The Supreme Court of Ohio

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

MERIT BRIEF OF APPELLEES CITY OF WICKLIFFE, WICKLIFFE CIVIL SERVICE COMMISSION, AND MAYOR JOSEPH SAKACS

Joseph W. Diemert, Jr. (0011573)
Thomas M. Hanculak (0006985)
Mark V. Guidetti (0084175)
COUNSEL OF RECORD
DIEMERT & ASSOCIATES CO., L.P.A.
1360 SOM Center Road
Cleveland, Ohio 44124
(440) 442-6800 (telephone)
(440) 442-0825 (facsimile)
jwdiemert@diemertlaw.com
tmhanculak@aol.com
mguidetti@diemertlaw.com
receptionist@diemertlaw.com
Attorneys for Appellant I.A.F.F. Local 1536, AFL-CIO

John D. Latchney (0046539)
COUNSEL OF RECORD
Hanna, Campbell & Powell, LLP
3737 Embassy Parkway, Suite 100
Akron, Ohio 44333
(330) 670-7602 (telephone)
(330) 670-7458 (facsimile)
jlatchney@hcplaw.net

Attorney for Appellees City of Wickliffe, City of Wickliffe Civil Service Commission, and Mayor Joseph Sakacs

Alexander L. Ewing (0083934)
Charles B. Galvin (0091138)
COUNSEL OF RECORD
FROST BROWN TODD LLC
9277 Centre Pointe Drive, Suite 300
West Chester, Ohio 45069
(513) 870-8242 (telephone)
(513) 870-0999 (facsimile)
aewing@fbtlaw.com
cgalvin@fbtlaw.com

Stuart Torch (0079667)
EMPLOYMENT LAW PARTNERS, LLC
4700 Rockside Road, Suite 530
Independence, Ohio 44131
(216) 382-2501 (telephone)
(216) 381-0250 (facsimile)
stuart@employmentlawpartners.com

Attorneys for Appellee
James Powers

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF FACTS 2

STANDARD OF REVIEW 4

ARGUMENT IN OPPOSITION TO BOTH PROPOSITIONS OF LAW 5

A. Municipal charters generally 5

B. Where there is an exercise of local self-government, a municipal charter provision prevails over a conflicting Ohio Revised Code Section 6

C. The City of Wickliffe's Charter, SECTION VI-3, expressly states that civil service examinations shall not be required for department heads 7

Proposition of Law No. 1: Under Ohio law, a municipal corporation has the legal authority, under R.C. § 124.32(B) and/or R.C. § 145.381, to rehire an employee who retired to obtain vested retirement benefits, then was immediately rehired to the same position. Sherman v. Ohio Pub. Emp. Retirement Sys., 163 Ohio St.3d 258, 2020-Ohio-4960, applied and extended to R.C. § 124.32 9

A. The City had the legal authority and right to rehire Fire Chief Powers after he applied for his vested retirement benefits and separated for a single day as a result 9

B. Under the facts of this case, the Union's public policy arguments are without any substance whatsoever 13

Proposition of Law No. 2: A voluntary retirement for the purpose of obtaining retirement benefits does not constitute a vacancy for competitive examination purposes when there is no absence of any length from the position at issue. 14

A. There was no vacancy in the position of Fire Chief because there was no break-in-service, not even for a day 14

B. *Dore v. Miller* (9th Dist.), 2004-Ohio-4870, is both factually and legally distinguishable 15

CONCLUSION 19

CERTIFICATE OF SERVICE 20

Cases

Argabrite v. Neer, 149 Ohio St.3d 349, 2016-Ohio-8374, ¶14, 75 N.E.3d 161……..2

Beyer v. Donaldson (1st Dist. 1978), 57 Ohio App.2d 24, 27, 384 N.E.2d 712, 714 8

Browne v. Artex Oil Co., 158 Ohio St. 3d 398, 414, 2019-Ohio-4809, ¶61, 144 N.E.3d 378, 394 5

Carroll v. Grafton (9th Dist.), 2014-Ohio-4534, ¶5, 21 N.E.3d 661, 663 7

Cincinnati Bell Tel. Co. (1998), 81 Ohio St.3d 599, 605, 693 N.E.2d 212 6

City of Cleveland ex rel. Neelon v. Locher (1971), 25 Ohio St.2d 49, 51, 266 N.E.2d 831, 833 5

Cleveland Elec. Illuminating Co. v. Cleveland, 167 Ohio St.3d 153, 174–75, 2021-Ohio-4463, 190 N.E.3d 571, 590 6

Dore v. Miller (9th Dist.), 2004-Ohio-4870 ..... 15, 18

Glick v. City of Cleveland (8th Dist.), 2003-Ohio-997, ¶10 7

In re Retaining Vorys, Sater, Seymour & Pease LLP (7th Dist.), 192 Ohio App.3d 357, 364, 2011 Ohio 640, ¶21 9

Jacomin v. Cleveland (8th Dist. 1990), 70 Ohio App.3d 163, 590 N.E.2d 846 7

Joyce v. Gen. Motors Corp. (1990), 49 Ohio St.3d 93, 96, 551 N.E.2d 172 5

Kuivila v. City of Newton Falls (11th Dist.), 2017-Ohio-7957, ¶34, 98 N.E.3d 764, 773 6

Murphy v. Reynoldsburg (1992), 65 Ohio St.3d 356, 360, 604 N.E.2d 138…..…….4-5

Salloum v. Falkowski, 151 Ohio St.3d 531, 2017-Ohio-8722, ¶12, 90 N.E.3d 918 5

State ex rel. Int'l Assoc. of Fire Fighters v. Barbish (11th Dist.), 2022-Ohio-2201, 192 N.E.3d 548 4

