

IN THE SUPREME COURT OF OHIO

STATE EX REL. INTERNATIONAL	:	
ASSOCIATION OF FIRE FIGHTERS,	:	Case No. 2022-0988
LOCAL 1536, AFL-CIO,	:	
	:	
Plaintiff-Relator/Appellant,	:	On Appeal from the Court of
	:	Appeals of Ohio, Eleventh
	:	Appellate District, Lake County
v.	:	
	:	
JOHN BARBISH, et al.,	:	Court of Appeals Case No.
	:	2021-L-103
Defendants-Respondents/Appellees.	:	

BRIEF OF *AMICI CURIAE* OHIO ASSOCIATION OF PROFESSIONAL
FIRE FIGHTERS AND FRATERNAL ORDER OF POLICE OF OHIO IN SUPPORT
OF APPELLANT IAFF LOCAL 1536

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I. INTEREST OF *AMICI CURIAE*

This *amici curiae* brief is being submitted by the Ohio Association of Professional Fire Fighters (OAPFF) and the Fraternal Order of Police of Ohio (FOP) on behalf of the Appellant in this case.

The OAPFF represents more than 12,500 active firefighters and first responders in the State of Ohio. The OAPFF is dedicated to protecting fire fighters and first responders and defending their statutory and collective bargaining rights.

The FOP is dedicated to the betterment of law enforcement personnel and support personnel through representation of its members in collective bargaining and other labor relations matters. The FOP is Ohio's largest organization of sworn law enforcement officers, with more than 26,000 members and close to 200 local lodges.

Individual OAPFF and FOP members enjoy promotional rights and opportunities under Ohio laws. R.C. 124.44 (for police departments) and 124.45 and 124.48 (for fire departments), generally provide that vacancies in positions above the entry level rank in fire and police departments *shall* be filled by promotion from among persons holding positions in a rank lower than the position to be filled. Thus, when a fire or police chief resigns or retires, the position must be filled by promoting someone from the lower rank(s) (e.g., an assistant chief). Of course, this starts a chain reaction. When an assistant chief is promoted to chief, a vacancy is created in the assistant chief rank. Someone (e.g., a lieutenant) is then promoted to fill the assistant chief vacancy, and then someone else (e.g., a firefighter or a patrol officer) is then promoted to fill the vacant lieutenant position.

Promotional opportunities are highly coveted. They can be rare in many departments, since they usually depend on someone, generally a long term employee, resigning or retiring.

Amici Curiae are filing this brief because the lower courts' decisions allow public employers to blatantly ignore state law and re-hire a retired employee by bypassing the mandatory statutory procedures for filling a vacancy in a police or fire department.

Recruitment and retention for police and fire departments are at a critical juncture. If this Court affirms the lower courts' decisions that is just one more nail in the coffin of what are already depleted pools of eligible and interested candidates applying for vacancies in police and fire departments. If this Court allows the Appellee to subvert the competitive promotional examination process it will create a slippery slope whereby municipalities could avoid the competitive testing process at any promotional rank, not just for Chief. Moreover, those police officers and firefighters who have patiently earned their experience at lower ranks, and who were banking on opportunities to advance their skills and leadership experience, will be thwarted. A denial of promotional opportunities, and the ensuing lack of career development and advancement, will further add to the already tenuous retention rates when it comes to staffing for police and fire departments. Promotional opportunities will be denied to all department members who should have been able to compete for and be selected to fill the positions.

The lower courts' decisions are contrary to law and have a significant adverse impact on the rights of firefighters and police officers. Accordingly, *Amici Curiae* join with Appellant and urge this Court to reverse the lower court.

II. STATEMENT OF FACTS

The Brief of Appellant sets forth in detail the relevant facts in this case. For purposes of this *Amici Curiae* brief, those facts can be summarized as follows. Appellee James Powers retired from his employment as the Fire Chief for the City of Wickliffe on January 6, 2020. Court of Appeals Decision, page 3. The next day, January 7, 2020, he was rehired as the Fire Chief and

sworn in by the Mayor that same day. Id. This retire/rehire arrangement allowed Appellee Powers to collect a salary working as the Fire Chief while at the same time drawing monthly retirement benefits from the Ohio Police and Fire Pension Fund.

