

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 *AMICUS CURIAE*, OHIO PUBLIC EMPLOYERS LABOR
RELATIONS ASSOCIATION IN SUPPORT OF DEFENDANTS-
RESPONDENTS/APPELLEES JOHN BARBISH AND
JAMES POWERS

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I. INTEREST OF AMICUS CURAE

This *Amicus Curiae* brief is being submitted by the Ohio Public Employers Labor Relations Association (OHPELRA) in support of Defendants-Respondents/Appellees John Barbish and James Powers. OHPELRA urges this Court to affirm the decision of the 11th District Court of Appeals.

OHPELRA is an organization comprised of a cross-section of public sector employers at all levels of government, including the state, cities, counties, townships, other agencies of local government, colleges and universities, and public schools throughout the State of Ohio. OHPELRA's members are employees who represent Ohio public employers in labor-relations and human-resources matters, including dealings with labor unions. Members include elected officials, department directors, and human resources professionals. OHPELRA is affiliated with the National Public Employers Labor Relations Association. OHPELRA has a direct interest, on behalf of its members, in the propositions of law presented in this case.

This case presents a significant issue for cities regarding promotions and tenure for the highest ranking positions in police and fire departments as well as the terms for those public employees commonly referred to as "retire/rehire". The outcome of this case can have a significant impact on recruitment and retention in law enforcement which is an even more crucial issue in 2023 than it has been in the past.

II. STATEMENT OF FACTS

The facts in this case largely are not in dispute. OHPELRA adopts the statement of facts set forth in the merit briefs submitted by Appellees. For purposes of this brief, OHPELRA emphasizes the following facts.

James Powers has served as the lawfully appointed Wickliffe Fire Chief since 2009 and has been an employee of the Wickliffe Fire Department for more than 30 years. There is no dispute Chief Powers was appointed as the fire chief based on merit and fitness in accordance with applicable civil service law. Chief Powers attained the age and service to qualify for full retirement under the Ohio Police and Fire Pension Fund (OPFPF). Accordingly, he decided to apply for and begin receiving the retirement benefits to which he was entitled effective January 6, 2020.

In anticipation of his decision to retire, Chief Powers and the City of Wickliffe (City) agreed that Chief Powers could continue working with the City as fire chief while he received his accrued retirement benefits. This is commonly known as a “retire/rehire” and is permissible under Ohio law. R.C. § 742.26. To this end, Chief Powers continued to serve as fire chief on January 7, 2020 just as he had for the past eleven years, and he continues to serve in this capacity. Chief Powers agreed to a reduced salary but all other aspects of his employment and authority as the fire chief remained the same on January 7, 2020 as it had been on January 6, 2020.

III. ARGUMENTS IN OPPOSITION TO PROPOSITIONS OF LAW

Relator/Appellant’s Proposition of Law No. 1

The retirement of a classified civil servant in the promoted ranks of a fire department immediately creates a vacancy, since retirement constitutes a permanent separation of employment regardless of intent, and that vacancy must be filled through the competitive promotional examination process mandated by Ohio law.

In their briefs, Relator/Appellant and *Amici Curiae* Ohio Association of Professional Firefighters (OAPFF) and Fraternal Order of Police (FOP) spend a significant amount of effort explaining the history of civil service law in Ohio as it relates to merit and fitness in promotions. There is no dispute that the Wickliffe fire chief position must be filled based on merit and fitness. The Ohio Constitution addresses this merit and fitness requirement for public employment in Article XV section 10 and Chapter 124 of the Ohio Revised Code codifies this requirement,

however, nothing in this case comes close to violating or jeopardizing this standard as claimed by Appellant and *Amici*. In fact, that is not the real issue in this case. Rather, the issue is whether Chief Powers' decision to retire on January 6, 2020, and his continued service as the Wickliffe fire chief on January 7, 2020 and thereafter constitutes a vacancy within the meaning of R.C. § 124.48. For the reasons stated by the 11th District Court of Appeals, there was no vacancy in the position of Wickliffe fire chief on or about January 6, 2020.

The issues in this case must be viewed consistent with the intent of the merit and fitness requirement set forth in the Ohio Constitution and Chapter 124 of the Ohio Revised Code. There are specific statutes addressing merit and fitness for promotions in police and fire departments. See R.C. §§124.44, 124.45, and 124.48. The statutes for filling vacancies in promoted ranks in fire departments and police departments are similar and cases interpreting one of those statutes is persuasive for how the other statute should be interpreted. See, e.g., *Brickweg v. City of St. Bernard*, 133 Ohio App. 3d 189, (1st Dist. 1999) (noting that the content and design of R.C. §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.)