Sherman v. Ohio Pub. Emp. Retirement Sys., 163 Ohio St.3d 258, 2020-Ohio-4960 ..... 2, 9

State ex rel. Bardo v. Lyndhurst, 37 Ohio St.3d 106, 108–109, 524 N.E.2d 447 ..... 6, 7

State ex rel. Board of Educ. v. Ohio State Bd. of Educ. (10th Dist. 2000), 139 Ohio App.3d 257, 262 10

State ex rel. Commt. for the Charter Amendment, City Trash Collection v. Westlake, 97 Ohio St.3d 100, 2002-Ohio-5302, ¶31, 776 N.E.2d 1041 6

State ex rel. Crabtree v. Franklin County Bd. of Health (1997), 77 Ohio St.3d 247, 249 10

State ex rel. Dreamer v. Mason, 129 Ohio St.3d 94, 98, 2011-Ohio-2318, ¶18, fn. 2, 950 N.E.2d 519, 522 5

State ex rel. Dwyer v. Middletown (12th Dist. 1988), 52 Ohio App.3d 87, 92, 557 N.E.2d 788 ..... 15, 17

State ex rel. Fenley v. Kyger (1995), 72 Ohio St.3d 164, 165, 648 N.E.2d 493, 494 6

State ex rel. Frankenstein v. Hillenbrand (1919), 100 Ohio St. 339, 343, 126 N.E. 309 7

State ex rel. Hackley v. Edmonds (1948), 150 Ohio St. 203, 216, 80 N.E.2d 769 7

State ex rel. Hipp v. N. Canton, 75 Ohio St.3d 221, 224, 1996-Ohio-225, 661 N.E.2d 1090, 1093 7

State ex rel. Int'l Assoc. of Fire Fighters v. Barbish (11th Dist.), 2022-Ohio-2201, 192 N.E.3d 548 ..... 14, 15

State ex rel. Lightfield v. Indian Hill (1994), 69 Ohio St.3d 441, 442, 633 N.E.2d 524 7

State ex rel. Mathews v. Alliance (5th Dist.), No. 1995CA00160, 1995 WL 768511, *1-2 15

State ex rel. Meyers v. Columbus (1995), 71 Ohio St.3d 603, 606, 646 N.E.2d 173 7

State ex rel. Minor v. Eschen (1995), 74 Ohio St.3d 134, 138, 656 N.E.2d 940 ..... 5, 6

State ex rel. Paluf v. Feneli (1994), 69 Ohio St.3d 138, 142, 630 N.E.2d 708, 711 6

State ex rel. Regetz v. Cleveland Civ. Serv. Comm. (1995), 72 Ohio St.3d 167, 169, 648 N.E.2d 495, 497 7

State ex rel. Richard v. City of Springfield (1990), 48 Ohio St.3d 65, 549 N.E.2d 164, 166 ..... 14, 15

State ex rel. Schroeder v. Cleveland, 150 Ohio St.3d 135, 135, 2016-Ohio-8105, ¶13, 80 N.E.3d 417, 418 8

State v. Rue, 164 Ohio St.3d 270, 290, 2020-Ohio-6706, ¶86, 172 N.E.3d 917, 934 5

Therrien v. City of Perrysburg (6th Dist. Dec. 22, 2000), No. WD-00-017, 2000 WL 1867466, at *1 8

Statutes

R.C. Ch. 124 14

R.C. § 124.11 2

R.C. § 124.32 9

R.C. § 124.32(B) 8-10

R.C. § 124.45 ..... 1, 7, 8, 12

R.C. § 145.38(B)(1) 3

R.C. § 145.381 ..... 2, 8, 12

R.C. § 145.381(B) 12

R.C. Chapter 4117 10

R.C. § 4117.08(C) 10, 11

Rules

Ohio Civil Rule 21……2

Ohio Civil Rule 25(D)……2

Civ.R. 44.1(A)……..……..8

Civ.R. 44.1(A)(2)……..…….8

INTRODUCTION

Sometimes we miss the forest for the trees. That's the case here. Indeed, during the research and preparation phase of the briefing, counsel had occasion to review the City of Wickliffe Charter. It was discovered that the Charter, in particular Section VI-3, provides that civil service examinations "shall not be required" for department head appointments (like the Fire Chief who is head of the Fire Department). Given that the Charter provision directly conflicts with the requirement in R.C. §124.45 that vacancies above the rank of regular firefighter shall be filed by competitive promotional examinations, the two provisions are irreconcilable and, based upon long-standing Ohio Supreme Court precedent, the Charter controls over that conflicting statute.

Relator's mandamus petition and request for a mandatory injunction are predicated upon a perceived requirement that the Wickliffe Civil Service Commission ("Commission") be compelled to conduct a civil service promotional examination due to a supposed "vacancy" in the Fire Chief's position; in other words, Relator claims that the Commission has a clear legal duty to do so. However, as explained in further detail hereafter, Wickliffe Charter Section VI-3 states that the Commission shall not be required to conduct such an examination when the appointment of a department head is involved. As such, the Commission does not have a clear legal duty to do so.

Beyond this threshold, and arguably insurmountable, barrier to relief in mandamus and/or the issuance of a mandatory injunction, the well-reasoned decision of the court of appeals should be affirmed because the law was properly applied. When passing R.C. § 124.45, the General Assembly must have been contemplating permanent vacancies, not those for which the appointing authority permits an employee to resign-retire, then return to the same position.

STATEMENT OF FACTS/CASE

Fire Chief James Powers has enjoyed a lengthy career of public service to the City of Wickliffe. *Affidavit of James Powers*, ¶¶ 2-4. He has been a member of the City of Wickliffe Fire Department for over thirty (30) years. *Id.* at ¶2. Following 16 years of exceptional service as a lieutenant in the Department, Powers was promoted to Fire Chief in 2009 – a position which he holds to this day. *Id.* at ¶¶ 3-4.

