

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Internatl. Assn. of Fire Fighters, Local 1536, AFL-CIO v. Sakacs*, Slip Opinion No. 2023-Ohio-2976.]

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SLIP OPINION NO. 2023-OHIO-2976

THE STATE EX REL. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1536, AFL-CIO, APPELLANT, v. JOSEPH SAKACS, MAYOR, ET AL., APPELLEES.

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Civil law—R.C. 124.48—A vacancy in a promoted-rank position in a fire department occurs automatically upon incumbent’s retirement, and that position must be filled under competitive promotional-examination process set forth in R.C. 124.48—Court of appeals’ judgment reversed and cause remanded.

(No. 2022-0988—Submitted May 3, 2023—Decided August 29, 2023.)

APPEAL from the Court of Appeals for Lake County,

No. 2021-L-103, 2022-Ohio-2201.

STEWART, J.

{¶ 1} When a vacancy occurs in a promoted-rank position in a fire department and no list of eligible candidates for that position exists, the position must be filled through the competitive promotional-examination process. *See* R.C. 124.48. The question we are asked to decide in this discretionary appeal is what constitutes a “vacancy.” Specifically, we must determine whether a position is rendered vacant when the incumbent in that position retires but is rehired for the same position the next day. We conclude that under the plain language of R.C. 124.48, a vacancy occurs when the incumbent in a promoted-rank position in a fire department retires and therefore the position must be filled through the process set forth in R.C. 124.48. Because the Eleventh District Court of Appeals reached a contrary conclusion, we reverse its judgment and remand the case to that court to consider the assignments of error that it had deemed moot.

Facts and Procedural History

{¶ 2} The city of Wickliffe’s Department of Public Safety includes its Division of Fire, which is served by a fire chief, four captains, three lieutenants, and various grades of fire fighters. These employees are members of the competitive-classified civil service and are subject to the civil-service competitive-examination process for appointments and promotions. The fire chief, unlike other members of the Division of Fire, is not a bargaining-unit employee who is subject to the collective-bargaining agreement between appellee the city of Wickliffe (“the city”) and appellant, the International Association of Fire Fighters, Local 1536, AFL-CIO (“Local 1536”).

{¶ 3} Appellee James G. Powers is currently employed as the city’s fire chief. He has been a member of the city’s Division of Fire for over 30 years and was promoted to the rank of chief after 16 years of service.

{¶ 4} On January 6, 2020, Powers retired from the position of fire chief. That day, appellee Mayor John Barbish¹ submitted paperwork to the Ohio Police and Fire Pension Fund verifying Powers’s retirement. The mayor also issued a memorandum to the city’s finance director, instructing her to assist Powers with securing his pension benefits.

{¶ 5} The next day, January 7, the mayor rehired Powers to serve as the city’s fire chief and swore him in to the position. The reason for Powers’s retirement and his immediately being rehired was to allow him to receive pension benefits while remaining employed as the fire chief.

{¶ 6} On February 7, 2020, Local 1536 sent an email to appellee Wickliffe Civil Service Commission (“the commission”) expressing its belief that Powers’s retirement created a vacancy in the position of fire chief. The commission disagreed. In a responsive letter to Local 1536, the commission’s chairman stated: “Although the term ‘retire/rehire’ is commonly used in reference to this action, it is actually not the case. * * * There was no resignation from the City, or from the position of Chief. There is continuous service and no break in payroll administration, thus no vacancy was created.”

{¶ 7} At the February 10, 2020 city-council meeting, the mayor presented an emergency ordinance to the council. Emergency Ordinance No. 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 city’s finance director to “compensate the person performing the duties of Chief of Fire” at the rate of \$97,965.00 per year. During the meeting, the mayor represented that Powers’s retirement and subsequent rehiring was an administrative change and that

1. The complaint named John Barbish in his official capacity as mayor and director of public safety for the city. Joseph Sakacs, who succeeded Barbish as mayor and public-safety director, has been substituted for Barbish in this appeal. *See* S.Ct.Prac.R. 4.06(B); Civ.R.25(D)(1).

Powers had not vacated the position of fire chief. The city council adopted the ordinance.

{¶ 8} In a May 2020 letter from its legal counsel to the city’s law director, Local 1536 expressed its view that Powers’s retirement had created a vacancy in the position of fire chief. In addition, Local 1536 demanded that the city immediately conduct a competitive promotional examination to fill the vacancy. The city’s law director did not act on Local 1536’s demand. In September 2020, Local 1536’s legal counsel sent a letter to the city’s law director demanding that the law director prosecute the mayor under R.C. 124.62 for refusing to declare a vacancy in the position of fire chief. The law director denied having the legal duty to take the requested action.