The purpose of the civil service system is to provide a “stable framework of public offices upon which a workable civil service system may be constructed while avoiding the traditional spoils system ... and ... providing a method of fair employee selection and promotion based upon merit and fitness.” *Hungler v. City of Cincinnati*, 25 Ohio St.3d 338 (1986); *McCarter v. Cincinnati*, 3 Ohio App.3d 244 (1st Dist. 1981). When construing the language of a statute, courts are obligated to avoid absurd or ridiculous results. *Hungler, supra*; *Nozik v. Sanson*, 1996 Ohio App. LEXIS 4665, 1996 WL 613643 (8th Dist. 1996), citing *In re Appeal of Little Printing Co.*,

Inc., 4 Ohio St.3d 214 (1983). It is with these principles in mind that this present case must be reviewed.

A vacancy for purposes of R.C. § 124.44 (police) or § 124.48 (fire) is not defined in the statute. It is not subject to any technical definition. *State ex rel. Hrelac v. Campbell*, 146 Ohio App. 3d 112 (7th Dist. 2001). A vacancy occurs "when a position that has been established and occupied becomes vacant by reason of the death, retirement, dismissal, promotion, or other **permanent** absence of the former incumbent." *State ex rel. Ohio Patrolmen's Benevolent Ass'n v. City of Warren*, 2019-Ohio-5046 (11th Dist. 2019) citing *State ex rel. Mylott v. McKelvey*, 151 Ohio App. 3d 673, 676, 2003-Ohio-328 (7th Dist.2003). (Emphasis added) Based on this definition, a vacancy for purposes of R.C. § 124.48 contemplates a permanent separation from the position. See *McCarter v. Cincinnati*, 3 Ohio App 3d 244, 247 (1st Dist. 2001) ("to create a vacancy pursuant to R.C. 124.44, the absence from the position must be permanent").

In the present case, Chief Powers never vacated the fire chief position in the City of Wickliffe. He served as the fire chief on January 6, 2020, the date his retirement papers were effective and continued to serve as the fire chief on January 7, 2020. His job duties never changed. Most importantly, neither Chief Powers nor the City took any actions to indicate he intended to vacate the fire chief position. There is no evidence that Chief Powers intended to leave his position with the City, either temporarily or permanently or that the City wanted him to leave. To the contrary, the parties to this action all knew what was happening; specifically, Chief Powers would continue serving as the fire chief even after he began to receive his retirement benefits. Appellant complains that the City engaged in some type of secretive process and nobody discussed the retire/rehire plan with it. The facts do not support this argument. To the contrary, Chief Powers'

decision not to vacate the fire chief position was common knowledge and the Wickliffe City Council approved his new salary, to begin on January 7, 2020, by ordinance in an open meeting.

A vacancy for purposes of R.C. § 124.48 requires an action and intent to relinquish the position. *Dore v. Miller*, 2004-Ohio-4870 (9th Dist. 2004), citing *State ex rel. Dwyer v. Middletown* 52 Ohio App. 3d 87, 92 (12th Dist. 1988). In the present case, even though Chief Powers retired “on paper”, he never indicated an intent to relinquish his position with the City. Moreover, the City did not intend for him to leave the fire chief position.

The facts of this case are in contrast to the case of *Dore v. Miller, supra*. In that case, the City of Lorain fire chief, Mr. Dore, retired under the applicable pension rules. In addition to retiring, Mr. Dore was removed from the City’s payroll and ceased receiving pay and benefits. The City appointed an acting fire chief as a result of the retirement. He was off work for approximately 27 days before seeking reinstatement as fire chief. Based on these facts, the Court of Appeals concluded that his actions created a vacancy in the fire chief position within the meaning of Chapter 124 of the Ohio Revised Code. Unlike the Dore case, Chief Powers was never removed from the City’s payroll. There was no separation because he continuously worked as the fire chief.

Appellant and *Amici* set forth several sweeping “what if” scenarios about the absurd consequences they believe will result from the Court of Appeals decision. According to them, a failure to reverse the decision will result in a return to the spoils system and destroy the police and fire service in Ohio. This hyperbole is, at best, misleading and ignores the facts of this case. Moreover, contrary to these claims, the lower courts’ decisions are consistent with the intent of the Ohio civil service system.