Fire Chief is a classified civil service position, subject to State and local Civil Service Commission rules and regulations. *See* R.C. § 124.11; City of Wickliffe Civil Service Rules and Regulations (hereafter "Wickliffe Civil Service Rules"), attached as "Exhibit 1" to the *Powers Affidavit*), Rule II; Joint Stipulations of Fact (hereinafter, "*Joint Stip*."), ¶¶ 4-5.

Powers desired to begin receiving the State pension he had earned from the Ohio Police & Fire Pension Fund over his three decades of public service in 2020. *Powers Aff*., ¶6. He met with then[1] City of Wickliffe Mayor John Barbish ("Mayor Barbish"), in November 2019 to discuss proceeding with an administrative "retire/rehire" of Powers in the role of Fire Chief. *Id.*

As this Court has observed, a "retire/rehire" is a common process whereby the requisite paperwork is filed with the Pension Fund indicating a public employee has retired from his/her job in order to receive the employee's accrued pension. *See, e.g., Sherman v. Ohio Pub. Emp. Retirement Sys.*, 163 Ohio St.3d 258, 2020-Ohio-4960, ¶10 (subject to R.C. § 145.381, retirees

[1] Ohio Civil Rule 25(D) provides "Public officers; death or separation from office, (1) When a public officer is a party to an action in the public officer's official capacity and during its pendency *** ceases to hold office, *** **the public officer's successor is automatically substituted as a party**." To the extent that Relator seeks extraordinary relief in mandamus and for a mandatory injunction, City of Wickliffe Mayor Joseph Sakacs (who took office January 1, 2022), should have been substituted as a Respondent for former Mayor Barbish. See also Ohio Civil Rule 21, "Parties may be dropped or added by order of the court [and on] its own initiative at any stage of the action."

receiving a pension are expressly allowed to be reemployed by a public employer pursuant to R.C. § 145.38(B)(1)).

The City agreed to assist Powers with the retire/rehire. *Powers Aff.*, ¶9. Powers, Mayor Barbish and all other involved City officials were always aware that Powers' "retirement" was simply a matter of bureaucratic paperwork, and Powers would not actually be resigning from his role as Fire Chief and there would be no gap in this service in the position. *Id.*

On January 6, 2020 the Chief of Division of Fire for the City, Mr. Powers, separated from employment with the City though his retirement. *Joint Stip*. ¶8. The City rehired Mr. Powers as Chief of Division of Fire for the City on January 7. *Id*. at ¶11. The City's decision to allow Mr. Powers to retire and be immediately rehired was not made based on any alleged or actual delinquency or misconduct on the part of Mr. Powers; nor due to any alleged or actual injury or physical or psychiatric disability of Mr. Powers. *Id*. at ¶9.

On February 10, 2020, the Mayor presented emergency Ordinance 2020-10 to City Council. *Joint Stip*. ¶16. Emergency Ordinance 2020-10, titled "An Ordinance Authorizing Compensation for the position of Chief of Fire of the City of Wickliffe, Ohio; and Declaring an Emergency," authorized the Finance Director to "compensate the person performing the duties of Chief of Fire" at the rate of $97,965.00 per year. *Id*. at ¶17. Council adopted Emergency Ordinance 2020-10 at its February 10, 2020 Council meeting by a vote of 6-0. *Id*. at ¶21.

The Union initiated this case on September 21, 2020, when it filed its Verified Complaint for Declaratory Judgment, Permanent Injunction & Petition for Writ of Mandamus. T.d. 2. Appellee Powers filed his Motion to Intervene, which the trial court granted. T.d. 19, 24.

After the Union filed its First Amended Verified Complaint on January 22, 2021 (T.d. 33), the Wickliffe Appellees filed another Motion for Partial Judgment on the Pleadings on

February 5, 2021. T.d. 37. The Parties submitted Joint Stipulations of Fact on February 26, 2021, and then filed cross motions for summary judgment on April 5, 2021. T.d. 40, 42, 43, 44.

After full briefing on all the pending motions, the trial court granted the Wickliffe Appellees' Motion for Partial Judgment on the Pleadings in part on June 14, 2021, holding that any determinations on Appellant's other claims were more appropriately addressed in response to the summary judgment motions. T.d. 59. The trial court then addressed the Parties cross motions for summary judgment. The trial court found that Powers "never stopped working and there was no real break in service." T.d. 60 at 5. "Essentially he was redeeming his vested benefits in the Ohio Police and Fire Pension fund. He had participated in this fund for thirty years and had vested statutory benefits that he was entitled to redeem. The benefits cannot be redeemed without the submission of a retirement application. **There is no evidence this was not correctly done**." *Id*. (emphasis added). The trial court then granted Appellees' motions for summary judgment, and denied Appellant's motion for summary judgment, on August 26, giving rise to the underlying appeal. T.d. 60.

After full briefing and oral argument, the Eleventh District Court of Appeals issued its decision affirming the trial court's decision on June 27, 2022. *See State ex rel. Int'l Assoc. of Fire Fighters v. Barbish* (11th Dist.), 2022-Ohio-2201, 192 N.E.3d 548.