No process was initiated under the civil service rules as is required when there is a vacancy for the Fire Chief position. Id, page 4. Had the City followed the process for filling the Fire Chief position by way of a competitive promotional examination, approximately four captains employed by the City's Fire Department would have been eligible to take the promotional examination for the chief's position, and approximately three lieutenants would have been eligible to take an examination to replace a promoted captain. Id.

Appellant Local 1536 sent correspondence to the City's Civil Service Commission and Law Director, indicating that the vacancy should have been filled by way of a competitive promotional examination rather than by the retire/rehire arrangement. No action was taken on the Appellant's correspondence, leading to Appellant filing its complaint in the Lake County Court of Common Pleas. That Court ruled against Appellant, as did the 11th District Court of Appeals. This Court accepted jurisdiction of Appellant's discretionary appeal.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Amici Curiae's Proposition of Law No. 1

A retirement in a promoted rank in a fire or police department creates a vacancy which must be filled through the statutorily-mandated competitive promotional examination process.

Several provisions of Ohio law deal with the filling of vacancies in what the law refers to as promoted ranks in fire departments. R.C. 124.45 reads in part as follows:

Vacancies in positions above the rank of regular fire fighter in a fire department shall be filled by competitive promotional examinations, and promotions shall be by successive ranks as provided in this section and sections 124.46 to 124.49 of the Revised Code. Positions in which those vacancies occur shall be called promoted ranks. (Emphasis

added.)

And R.C. 124.48 reads in part as follows:

Whenever a vacancy occurs in a promoted rank in a fire department and no eligible list for that rank exists, the appointing authority shall certify the fact to the civil service commission. The civil service commission, within sixty days of the vacancy, shall conduct a competitive promotional examination. After the examination has been held, an eligible list shall be established, and the civil service commission shall certify to the appointing authority the name of the person on the list receiving the highest grade. Upon the certification, the appointing authority shall appoint the person so certified within ten days.

When an eligible list exists and a vacancy occurs in a position for which the list was established, the appointing authority shall certify the fact to the civil service commission. The person standing highest on the list shall be certified to the appointing authority, and that person shall be appointed within ten days.

Thus, under these statutes, vacancies in fire department ranks above that of regular fire fighter, e.g., fire chief, must be filled by promoting someone in a lower rank to fill that vacancy.

This method for filling vacancies in fire departments by promotion is similar to the statutory method for filling vacancies in police departments. R.C. 124.44 reads in part as follows:

No positions above the rank of patrol officer in the police department shall be filled by original appointment. *Vacancies in positions above the rank of patrol officer in a police department shall be filled by promotion from among persons holding positions in a rank lower than the position to be filled.* No position above the rank of patrol officer in a police department shall be filled by any person unless the person has first passed a competitive promotional examination. Promotion shall be by successive ranks insofar as practicable.... (Emphasis added.)

Because the statutes for filling vacancies in fire departments and police departments are so similar, cases interpreting one of those statutory systems is persuasive precedent for how the other statute(s) should be interpreted. See, e.g., *Brickweg v. City of St. Bernard*, 133 Ohio App. 3d 189, 727 N.E.2d 164 (1st Dist. 1999), noting that the content and design of §124.48 is virtually identical to R.C. 124.44, and so cases interpreting and applying one statute are relevant to the interpretation and application of the other.

As the plain language suggests, it is beyond question that these statutes are mandatory. Numerous cases decided by this Court have so held. See, e.g., *State ex rel. Bardo v. City of Lyndhurst*, 37 Ohio St. 3d 106, 524 N.E.2d 447 (1988) (124.44 creates a clear legal duty to promote upon a vacancy being created); *State ex rel. Bednar v. City of N. Canton*, 69 Ohio St. 3d 278, 281, 631 N.E.2d 621 (1994) ("The procedure for promotion provided in R.C. 124.44 is mandatory upon the occurrence of a vacancy in a position above police patrolman...."); *Zavisin v. City of Loveland*, 44 Ohio St. 3d 158, 541 N.E.2d 105 (1989); and *State ex rel. Lightfield v. Indian Hill*, 69 Ohio St. 3d 441, 633 N.E.2d 524 (1994).