Relator and *Amici* argue that upholding the lower courts' decisions will somehow undermine the requirement to promote employees based on merit and fitness. For example, at page 4 of its merit brief, Appellant states "the opinion by the majority of the Eleventh District Court of Appeals' unnecessarily attacks this sacred system of merit by allowing promotional decisions to be made without regard to merit." This entire argument is false. There are no facts in this case that support such a conclusion nor does the lower court's decision open the door for such concerns. A brief review of the facts in this case shows how outlandish this argument is. Chief Powers was lawfully promoted to the position of fire chief in Wickliffe based on merit and fitness. He earned that promotion by going through a promotional process that meets the requirements of Article XV section 10 and Chapter 124 of the Ohio Revised Code. Again, there are no facts that contradict this conclusion. He lawfully held the position for approximately eleven years prior to January 6, 2020. There is no claim Chief Powers became unqualified to be the fire chief on January 7, 2020 and no argument that he had engaged in any misconduct. The merit and fitness that resulted in Chief Powers' promotion to fire chief was still applicable on January 7, 2020. His decision to retire on paper does not change this conclusion. The City's decision to continue employing Chief Powers as the fire chief is consistent with the civil service system because it represents a "stable framework" and a "workable civil service system" that provides a fair employee promotion process based merit and fitness and avoids the spoils system. *Hungler, supra.*

Amici OAPFF and FOP argue that the decision by the Court of Appeals will have a negative impact on law enforcement in Ohio because employees who retire and are rehired in promoted ranks will take away promotion opportunities for others in the police and fire service. Initially, it must be noted that there is no evidence supporting this claim. In fact, the OAPFF and

FOP represent ranked employees such as sergeants, lieutenants, and captains in police and fire departments. It is not unusual for these members of the OAPFF and FOP to retire under OPFPF and keep working in their current position. The applicable statute and rules governing retirements under OPFPF allow employees to receive retirement benefits and continue to work in their regular capacity for their respective police and fire department. R.C. § 742.26. After attaining the age and service requirements, these employees receive their retirement benefits and continue to serve their communities. It is a win/win situation because the employee gets to receive the retirement benefits they have earned while the citizens do not lose the benefit of that employee's experience.

Amici claim upholding the lower court's decision will somehow have a detrimental impact on recruiting and retaining individuals in the police and fire service. Again, this is a "sky is falling" argument that is unsupported by the facts and contrary to law. There is no reason to believe an employee will decide not to pursue a career in law enforcement because one of their supervisors may exercise their right to retire and continue work longer than expected.

The General Assembly has passed laws specifically allowing public employees to retire under the applicable pension system and continue to work, even in the same capacity and for the same public employer. R.C. §§ 742.26 (OPFPF), 145.38 (Ohio Public Employees Retirement System), and 3309.34 (School Employees Retirement System). R.C. § 742.26(C) specifically states "An OPFPF retirant or other system retirant may be employed as a member of a police or fire department." There is no restriction on how they may be employed within such a department. Moreover, it is common practice for ranked officers to retire under OPFPF and continue working in that same capacity while receiving retirement benefits. In the present case, Chief Powers exercised his right under Ohio law to receive his earned retirement benefits and continue to serve

as the fire chief. The City of Wickliffe agreed to this arrangement so it could continue to benefit from having a highly qualified and experienced employee as its fire chief.

Over the past several decades, it has become more difficult for cities to recruit qualified individuals to serve as police officers and firefighters. There are numerous reasons for this reality. The problem has become worse since 2020. One of the ways to address manpower needs has been the approach that allows experienced employees to retire under OPFPF but continue to work in their current capacity in the police or fire service. These are employees who have paid into the retirement system during the course of their 25 to 35 year career and have earned their retirement benefits under the law. Many of these employees still have valuable years of their working life remaining when they meet the requirements for retirement under the law. Instead of making these employees choose between retiring and still serving their community, Ohio law allows them, with the approval of the public employer, to continue working in law enforcement while receiving the retirement benefits they have earned. Therefore, contrary to the OAPFF and FOP claims, the plan employed by Appellees encourages the retention of employees in law enforcement. If Appellant or *Amici* do not like the current system (despite their own members benefiting from it), they should seek changes to the law. It is not for the Court to issue a ruling that would undermine the clear legislative intent to allow employees to receive retirement benefits while still working for their police or fire department.