STANDARD OF REVIEW

The Court's review is *de novo*, and the Court must "consider the evidence as if for the first time." *Argabrite v. Neer*, 149 Ohio St.3d 349, 2016-Ohio-8374, ¶14, 75 N.E.3d 161. For this reason, the Court conducts its' own examination of the record. *Murphy v. Reynoldsburg*, 65

Ohio St.3d 356, 360, 604 N.E.2d 138 (1992) . Correlatively, the Court's "plenary authority[2] in extraordinary actions permits [the Court] to consider the instant appeal as if it had been originally filed in this court." *State ex rel. Dreamer v. Mason*, 129 Ohio St.3d 94, 98, 2011-Ohio-2318, ¶18, fn. 2, 950 N.E.2d 519, 522, citing *State ex rel. Minor v. Eschen* (1995), 74 Ohio St.3d 134, 138, 656 N.E.2d 940. However, an appellate court reviews the inferior court's judgment, not its reasoning, *Browne v. Artex Oil Co.*, 158 Ohio St. 3d 398, 414, 2019-Ohio-4809, ¶61, 144 N.E.3d 378, 394, and the Court has consistently held that a "reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof." *Id*. at 414, citing *Salloum v. Falkowski*, 151 Ohio St.3d 531, 2017-Ohio-8722, ¶12, 90 N.E.3d 918, quoting *Joyce v. Gen. Motors Corp.* (1990), 49 Ohio St.3d 93, 96, 551 N.E.2d 172 ; *State v. Rue*, 164 Ohio St.3d 270, 290, 2020-Ohio-6706, ¶86, 172 N.E.3d 917, 934 (same).

In the case *sub judice*, both the common pleas court and court of appeals reached the right conclusion. Nonetheless, the City of Wickliffe Respondents present an alternative, and wholly dispositive, basis for affirmation of their decisions.

ARGUMENT IN OPPOSITION TO BOTH PROPOSITIONS OF LAW

City of Wickliffe Charter Section VI-3 directly contradicts the Union's assertion that a civil service promotional examination was required to be conducted by the City.

A. Municipal charters generally.

A "municipal charter is basically the constitution of the municipality." *City of Cleveland ex rel. Neelon v. Locher* (1971), 25 Ohio St.2d 49, 51, 266 N.E.2d 831, 833 . The Home Rule

---

[2] The "court's plenary authority generally refers to our ability to address the merits of a writ case without the necessity of a remand if the court of appeals erred in some regard[,]" *State ex rel. Dreamer*, 129 Ohio St.3d at 98, citing *State ex rel. Natl. Elec. Contrs. Assn., Ohio Conf. v. Ohio Bur. of Emp. Servs*. (2000), 88 Ohio St.3d 577, 579, 728 N.E.2d 395, concluding that no remand was warranted here, and choosing to invoke this court's plenary authority to resolve the issue that was decided in the court of appeals in this writ case.

Amendment to the Ohio Constitution governs the respective roles of the state and its municipalities. Section 3, Article XVIII, Ohio Constitution; *State ex rel. Fenley v. Kyger* (1995), 72 Ohio St.3d 164, 165, 648 N.E.2d 493, 494. "[T]he intention of the Home Rule Amendment was to eliminate statutory control over municipalities by the General Assembly." *Cincinnati Bell Tel. Co.* (1998), 81 Ohio St.3d 599, 605, 693 N.E.2d 212. Accordingly, "[b]y reason of Sections 3 and 7 of Article XVIII of the Ohio Constitution, a charter city has all powers of local self-government *except to the extent that those powers are taken from it or limited by other provisions of the Constitution* or by statutory limitations on the powers of the municipality which the Constitution has authorized the General Assembly to impose." *Cleveland Elec. Illuminating Co. v. Cleveland*, 167 Ohio St.3d 153, 174–75, 2021-Ohio-4463, 190 N.E.3d 571, 590, citing *State ex rel. Commt. for the Charter Amendment, City Trash Collection v. Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, ¶31, 776 N.E.2d 1041 (emphasis added in *Westlake*). "'Municipal charters are to be so construed as to give effect to all separate provisions and to harmonize them with statutory provisions whenever possible. In the absence of circumstances requiring otherwise, language used in a municipal charter is to be construed according to its ordinary and common usage.'" *State ex rel. Minor*, 74 Ohio St.3d at 138, citing *State ex rel. Paluf v. Feneli* (1994), 69 Ohio St.3d 138, 142, 630 N.E.2d 708, 711, quoting 1 Gotherman & Babbit, Ohio Municipal Law (2 Ed.1992) 55, Section T 4.39.

B. Where there is an exercise of local self-government, a municipal charter provision prevails over a conflicting Ohio Revised Code Section.

"The general rule is that in matters of local self-government, if there is a conflict between a charter provision and a statute, the charter provision prevails." *Kuivila v. City of Newton Falls* (11th Dist.), 2017-Ohio-7957, ¶34, 98 N.E.3d 764, 773, citing *State ex rel. Bardo v. Lyndhurst*, 37 Ohio St.3d 106, 108–109, 524 N.E.2d 447 (1988). Stated another way, "[w]hen a

municipality exercises its home rule powers on a matter of local self-government, conflicting charter provisions prevail over parallel state laws. *Carroll v. Grafton* (9th Dist.), 2014-Ohio-4534, ¶5, 21 N.E.3d 661, 663, citing *State ex rel. Lightfield v. Indian Hill* (1994), 69 Ohio St.3d 441, 442, 633 N.E.2d 524. "[C]harter provisions and civil service regulations promulgated pursuant to home rule authority will prevail over conflicting state civil service provisions; general civil service laws will apply [only] where the charter is silent or has adopted the state statute." *Glick v. City of Cleveland* (8th Dist.), 2003-Ohio-997, ¶10, citing *Jacomin v. Cleveland* (8th Dist. 1990), 70 Ohio App.3d 163, 590 N.E.2d 846.

This Court has held that the "regulation of city civil service is within the powers of local self-government."[3] *State ex rel. Meyers v. Columbus* (1995), 71 Ohio St.3d 603, 606, 646 N.E.2d 173. The appointment of officers within a city constitutes an exercise of local self-government within the meaning of the Home Rule. *Id.*; see also *State ex rel. Hipp v. N. Canton*, 75 Ohio St.3d 221, 224, 1996-Ohio-225, 661 N.E.2d 1090, 1093; *State ex rel. Regetz v. Cleveland Civ. Serv. Comm.* (1995), 72 Ohio St.3d 167, 169, 648 N.E.2d 495, 497, *State ex rel. Bardo*, 37 Ohio St.3d at 108–09.