As noted in *Brickweg v. City of St. Bernard* (1999), *supra*:

R.C. 124.48 uses the word "shall" eight times, suggesting an intent by the legislature to create a mandatory obligation. The content and design of R.C. 124.48, which are virtually identical to R.C. 124.44, create definite rights and mandatory duties. R.C. 124.48 contains no clear and unambiguous expression that "shall" is to be construed as anything other than mandatory. 133 Ohio App. 3d at 193.

A retirement clearly triggers the application of the statute requiring filling of the vacancy by promotion. "When a position in a police department has been both established and occupied by appointment, a vacancy in that position automatically occurs upon the retirement of the incumbent." *Zavisin v. City of Loveland*, *supra*, at 160. As noted in the syllabus in *McCarter v. Cincinnati*, 3 Ohio App. 3d 244, 444 N.E.2d 1053 (1st Dist. 1981):

1. When a position of police captain in the Cincinnati Police Division has been both established and occupied by appointment, a vacancy in that position automatically occurs upon the retirement of the incumbent, without the necessity for a declaration, certification or other affirmative action by the city manager.
2. Under R.C. 124.44, the civil service commission must hold a competitive promotional examination within sixty days after the occurrence of a vacancy in a position above the rank of patrolman in a police department, when there is no eligible list for such rank.

Thus, when Appellee Powers retired, the City was under a clear legal obligation to fill the

position by promoting someone from a lower rank.

Appellees, however, take a different approach. In their mind R.C. 124.45 and 124.48 are mandatory unless they decide to fill the position in some way other than promoting an employee from a lower rank. Then, they argue, they could ignore the mandatory provisions of Ohio law. The Appellees read into the applicable statutes a requirement that the incumbent's absence be "permanent." Since they intended to fill the position by rehiring that incumbent rather than promoting, his absence was not "permanent," they therefore argue that they could ignore the state law.

Appellees have come up with a clever way of avoiding Ohio law. In their mind, when a fire chief (or really any fire or police officer) retires, the public employer can decide to fill the position by rehiring the retiring employee and then claim that gives them the right to ignore the law. In fact, the City Appellees argued in their Memorandum in Response of the City of Wickliffe, at pages 7-9, that a chief could retire, then change his mind 70 days later and ask to be reinstated, and that would excuse the city from complying with R.C. 124.45 and 124.48. This is absurd, but it is an example of what happens when you start looking for ways to evade the law rather than simply applying it as written.

The dissenting judge in the Court of Appeals noted that "vacancy" is defined as "The quality, state, or condition of being unoccupied." Decision, p. 16, ¶43. As further noted by the dissenting judge:

Next, during oral argument, the city and the chief argued that no vacancy in the position of fire chief occurred because it was never unoccupied. In other words, notwithstanding the retire/rehire arrangement, there was no separation from the chief's employment. I find this position somewhat disingenuous. Upon his formal retirement, there was an immediate vacancy. That is, to be rehired necessarily implies an existing vacancy which would trigger the statutorily mandated promotional process to fill the retired incumbent's position. Our working concepts of space and time necessitate this conclusion; even if the

chief retired for a nanosecond, there was still a legal vacancy and the R.C. 124.48 procedures must be observed. *Id.*, p. 17, ¶46.

As the dissenting judge noted, there was a vacancy when Appellee Powers retired. If there was no vacancy, how could he be rehired to fill that vacancy?

Amici Curiae submit that the dissenting judge got it right. Appellees cannot ignore the mandatory provisions of state law simply by saying that they did not intend that the Chief would be permanently absent from his position.

Amici Curiae's Proposition of Law No. 2

Applicable law (R.C. 124.50) prohibits an individual who voluntarily resigns from a fire or police department in order to receive retirement benefits from being reinstated to any position above the rank of a regular firefighter or patrol officer, regardless of the position the person may have held at the time of resignation.