Appellant argues the Court of Appeals decision somehow requires a determination of the employee's and employer's subjective intent regarding whether a vacancy in a promoted rank has occurred. This is a false claim. All that is required for a court to decide if there is a vacancy within the meaning of R.C. § 124.44 or § 124.48 is a review of the facts to determine if there is a permanent vacancy. A comparison of the facts in this case to the facts in *Dore, supra* illustrate

that this is not difficult for a court to do. In the present case, Chief Powers continued to work as the fire chief without a break in service. He remained on the payroll during the entire time and his job duties never changed. On the other hand, Mr. Dore was removed from the payroll, he stopped working as fire chief, and, at a later date, sought to return to his former position. Subjective intent did not need to be reviewed in either situation.

The dissenting opinion in the 11th District decision asserts that Ohio courts should look to Black's Law Dictionary which defines a vacancy as "The quality, state, or condition of being unoccupied ...The time during which an office, post, or piece of property is unoccupied." This definition supports Appellees' argument in the present case because the facts establish the fire chief position was never unoccupied by Chief Powers. He occupied the fire chief position on January 6, 2020 and continued to do so on January 7, 2020.

Appellants and *Amici* want this Court to rule that Chief Powers' decision to begin receiving retirement benefits but continue to serve as the fire chief as permitted by Ohio law means there was a vacancy pursuant to R.C. § 124.48. This is a ridiculous assertion and would lead to the type of absurd results this Court has said should be avoided. *Hungler, supra; Nozik v. Sanson*, 1996 Ohio App. LEXIS 4665, 1996 WL 613643 (8th Dist. 1996), citing *In re Appeal of Little Printing Co., Inc.*, 4 Ohio St.3d 214 (1983). Chief Powers was never separated from the fire chief position by any logical definition and there was no vacancy. Appellant and *Amici* are asking this Court to create a legal fiction of a separation creating a vacancy that simply does not exist in this case.

Finally, Appellant claims the fact that Powers and the City agreed to new terms and conditions of employment somehow is evidence of a vacancy. The only change in Powers' conditions of employment was he agreed to a lower salary in recognition that he would also be

receiving his retirement benefits. This change is not evidence of a vacancy under any definition. If anything, it is evidence of a good deal for the City and its taxpayers.

Appellant James Powers has been a long-serving member of the Wickliffe fire department. He rose through the ranks based on merit and fitness and eventually was promoted to the position of fire chief. Chief Powers has served in his current position since 2009. On January 6, 2020, Powers decided to exercise his right under Ohio law to retire. Arrangements had been made between Chief Powers and the City of Wickliffe for him to continue to serve as fire chief while receiving retirement benefits under OPFPF. As a result, Chief Powers left work on January 6, 2020 and returned to work on January 7, 2020 in the capacity as fire chief. His authority and responsibilities as the fire chief never changed. The only differences on January 7 were the City re-swore him in as fire chief and he was paid approximately \$10,000 per year less than he had been receiving. In summary, Chief Powers retired on paper and he never vacated the fire chief's position either legally or practically. There was no separation or vacancy in this case for purposes of R.C. § 124.48.

Relator/Appellant's Proposition of Law No. 2

Applicable law concerning the reinstatement of a classified civil servant in the promoted ranks of a fire department permits an individual who voluntarily resigned from the position of fire chief to be reinstated to the same position within one year of that voluntary resignation.

Although there is significant overlap concerning the facts and the law between Proposition 1 and Proposition 2, this issue primarily relates to R.C. § 124.50. This statute is titled "Reinstatement of Firefighter or Police Officer after Injury or Resignation". Appellant argues this statute limits the City of Wickliffe to reinstate Appellee Powers to an entry level firefighter position after January 6, 2020. A review of the language in the statute and the facts of this case do not support this conclusion.

Based on the language in R.C. § 124.50, there are two circumstances when a person who has separated from a police department or fire department is entitled to be reinstated to a position within that department. The first situation involves an injury to the employee that results in a separation. The statute provides a city must reinstate such a former employee within one year of separation if the injury occurred on duty and the city may reinstate within one year if it was an off duty injury. This paragraph is not applicable because Chief Powers did not have an injury.

The second paragraph of this statute states a person who resigns from a position in the police or fire department may apply for reinstatement within one year of the date of resignation. An individual reinstated under this paragraph may only be placed in an entry level police officer or firefighter position. Appellants argue that Appellee Powers could have been employed by the City of Wickliffe after January 6, 2020, but only as an entry level firefighter.