C. The City of Wickliffe's Charter, SECTION VI-3, expressly states that civil service examinations shall not be required for department heads.

The Union has alleged that pursuant to R.C. § 124.45, the City and/or its' Civil Service Commission must conduct a civil service promotional examination for the position of Fire Chief, who is head of the Fire Department. However, the City's Charter contains a provision which

[3] It is well settled that the terms and conditions of employment for municipal officers are purely a local matter. See, *e.g.*, *State ex rel. Frankenstein v. Hillenbrand* (1919), 100 Ohio St. 339, 343, 126 N.E. 309 (qualification, duties, and manner of selection of municipal officers come within the purview of local self-government.); *State ex rel. Hackley v. Edmonds* (1948), 150 Ohio St. 203, 216, 80 N.E.2d 769 (selection, compensation, and purely local duties of municipal officers do not conflict with any general problem or concern of the state at large).

directly conflicts with R.C. § 124.45[4] and, therefore, takes precedence over that conflicting Ohio Revised Code Section.

The City's Charter[5], SECTION VI-3, entitled "DUTIES" provides that the "Civil Service examination **shall *not* be required for the appointment of** any member of a board or commission, or **any head of a department**, or any assistant to the Director of Law or to the Director of Finance, or any secretary to the Mayor or to **the head of any department**, **or any officer** or employee **appointed by the Council**, **or for appointment to any other office or position requiring peculiar and exceptional qualifications**." [6] (Emphasis added).

That Charter provision directly contradicts Appellant's argument that an appointment to the position of Fire Chief, a department head, is subject to a required/mandatory civil service promotional examination. As such, the Union cannot establish the "clear legal duty" element of a mandamus action[7] where the City's Charter clearly affords discretion to the Civil Service Commission as to whether a promotion examination is necessary for a department head.

---

[4] That Section provides, in relevant part, that "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). Wickliffe Charter SECTION VI-3 says exactly the opposite regarding department heads like the Fire Chief, *i.e.* "**shall *not* be required.**"

[5] Civ.R. 44.1(A) provides, in material part, that: "(1) Judicial notice shall be taken of the *** public statutory law of this state." The rule includes judicial notice of "constitutions, municipal ordinances, administrative regulations and local rules of court. Civ.R. 44.1(A)(2)." *Therrien v. City of Perrysburg* (6th Dist. Dec. 22, 2000), No. WD-00-017, 2000 WL 1867466, at *1 (taking judicial notice of city's charter); *Beyer v. Donaldson* (1st Dist. 1978), 57 Ohio App.2d 24, 27, 384 N.E.2d 712, 714 (noting trial court took judicial notice of the provisions of the Charter of the city of Cincinnati).

[6] See: https://codelibrary.amlegal.com/codes/wickliffe/latest/wickliffe_oh/0-0-0-1393

[7] *State ex rel. Schroeder v. Cleveland*, 150 Ohio St.3d 135, 135, 2016-Ohio-8105, ¶13, 80 N.E.3d 417, 418.

Proposition of Law No. 1: Under Ohio law, a municipal corporation has the legal authority, under R.C. § 124.32(B) and/or R.C. § 145.381, to rehire an employee who retired to obtain vested retirement benefits, then was immediately rehired to the same position. *Sherman v. Ohio Pub. Emp. Retirement Sys.*, 163 Ohio St.3d 258, 2020-Ohio-4960, applied and extended to R.C. § 124.32.

A. The City had the legal authority and right to rehire Fire Chief Powers after he applied for his vested retirement benefits and separated for a single day as a result.

The Union's entire case starts from the flawed premise that the City had no right to rehire Fire Chief Powers because his one day "retirement" to receive pension benefits "automatically" created a vacancy, which in turn triggered a legal duty for the Commission to conduct a civil service examination to replace Fire Chief Powers. There are three separate legal sources of the City's discretionary right to rehire Fire Chief Powers after he "retired" for a single day.

1. R.C. § 124.32(B) is the enabling legislation which authorizes a city to exercise its' discretion to reinstate (within one year), an employee who has previously separated.

First, while the City was certainly not required to reinstate Fire Chief Powers, under the enabling statute, R.C. § 124.32(B), cities were given the legal authority to do so. Indeed, R.C. § 124.32(B), which provides in relevant part, "***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*[8] *be reinstated*** within one year from the date ***of that separation*** to a vacancy ***in the same office***…," establishes that "any person" (which would include Fire Chief Powers), may be reinstated into the same office after a separation. Excepting those employees who separated due to delinquency, misconduct, or disability (none of which are applicable here),

[8] "The statutory use of the word 'may' is generally construed to make the provision in which it is contained **optional, permissive, or discretionary**, at least where there is nothing in the language or in the sense or policy of the provision to require an unusual interpretation." *In re Retaining Vorys, Sater, Seymour & Pease LLP* (7th Dist.), 192 Ohio App.3d 357, 364, 2011 Ohio 640, ¶21 (emphasis added).

there are no statutory limitations placed on a political subdivision's ability to reinstate or rehire an employee within one (1) year.

The Union stipulated that "The City's decision to allow Mr. Powers to retire and be immediately rehired was not made based on any alleged or actual delinquency or misconduct on the part of Mr. Powers; nor due to any alleged or actual injury or physical or psychiatric disability of Mr. Powers." *Joint Stip*. ¶9. Thus, there is no question that Fire Chief James Powers was eligible for reinstatement and the aforementioned conditions precedent do not apply.