{¶ 9} Local 1536 subsequently filed a complaint in the Lake County Court of Common Pleas against the city, the mayor, and the commission (collectively, “Wickliffe”), seeking a declaratory judgment, a permanent injunction, and a writ of mandamus, claiming that Wickliffe’s failure to fill the vacancy in the position of fire chief through the competitive promotional-examination process upon Powers’s retirement violated civil-service laws and deprived eligible captains of the opportunity to ascend to the position of fire chief. Local 1536 also sought attorney fees and punitive damages. Powers intervened in the action.

{¶ 10} The trial court granted Wickliffe’s motion for partial judgment on the pleadings regarding Local 1536’s claims for attorney fees and punitive damages. The trial court later granted Powers’s and Wickliffe’s motions for summary judgment on Local 1536’s remaining claims.

{¶ 11} Local 1536 appealed the trial court’s judgment to the Eleventh District, raising three assignments of error. 2022-Ohio-2201, 192 N.E.3d 548. In its first assignment of error, Local 1536 asserted that the trial court had failed to properly apply the law regarding whether a vacancy had occurred. *Id.* at ¶ 16. In its second and third assignments of error, Local 1536 asserted that the trial court

had erred in granting Wickliffe's motion for partial judgment on the pleadings regarding its claims for attorney fees and punitive damages. *Id.* at ¶ 14-15.

{¶ 12} In a split decision, the Eleventh District overruled Local 1536's first assignment of error and affirmed the trial court's judgment on that basis. *Id.* at ¶ 32-36. The court of appeals concluded that Powers's retirement did not create a vacancy. *Id.* at ¶ 24. In arriving at its decision, the Eleventh District first analyzed R.C. 124.48, which sets forth the process for filling vacancies in fire departments. It concluded that the retirement and subsequent rehire of Powers did not create a vacancy, because Powers did not intend to permanently leave the position. *Id.* at ¶ 24. In its view, a person's temporary separation from a position that the person does not intend to permanently leave does not create a vacancy as that term is used in R.C. Chapter 124. *Id.* at ¶ 23-24.

{¶ 13} Next, the Eleventh District analyzed R.C. 124.50, which governs the reinstatement process for fire fighters and police officers who have resigned from their positions. The Eleventh District stated that two elements must be present for a person to resign under R.C. 124.50: (1) intent to resign and (2) an act of relinquishment. 2022-Ohio-2201 at ¶ 28. The court of appeals concluded that neither element was present in this case. *Id.* It pointed to the fact that Powers returned to work as the fire chief the day after his resignation and continued to serve in that role without interruption. *Id.* Because the Eleventh District overruled Local 1536's first assignment of error, it deemed the second and third assignments of error moot. *Id.* at ¶ 33-34.

{¶ 14} Local 1536 appealed, and we accepted the following propositions of law for review:

Proposition of Law No. 1: Vacancy, for competitive promotional examination purposes, occurs immediately upon the retirement of a classified civil servant in the promoted ranks, since

retirement constitutes a permanent separation of employment regardless of intent, requiring the vacancy to be filled through the statutorily-mandated competitive promotional examination process.^[2]

Proposition of Law No. 2: Applicable law concerning the reinstatement of a classified civil servant in the promoted ranks of a fire department prohibits an individual who voluntarily resigned from the position of fire chief to be reinstated to any position above the rank of a regular firefighter and, in any event, an individual's voluntary resignation, regardless of purpose, constitutes an immediate vacancy from office, requiring any reinstatement thereafter to follow the mandated Civil Service process set forth in the Ohio Revised Code.

See 168 Ohio St.3d 1418, 2022-Ohio-3752, 196 N.E.3d 852. We find merit in Local 1536's first proposition of law. We reverse the judgment of the court of appeals on that basis and remand the case to that court to consider Local 1536's assignments of error that the court had deemed moot.

Analysis

{¶ 15} We review de novo a decision granting summary judgment. *State ex rel. Manley v. Walsh*, 142 Ohio St.3d 384, 2014-Ohio-4563, 31 N.E.3d 608, ¶ 17. Summary judgment is proper when an examination of all relevant materials filed in

2. In response to Local 1536's proposition of law No. 1, Wickliffe asserts its own proposition of law in its merit brief. Our rules of practice do not, however, allow an appellee to set forth propositions of law, *see* S.Ct.Prac.R. 7.03(B) and 16.03(B), and we have cautioned against doing so, *see, e.g., Marchbanks v. Ice House Ventures, L.L.C.*, ___ Ohio St.3d ___, 2023-Ohio-1866, ___ N.E.3d ___, ¶ 8, fn. 2. *See also Goudy v. Tuscarawas Cty. Pub. Defender*, 170 Ohio St.3d 173, 2022-Ohio-4121, 209 N.E.3d 681, ¶ 15, fn.1 (cautioning parties against using propositions of law that were not accepted by this court). Therefore, we will not consider the proposition of law asserted by Wickliffe.

the action reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 16} To be entitled to a writ of mandamus, Local 1536 must prove by clear and convincing evidence (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of respondents to provide that relief, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6. Mandamus is an appropriate remedy in wrongful-failure-to-promote cases. *State ex rel. Hipp v. N. Canton*, 70 Ohio St.3d 102, 103, 637 N.E.2d 317 (1994); *State ex rel. Bardo v. Lyndurst*, 37 Ohio St.3d 106, 112-113, 524 N.E.2d 447 (1988).