As with the term vacancy in R.C. § 124.48, the term resign is not defined in R.C. § 124.50. Where the legislature fails to define a particular statutory term, courts accord that term its common, everyday meaning. *Pruszyński v. Reeves*, 117 Ohio St.3d 92 (2008). To "resign" is "to give up deliberately; esp.: to renounce (as a right or position) by a formal act" and "to give up one's office [**9] or position: QUIT." *State ex rel. Menzie v. State Teachers Retirement Bd. of Ohio*, 2010-Ohio-3485; 2010 Ohio App. LEXIS 2967 (10th Dist. 2010), citing Webster's Ninth New Collegiate Dictionary (1991). This Court has held that a resignation in the context of R.C. § 124.50 connotes the relinquishment of current as well as future opportunities. *State ex rel. Richard v. Springfield*, 48 Ohio St. 3d 65 (1990).

Based on the definition of resign, the question is whether Chief Powers gave up his fire chief position and relinquished his opportunity to continued service in that position. The facts in this case mandate the conclusion that Chief Powers never resigned from his position. He did not

offer a written or verbal resignation and there was no break in his service as fire chief. In fact, he took no actions indicating his intention to relinquish his position with the City. To the contrary, all facts support the conclusion that he planned, and actually continued, to serve as fire chief just as the City desired. Therefore, R.C. § 124.50 is inapplicable to the present case.

Appellant argues that Chief Powers must have resigned because he began receiving retirement benefits that he had earned. Appellant accuses the Court of Appeals of creating a new status of an “administrative retirement”. As with many other arguments, Appellant is complaining about alleged changes to the law and legal impediments resulting from the 11th District’s decision where no such problems exist.

It is Appellant that is attempting to create legal fictions to support its desired conclusion. The reality is the General Assembly allows members of a police or fire department to receive retirement benefits and continue to work in their same capacity with their current employer, subject to that employer’s agreement. There is nothing in the retire/rehire statutes that requires a fire chief or other ranked employee in a police or fire department to give up their ranked position as a condition of receiving the pension benefits to which they are entitled. The provisions of R.C. § 742.26 represents the General Assembly’s clear intention to allow employees in a police or fire department, regardless of their rank, to receive retirement benefits and continue working in the same capacity subject to the public employer’s approval.

The General Assembly has been clear about the circumstances when a person who has retired and rehired should be treated differently than an employee who has not retired. For example, R.C. § 9.44(C) provides:

An employee who has retired in accordance with the provisions of any retirement plan offered by the state and who is employed by the state or any political subdivision of the state on or after June 24, 1987, shall not have prior service with the state, any political subdivision of the state, or a regional council of government established in

accordance with Chapter 167. of the Revised Code counted for the purpose of computing vacation leave.

This provision is a clear example that the General Assembly can and has passed laws that treat retire/rehire employees differently than employees who have not retired. There is no indication the General Assembly desired to impose any restrictions on a retire/rehire's ability to retain their current position once they start collecting their retirement benefits. In fact, such a conclusion is consistent with one of the benefits of allowing employees to retire and stay in their current job; it keeps qualified people in law enforcement at a time when recruitment and retention are a challenge.

While most employees in the public and private sector must resign to receive retirement benefits, that is not universally the case. Ohio law creates exceptions that allow public employees in the retirement systems of OPFPF, PERS, and SERS to retire but not resign. This is done by employees who have met the age and service requirements under the applicable pension fund but who want to continue in their current position. This requires the public employer to agree to such an arrangement. These provisions allow the employer to keep experienced, effective employees because the employee does not have to choose between receiving retirement benefits and continuing in their current job. In many cases, these employees agree to a reduction in pay because they are receiving their retirement pay in addition to their salary. The Appellant's and *Amici's* arguments in this case, if accepted, would eliminate this statutory right for ranked employees in city police and fire departments. Not only would such a ruling violate the law, it would effectively encourage or require more law enforcement supervisors to retire instead of continuing to provide the benefit of their experience and knowledge to the citizens who rely on these departments for law enforcement and fire protection. Such an outcome is inconsistent with the Appellant's and *Amici's* arguments and contrary to law.

Chief Powers retired on paper. He did this after conferring with the City and in an effort to begin receiving the retirement benefits he had earned. He took no actions indicating he intended to resign or relinquish his position as fire chief. Therefore, Chief Powers did not resign within the meaning of R.C. § 124.50.

IV. CONCLUSION

The decisions rendered by the lower courts are consistent with applicable law and the facts of this case. Those decisions uphold the requirements of Ohio civil service law in a manner that is consistent with law enforcement employees' right to receive their retirement benefits and continue to work for their respective police or fire department in the same capacity as they did before receiving those benefits. Therefore, OHPELRA respectfully requests this Court affirm the decision of the 11th District Court of Appeals.

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CERTIFICATE OF SERVICE

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