When it comes to matters where a political subdivision has discretion, such as that afforded by R.C. § 124.32(B), the exercise of that discretion may not be controlled or limited via a mandamus petition. "The extraordinary writ of mandamus cannot be used to control the exercise of administrative or legislative discretion." *State ex rel. Crabtree v. Franklin County Bd. of Health* (1997), 77 Ohio St.3d 247, 249. Absent an abuse of discretion, mandamus cannot compel a public official to act in a certain way on a discretionary matter. *State ex rel. Lee v. Montgomery* (2000), 88 Ohio St.3d 233, 235; accord: *State ex rel. Board of Educ. v. Ohio State Bd. of Educ.* (10th Dist. 2000), 139 Ohio App.3d 257, 262. Thus, the Union cannot, via a mandamus petition, force the City to exercise its' discretion in a different fashion.

2. R.C. § 4117.08(C) generally, and specifically CBA ARTICLE 5, Section 5.01, entitled "Management Rights," provides the City with the exclusive right to retain employees and manager the work force, which would include the retire/rehire of Fire Chief Powers.

In its' Brief, the Union completely ignores the collective bargaining agreement and R.C. Chapter 4117, which gives the City general authority to take the reinstatement action. Ohio Rev. Code § 4117.08(C) provides that:

> Unless a public employer agrees otherwise in a collective bargaining agreement, **nothing** in Chapter 4117. of the Revised Code **impairs the right and responsibility of each public employer to**:

> (1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;
>
> (2) Direct, supervise, evaluate, or hire employees;
>
> (3) Maintain and improve the efficiency and effectiveness of governmental operations;
>
> (4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
>
> (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or **retain employees**;
>
> (6) Determine the adequacy of the work force;
>
> (7) Determine the overall mission of the employer as a unit of government;
> (8) Effectively **manage the work force**;
>
> (9) Take actions to carry out the mission of the public employer as a governmental unit.

(Emphasis added). Consistent with R.C. § 4117.08(C), that's exactly what the collective bargaining agreement between Appellant and the City says, in ARTICLE 5, entitled MANAGEMENT RIGHTS. Section 5.01 provides, in relevant part:

> Not by limitation of the following paragraph, but to only indicate the type of matters or rights which belong to and are inherent to the Employer, **the Employer retains the right to**: *** 5) make any and all rules and regulations; 6) determine the work assignments of its employees; 7) determine the basis for selection, **retention**, and promotion **of employees** to or for positions **not within the Bargaining Unit** established by this Agreement[.]

Joint Stip. ¶¶ 5-6 (emphasis added). The Union stipulated that the Chief of the Division of Fire is not a "bargaining unit" employee subject to the CBA. *Id*.

Under both R.C. § 124.32(B) and Section 5.01(7), the City had both the discretion and the right to rehire James Powers after he "retired" without any break in service. The Union offers nothing of substance to the contrary.

3. Generally, R.C. § 145.381(B) directly contradicts the Union's argument that a retirement "automatically" creates a permanent vacancy, which in turn requires a civil service examination be conducted.

R.C. § 145.381 also rebuts Appellant's argument that a retire/rehire "automatically" creates a permanent vacancy subject to a subsequent civil service examination process. Indeed, R.C. § 145.381 expressly contemplates the retire/rehire scenario and provides, in relevant part:

> (B) A board, commission, or legislative authority that proposes to continue the employment as a reemployed retirant or rehire as a reemployed retirant to the same position an individual described in division (A) of this section shall do both of the following in accordance with rules adopted under division (C) of this section:
>
> > (1) Not less than sixty days before the employment as a reemployed retirant is to begin, give public notice that the person is or will be retired and is seeking employment with the public employer;
> >
> > (2) Between fifteen and thirty days before the employment as a reemployed retirant is to begin and after complying with division (B)(1) of this section, hold a public meeting on the issue of the person being employed by the public employer.

If the Union's interpretation of R.C. § 124.45 was correct, *i.e.* that a retirement (whether for one day, sixty days, or somewhere in-between), "automatically" creates a permanent vacancy thereby triggering the need for the civil service promotional process, then R.C. § 145.381(B) could never apply to any firefighter, thereby treating them differently than any other municipal employee in the State of Ohio. In the Union's view, a municipality should have to go through the process set forth in R.C. § 145.381 while simultaneously conducting a wholly futile civil service examination process which would not lead to anyone being promoted. That makes no sense.

B. Under the facts of this case, the Union's public policy arguments are without any substance whatsoever.

At page 4, the Union argues that the Eleventh District's decision "unnecessarily attacks this sacred system of merit by allowing promotional decisions to be made without regard to merit." But James Powers wasn't being "promoted" to Fire Chief—he already was the Fire Chief—by virtue of merit—and had been since 2009.

At page 5, the Union talks about the personal safety of classified civil servants being ensured by commanding officers having been selected based on merit and fitness. Even setting aside the fact that that's how Fire Chief Powers was originally selected, how would anyone's "personal safety" be jeopardized by the same Fire Chief, who had held the position since 2009, retiring one day and being rehired the next?

At page 5, the Union further argues that "the functioning of safety forces throughout the state will be jeopardized by politics and favoritism into the hiring and promotional process." But, Fire Chief Powers was already in that position and had been since 2009. How does his retire/rehire, without any break-in-service, have anything to do with politics or favoritism?

At page 8, the Union notes that the civil service system is the foundation for merit-based service where "employees are to be judged solely on how well they can do the job at the time of appointment." There's no one at the City who could do the job of Fire Chief better than Powers, which is why the City wanted to keep him in that position.[9]

---

[9] At page 10, in what arguably is a *non sequitur* relative to the issue under discussion, the Union also suggests that a temporary or administrative retirement would "burden" an "already stressed pension system" by "depleting pension funds more rapidly." Beyond the speculative nature of that assertion, which isn't part of this lawsuit, where is the evidence in the record that this practice affects a large numbers of employees in Ohio? And, if this is a problem in Ohio, it would be a matter for the General Assembly to address if they wanted to prevent the practice and amend, for example, R.C. § 145.381.

Proposition of Law No. 2: A voluntary retirement for the purpose of obtaining retirement benefits does not constitute a vacancy for competitive examination purposes when there is no absence of any length from the position at issue.

The Union argues at page 4 that "whenever a separation of service occurs for a classified civil servant, whether through retirement or otherwise, Ohio law requires that the vacancy be declared…." The problem with that statement is that there is nothing in the Ohio Revised Code that actually says that. It's why the Courts of Appeal have had to resort to statutory interpretation.

A. There was no vacancy in the position of Fire Chief because there was no break-in-service, not even for a day.

An employee's voluntary separation or resignation from employment may create a vacancy under R.C. Ch. 124, but the permanence element must still be present. This Court discussed this issue in *State ex rel. Richard v. City of Springfield* (1990), 48 Ohio St.3d 65, 549 N.E.2d 164, 166:

> "Separation" means "termination of a contractual relationship (as employment or military service.)" Webster's Ninth New Collegiate Dictionary (1984) 1073. On the other hand, "to resign" is to "give up deliberately; *esp:* to renounce (as a right or position by a formal act." Webster's Ninth New Collegiate Dictionary (1984) 1003. A "separation" is an ending of a status. . . . "Resignation," in accordance with the foregoing definition and in the context of R.C. [Ch. 124], is a more radical change in circumstances connoting the relinquishment of current as well as future opportunities.

But as the Eleventh District found, "[i]n the present matter, there was no such departure, since there is no dispute that Powers retired but was reappointed to his office the next day." *State ex rel. Int'l Assoc. of Fire Fighters v. Barbish* at ¶24. "[T]emporary separations from a position where it is evident the individual was not intending to leave that position have not been found to create a vacancy." *Id.* at ¶24, citing *State ex rel. Mathews v. Alliance* (5th Dist.), No.

1995CA00160, 1995 WL 768511, *1-2. Here, there was not even a *temporary* separation of Powers from his position as Fire Chief.

The Eleventh District agreed, explaining that "[a]n act of resignation requires both an intent to resign and an act of relinquishment." *State ex rel. Int'l Assoc. of Fire Fighters v. Barbish* at ¶28, citing *Dore* at ¶12; see also *State ex rel. Dwyer v. Middletown* (12th Dist. 1988), 52 Ohio App.3d 87, 92, 557 N.E.2d 788, mot. to cert. over'd 39 Ohio St.3d 730, 534 N.E.2d 357 (holding that "an effective resignation requires two distinct components: first, an intention to resign, and, second, an act of relinquishment."). "Resignation has been viewed in the context of R.C. 124.50 as a 'more radical change in circumstances' than a separation from employment, 'connoting the relinquishment of current as well as future opportunities.'" *State ex rel. Int'l Assoc. of Fire Fighters v. Barbish* at ¶28, citing *State ex rel. Richard*, 48 Ohio St.3d at 66.

B. *Dore v. Miller* (9th Dist.), 2004-Ohio-4870, is both factually and legally distinguishable.

Throughout these proceedings, the Union has relied primarily upon the Ninth District's decision *Dore v. Miller* (9th Dist.), 2004-Ohio-4870, and argues that the *Dore* case stands for the proposition that when a fire chief retires and then seeks rehire, a permanent vacancy occurs. However, the case is easily distinguishable on both the facts and law.

As a threshold matter, the *Dore* case is legally distinguishable. Indeed, the *Dore* court did not interpret, analyze, consider, or even mention either R.C. § 124.32(B) or R.C. § 145.381(B), which both specifically address reinstatement. Rather, the *Dore* court was interpreting R.C. § 124.50, entitled "Reinstatement after separation due to injury or physical disability incurred in the performance of duty." That Section provides, in part, as follows:

> Any person holding an office or position under the classified service in a fire department … **who is separated** therefrom due to injury or physical disability incurred in the performance of duty shall be reinstated

> immediately, or one suffering injury or physical disability incurred other than in the performance of duty may be reinstated, **upon filing with the chief of the fire department …, a written application for reinstatement**, to the office or position held at the time of such separation, after passing a physical examination showing that the person has recovered from the injury or other physical disability. The physical examination shall be made by a licensed physician, a physician assistant, a clinical nurse specialist, a certified nurse practitioner, or a certified nurse-midwife within two weeks after application for reinstatement has been made, provided such application for reinstatement is filed within five years from the date of separation from the department, and further provided that such application shall not be filed after the date of service eligibility retirement. The physician, physician assistant, clinical nurse specialist, certified nurse practitioner, or certified nurse-midwife shall be designated by the firefighters' pension board or the police officers' pension board and shall complete any written documentation of the physical examination.
>
> Any person holding an office or position under the classified service in a fire department …, who **resigns** therefrom, may be reinstated to the rank of firefighter …, **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** …, and upon passing a physical examination disclosing that the person is physically fit to perform the duties of the office of firefighter …, 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).

Clearly, there was no separation in this case based upon an injury or disability. *Joint Stip*. ¶9. Thus, the provision set forth in the first paragraph of R.C. § 124.50 simply does not apply.

When an injury or disability is involved, the General Assembly used the much broader phrase "who is separated," which can encompass a number of different methods by which an employee leaves public employment. In contrast, the second paragraph of R.C. § 124.50 uses the much narrower phrase "who resigns," which suggests a limited circumstance—voluntary

resignation. Had the General Assembly intended to include retirements, they could have instead used the broader term "separation" in the second paragraph. They didn't.