R.C. 124.48 and our precedent

{¶ 17} R.C. 124.48 states:

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.

“Vacancy” is not defined for purposes of R.C. 124.48. *See* R.C. 124.01 (defining terms as they are used in R.C. Chapter 124). “When a term is undefined, we give the term its ‘plain and ordinary meaning.’” *Great Lakes Bar Control, Inc. v. Testa*, 156 Ohio St.3d 199, 2018-Ohio-5207, 124 N.E.3d 803, ¶ 8, quoting *Rhodes v. New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782, ¶ 17. In doing so, we keep in mind that “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.” R.C. 1.42.

{¶ 18} In determining the ordinary meaning of the term “vacancy,” we look to dictionary definitions. *See Athens v. McClain*, 163 Ohio St.3d 61, 2020-Ohio-5146, 168 N.E.3d 411, ¶ 30. “Vacancy” has a variety of definitions. *Black’s Law Dictionary* defines “vacancy” as

1. The quality, state, or condition of being unoccupied, esp. in reference to an office, post, or piece of property.
2. The time during which an office, post, or piece of property is not occupied.
3. An unoccupied office, post, or piece of property; an empty place. • Although the term sometimes refers to an office or post that is temporarily filled, the more usual reference is to an office or post that is unfilled even temporarily. * * *
4. A job opening; a position that has not been filled.

Id., 1862 (11th Ed.2019). These definitions support Local 1536’s reading of R.C. 124.48 and its argument that the position of fire chief became vacant when Powers retired on January 6, 2020. This court’s precedent also supports Local 1536’s argument.

{¶ 19} For example, in *Zavisin v. Loveland*, 44 Ohio St.3d 158, 541 N.E.2d 1055 (1989), we analyzed R.C. 124.44—the statute governing the filling of

vacancies in police departments. The issue addressed in *Zavisin* was whether a vacancy in a position above the rank of patrolman must be filled pursuant to R.C. 124.44 or whether the position could be abolished within the 60-day period prescribed by the statute. *Zavisin* at 160. In that case, a lieutenant retired from the Loveland Police Department, and instead of conducting a promotional examination and filling the position, the city of Loveland passed an ordinance to abolish the position. *Id.* at 159. We held that the procedure set forth in R.C. 124.44 is mandatory when a vacancy in a position above the rank of patrolman occurs and that the vacancy must be filled before the position can be abolished. *Zavisin* at 162. We further stated that abolishment of a position “presupposes the existence of an incumbent.” *Id.* In arriving at this result, we stated that a vacancy for purposes of R.C. 124.44 “*automatically occurs upon the retirement of the incumbent.*” (Emphasis added.) *Zavisin* at 160.

{¶ 20} The same is true here. On January 6, 2020, the position of fire chief became vacant when Powers retired. The mayor rehired Powers on January 7, 2020. But a person cannot be *rehired* for a position that is *not* vacant. As the court of appeals’ dissenting judge succinctly stated: “[T]o be rehired necessarily implies an existing vacancy which would trigger the statutorily mandated promotional process to fill the retired incumbent’s position.” 2022-Ohio-2201, 192 N.E.3d 548, at ¶ 46 (Rice, J., dissenting). We conclude that under the plain language of R.C. 124.48, a vacancy in a promoted-rank position in a fire department occurs automatically upon the incumbent’s retirement. Therefore, Wickliffe was required to fill the position of fire chief pursuant to the process outlined in R.C. 124.48 when Powers retired.

{¶ 21} Powers contends, however, that a vacancy did not occur, because he did not intend to permanently relinquish the position. In Powers’s view, “the critical aspect of a ‘vacancy’ is the permanence associated with the public officer’s act in leaving his position of employment.” Powers states that he retired for the

sole purpose of receiving his pension and that because he retired for that specific purpose, his retirement did not create a vacancy under R.C. 124.48, because “for all intents and purposes, the position remained occupied.”