There is a method for Appellee Powers to work for the Wickliffe Fire Department and at the same time draw a monthly retirement benefit from the Ohio Police and Fire Pension Fund (OPFPF). R.C. 124.50 provides in part as follows:

Any person holding an office or position under the classified service in a fire department or a police department, who resigns therefrom, may be reinstated to the rank of firefighter or police officer, upon the filing of a written application for reinstatement with the municipal or civil service township civil service commission and a copy thereof with the chief of the fire department or chief of the police department, and upon passing a physical examination disclosing that the person is physically fit to perform the duties of the office of firefighter or police officer, the application for reinstatement shall be filed within one year from the date of resignation. Any person reinstated pursuant to the authority of this paragraph shall not receive credit for seniority earned prior to resignation and reinstatement, and shall not be entitled to reinstatement to a position above the rank of regular firefighter or patrol officer, regardless of the position the person may have held at the time of resignation. (Emphasis added.)

The statute seems clear enough. A member of a fire or police department who resigns may be reinstated to the position of regular firefighter or patrol officer in his/her department. However, the reinstated member cannot be placed in a higher position. Thus, Appellee Powers could have been reinstated as a firefighter, but he could not lawfully be reinstated as the fire chief. See *Dore*

v. Miller, 2004-Ohio-4870 (9th App. Dist.) (“In this case, Appellant was disqualified under R.C. 124.50 from holding the office of fire chief due to his resignation and retirement.” ¶17.).

R.C. 124.50 is consistent with the overall method of filling vacancies in police and fire departments. As noted above, vacancies in the promoted ranks must be filled by way of a competitive promotional examination with candidates from a lower rank. It would be inconsistent for another statute to allow the filling of vacancies in those promoted ranks by reinstating former employees to those higher ranks instead.

Appellees, however, argue that there are other statutes that allow it to ignore R.C. 124.50. In their Memorandum in Response of the City of Wickliffe, Appellees argue that R.C. 124.32(B) and 145.381 allowed them to rehire the retired Chief back into the Chief’s position. R.C. 124.32(B) reads in part as follows:

Any person holding an office or position in the classified service who has been separated from the service without delinquency or misconduct on the person's part may be reinstated within one year from the date of that separation to a vacancy in the same office or in a similar position in the same department....

The problem, of course, is that this general statute conflicts with the more detailed statutes specifically directed towards reinstatement and the filling of vacancies in fire and police departments. Those statutes, specifically addressing fire and police and providing that (1) the chief’s position had to be filled by promotion and (2) Appellee Powers, if reinstated, could only be reinstated as a firefighter, prevail over the more general 124.32.

As to R.C. 145.381, this statute simply does not apply here. While R.C. 145.381 mentions a retirant being reemployed or rehired to the same position, a retirant is defined as someone receiving benefits from the Public Employees Retirement System (PERS) pursuant to R.C. Chap. 145. R.C. 145.01(V). Appellee Powers is not a PERS retirant. He is an OPFPF retiree, receiving

retirement benefits pursuant to R.C. Chap. 742. Accordingly, R.C. 145.381 does not authorize the Appellees to take action that is expressly prohibited by R.C. 124.50.

IV. CONCLUSION

We are dealing with several statutes that are straightforward. When Appellee Powers retired, a vacancy was created that had to be filled by promotion pursuant to R.C. 124.45 and 124.48. If the City wanted to reinstate him after his retirement, it could do so, but reinstatement had to be at the firefighter rank. R.C. 124.50 clearly prohibited his reinstatement to the Fire Chief's position. As the dissent noted in the court below:

The civil service promotional process provides a benefit of certainty to the advancement process upon which firefighters and police officers should be able to rely. Decision, p. 18, ¶48.

This Court should reject Appellees' attempt to interpret the applicable statutes as mandatory *unless* Appellees want to fill a vacancy by some other method, such as rehiring the former employee, in which case Appellees view the statutes as only discretionary. The lower courts should be reversed, and judgment entered in favor of Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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