And, applying the "resigns" term in R.C. § 124.50 to this case, it's clear that Fire Chief Powers never did so. Indeed, Black's Law Dictionary (5th Ed.1979) 1177, defines a resignation as a formal renouncement or relinquishment of office made **with the intention** of relinquishing the office and accompanied by an act of relinquishment. This definition suggests an effective resignation requires two distinct components: first, an intention to resign, and second, an act of relinquishment. *State ex rel. Dwyer*, 52 Ohio App.3d at 92. There is no dispute that Fire Chief Powers never intended to relinquish the position, nor did he actually do so. Again, there was no break in service whatsoever.

For the statute to make sense, it presupposes that there has been a resignation accompanied by an actual separation from employment or break-in-service such that the incumbent no longer occupies the office or position. That's not the case here. Fire Chief Powers never left the employ of the City, not even for a day.

Furthermore, it's not clear that R.C. § 124.50 was ever intended to apply to fire chief resignations (or at least not to the situation presented to the Court in this case). At page 18, the Union argues that R.C. § 124.50, "Reinstatement after separation due to injury or physical disability incurred in the performance of duty," stands for the proposition that "a firefighter in the classified service shall not be entitled to reinstatement to a position above the rank of regular firefighter … regardless of the position the person may have held at the time of resignation." Even assuming *arguendo* that the statute applies beyond an injury or physical disability reinstatement, the Union leaves out the phrase "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," which begs the question: who does a fire or police chief serve a copy upon? How does a fire chief file a written application for reinstatement to himself? Is a fire chief supposed to send himself a copy?

Factually, the *Dore* case is distinguishable from Powers' case because the *Dore* case involved an actual severing of the employment relationship. In *Dore*, the fire chief resigned conditionally on the adoption of a proposed memorandum of understanding that would modify the collective bargaining agreement to permit the fire chief to resign and then be rehired into the same position. *Dore*, 2004-Ohio-4870, ¶¶ 2-3. The fire chief resigned and retired effective May 17, 2002. *Id*. at ¶2. Upon his retirement, the fire chief was immediately removed from the city's payroll. *Id*. at ¶3. The city appointed another person to serve as "Acting Fire Chief" following the fire chief's retirement. *Id*. After the proposed modification to the collective bargaining agreement failed, the fire chief sought to rescind his resignation and retirement. *Id*. at ¶4. He was re-employed as fire chief effective June 10, 2002. *Id*. The court ultimately found that the fire chief could not rescind his resignation because the fire chief submitted an unconditional letter of resignation, followed by **actual relinquishment** of his position on his date of retirement. *Id*. at ¶13 (emphasis added). The fire chief was no longer on active payroll status **for a period of 24 days**. *Id*. (emphasis added).

Powers' case is distinguishable in several critical ways: (1) Powers' administrative retire/rehire involved no break in service. [*Stip. Facts*, ¶¶ 10-11; Powers Aff. ¶¶ 10-11]; (2) Powers never submitted an unconditional letter of resignation. [*Id*.]; (3) Powers never relinquished his position. [*Id*.]; (4) The City of Wickliffe never appointed an "Acting Fire Chief" to replace Powers because no vacancy existed. [See *Second Affidavit of James Powers*, dated May 20, 2021, at ¶6 attached to his Reply as Exh. 1]; (5) Powers' administrative retire/rehire

involved no removal from payroll. [See Reply Exh. 1 at ¶7]; (6) Powers never left active payroll status at the City of Wickliffe. [See Reply Exh. 1 at ¶7]; and (7) Powers' administrative retire/rehire was not conditioned on any modification of the collective bargaining agreement, but rather consistent with the pre-existing terms of the CBA. [See Reply Exh. 1 at ¶5].

CONCLUSION

One path to dispose of the case would be to dismiss the Appeal as improvidently allowed. Indeed, given the language of Wickliffe Charter VI-3, which provides that civil service examinations "shall not be required" for department head appointments, it's difficult to envision how the Court could award Appellants the relief requested, *i.e.* compelling such an examination to be conducted, when the Respondents have no clear legal duty to do so.

Turning to the substantive merits of the case, the Lake County Court of Common Pleas and Eleventh District Court of Appeals correctly found in favor of the Mayor, the City of Wickliffe, its Civil Service Commission, and Fire Chief Powers, by adhering to well-settled case law and fundamental principles of statutory interpretation. The City of Wickliffe Respondent therefore respectfully requests that this Court affirm the ruling of the Eleventh District.

Respectfully submitted,

/s/ ***John D. Latchney***
John D. Latchney (0046539)
COUNSEL OF RECORD
Hanna, Campbell & Powell, LLP
3737 Embassy Parkway, Suite 100
Akron, OH 44333
(330) 670-7602 (telephone)
(330) 670-7458 (facsimile)
Email: jlatchney@hcplaw.net

Counsel for the Respondents-Appellees City of Wickliffe, City of Wickliffe Civil Service Commission, and Mayor Joseph Sakacs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Appellees' Merit Brief was forwarded to all counsel of record via email on this 11th day of January 2023

Alexander L. Ewing
Frost Brown Todd LLC
9277 Centre Pointe Drive, Suite 300
West Chester, OH 45069

Stuart G. Torch
Elfvin, Klingshirn, Royer & Torch, LLC
4700 Rockside Road, Suite 530
Independence, OH 44131

Counsel for Mr. Powers

Joseph W. Diemert, Jr.
Thomas M. Hanculak
Mark V. Guidetti
Diemert & Associates Co., L.P.A.
1360 SOM Center Road
Cleveland, OH 44124

Counsel for Appellant International Association of Fire Fighters, Local 1536, AFL-CIO

/s/ ***John D. Latchney***