{¶ 22} The problem with Powers’s argument is that it misconstrues the plain language of R.C. 124.48. The statute does not require that intent be shown to create a vacancy. It requires the commission to initiate the competitive promotional-examination process whenever there is a vacancy and, as we have noted, a vacancy “automatically occurs upon the retirement of the incumbent,” *Zavisin*, 44 Ohio St.3d at 160, 541 N.E.2d 1055. Whether an incumbent intends to permanently leave a position or to leave with the expectation of immediately returning to that position is irrelevant to the determination whether the incumbent’s leaving creates a vacancy under R.C. 124.48.

The city’s charter does not dictate a contrary result

{¶ 23} In its merit brief to this court, Wickliffe argues that the city’s charter authorizes the mayor’s appointment of Powers as fire chief after Powers had retired.³ Specifically, Wickliffe asserts that the city’s charter is in direct conflict with R.C. 124.45, which requires vacancies in positions above the rank of regular fire fighter to be filled using the competitive promotional-examination process. Therefore, Wickliffe argues, the charter controls the outcome in this case. As an initial matter, we note that this argument was neither raised in the trial court nor the court of appeals; thus, it is forfeited. *See Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, ¶ 6, fn.1. Nonetheless, Wickliffe’s argument lacks merit.

{¶ 24} Article XVIII, Section 3 of the Ohio Constitution (the “Home Rule Amendment”) provides that “municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such

3. Wickliffe submitted a merit brief to this court but waived oral argument.

local police, sanitary and other similar regulations, as are not in conflict with general laws.” Article XVIII, Section 7 states that “[a]ny municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.” We have stated that “the intention of the Home Rule Amendment was to eliminate statutory control over municipalities by the General Assembly.” *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599, 605, 693 N.E.2d 212 (1998). Consequently, “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.” *Bazell v. Cincinnati*, 13 Ohio St.2d 63, 233 N.E.2d 864 (1968), paragraph one of the syllabus. In the event of an express conflict with parallel state law, a city charter prevails on matters of local self-government. *State ex rel. Murray v. Scioto Cty. Bd. of Elections*, 127 Ohio St.3d 280, 2010-Ohio-5846, 939 N.E.2d 157, ¶ 40, citing *State ex rel. Lightfield v. Indian Hill*, 69 Ohio St.3d 441, 442, 633 N.E.2d 524 (1994).

{¶ 25} The provision at issue, Article VI, Section VI-3 of the city’s charter, provides that the civil service examination “shall not be required for the appointment of * * * any head of a department.” *Id.*, https://codelibrary.amlegal.com/codes/wickliffe/latest/wickliffe_oh/0-0-0-1385#JD_CharterArticleVI (accessed August 3, 2023) [<https://perma.cc/EX7B-KBAW>]. Wickliffe maintains that the fire chief is the head of a department under Section VI-3 of the city’s charter and therefore the position need not be filled using the competitive promotional-examination process. Wickliffe’s interpretation of this charter provision ignores other parts of the charter. Specifically, Article V, Section V-4 of the city’s charter states that “[t]he Director of Public Safety shall be the head of the Division of Police, Division of Fire, Division of Building Engineering and Inspection, and the Division of Health.” *Id.*, <https://codelibrary.amlegal.com/codes/wickliffe/latest>

/wickliffe_oh/0-0-0-1381 (accessed August 3, 2023) [<https://perma.cc/9LXM-9VW6>]. By the express terms of the city’s charter, the director of public safety is the head of the city’s Division of Fire. Therefore, Section VI-3 of the city’s charter does not expressly conflict with R.C. 124.45.

Conclusion

{¶ 26} The Eleventh District Court of Appeals erred in concluding that Powers’s retirement as fire chief did not create a vacancy in the position under R.C. 124.48. We therefore reverse the judgment of the court of appeals and remand the cause to that court to consider Local 1536’s assignments of error that it had deemed moot. Because we resolve this matter on the first proposition of law, we need not address the second proposition of law.

Judgment reversed
and cause remanded.

KENNEDY, C.J., and FISCHER, DEWINE, DONNELLY, BRUNNER, and DETERS, JJ., concur.

Diemert & Associates Co., L.P.A., Joseph W. Diemert Jr., Thomas M. Hanculak, and Mark V. Guidetti, for appellant.

Frost Brown Todd, L.L.C., Alexander L. Ewing, and Charles B. Galvin; and Employment Law Partners, L.L.C., and Stuart G. Torch, for appellee James G. Powers.

Hanna, Campbell & Powell, L.L.P., and John D. Latchney, for appellees city of Wickliffe, city of Wickliffe Civil Service Commission, and Mayor Joseph Sakacs.

Livorno & Arnett Co., L.P.A., and Henry A. Arnett, urging reversal for amicus curiae Ohio Association of Professional Fire Fighters.

Fraternal Order of Police of Ohio, Inc., and Gwen E. Callender, urging reversal for amicus curiae Fraternal Order of Police of Ohio, Inc.

January Term, 2023

Fishel Downey Albrecht & