioners must contribute the remainder of the revenue arising from the county hotel lodging excise tax to the convention and visitors bureau operating within the county. *See* 2003 Op. Att'y Gen. No. 2003-039 at 2-325 citing 1981 Op. Att'y Gen. No. 81-093 at 2-356.

R.C. 5739.09(J) further limits all money collected by a county and distributed to a convention and visitors bureau to "debt service charges on bonds, notes, securities, or lease agreements, to be used solely for tourism sales, marketing and promotion, and their associated costs, including, but not limited to, operational and administrative costs of the bureau, sales and marketing and maintenance of the physical bureau structure. *See* R.C. 5739.092. As a general

¹ Divisions (A)(2), (3) and (4) of R.C. 5739.09 authorize a board of county commissioners to increase the rate of a tax levied under R.C. 5739.09(A)(1) and to provide for the disbursement of revenue resulting from an increased tax rate. R.C. 5739.09(A)(5) authorizes a board of county commissioners to designate the use of some or all of the tax revenue collected under R.C. 5739.09(A)(1) to pay the operating expenses of a port authority.

rule, no revenue derived from a permissive lodging tax may be used for the county general fund. The *only* revenue that the county can retain is to the real and actual costs of administering the tax. After deducting administrative expenses, the county must deposit the remaining revenue in a special fund to be used solely to make contributions to the convention and visitors bureau operating in the county.

Here, the Board of Commissioners has undertaken actions that are in clear violation of the Ohio Revised Code. Beginning with the Resolution dated February 26, 1997, the Board of Commissioners approved Resolution No. 738-97 to enact a two percent (2%) bed tax for Pike County starting on March 1, 1997. Relator's Exhibit 1. Pursuant to this Resolution, the money collected each year not to exceed \$20,000.00 per year (minus the .0025 retained by Pike County for administrative costs) will be turned over to the Pike County Chamber of Commerce to be administered to the CVB at its discretion. In passing this resolution, the Board of Commissioners provided the Chamber of Commerce with the power to distribute any money over the \$20,000.00 to the CVB ultimately resulting in the CVB receiving less than it should have. Thereafter, on February 4, 2002, the Board of Commissioners approved Motion No. 130-02 wherein it provided that the balance of the funds collected shall continue to be paid to the CVB up to \$27,000.00. Relator's Exhibit 2. Moreover, the Motion provided that the Auditor is authorized to release \$9,000.00 to the CVB and an additional \$6,000.00 in August 2002 to be used for the Bi-Centennial; however, the CVB was not affiliated with the Bi-Centennial Committee.

On March 1, 2003, the Board of Commissioners issued a statement clarifying Motion No. 130-2, specifically the formula for payment of lodging tax to the CVB. Relator's Exhibit 4.

Oddly enough, despite the Board of Commissioners attempt to do so, it failed to address the destination of all funds after the \$9,000.00 loan was reimbursed to the general fund.

The resolution dated February 21, 2019 passed by the Board of Commissioners specifically provides that Pike County will retain a fee of 33.3% of the collected tax money for administrative costs and *beautification projects* at the discretion of the Board of Commissioners in clear violation of R.C. 5739.09. Relator's Exhibit 4. Thus, the Board of Commissioners adopted a resolution that provides Pike County to withhold funds from the CVB for a purpose prohibited under the Ohio Revised Code clearly evidencing malfeasance on the part of the Board of Commissioners. In addition, the Board of Commissioners failed to disburse funds for the months of January and February 2019 until March 2019 *after* the resolution was adopted, and then wrongfully and retroactively implemented said resolution for the months of January and February 2019 ultimately withholding the additional 33.3% administrative fee that did not go into effect until February 21, 2019 at the earliest. The same resulted in the CVB receiving 33.3% less for the months of January and February 2019 than outlined under the prior resolutions.

Thereafter, the Board of Commissioners took it upon themselves to adopt Resolution No. 504-20 on July 20, 2020 which erroneously terminates funds that are required to be specifically directed to the CVB, and instead, distributed said funds to the Pike County Chamber of Commerce. Respondents will argue that it did so due to the Ohio Auditor of State November 15, 2018 Report of Financial Audit; however, the Board of Commissioners did not adopt said resolution until sixteen (16) months after the AOS Report was released.

The Board of Commissioners and Auditor are under a clear legal duty to comply with R.C. 5739.09; yet, have failed to do so. It is alarming that these violations appear to have been undertaken intentionally for the purpose of withholding funds from the CVB.

IV. CONCLUSION

For the reasons set forth above, Relator is entitled to a Writ of Mandamus requiring Respondents to comply with the statutory requirements presented in R.C. 5739.09, and award them their reasonable attorney's fees incurred in bringing this action.

Respectfully submitted,

s/ Kristina S. Herman
Michael J. Shaheen (0042155)
Kristina S. Herman (0092233)
128 South Marietta Street
P.O. Box 579
St. Clairsville, OH 43950
Telephone: (740) 695-4448
Telefax: (740) 695-6511
Email: office@slgjustice.com
Counsel for Relator

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Relator's Merit Brief was sent by regular U.S. mail, postage prepaid, on this 21st day of June, 2021 to the following:

Randall L. Lambert, Esq.
215 South 4th Street
P.O. Box 725
Ironton, Ohio 45638

s/ Kristina S. Herman
Counsel for Relator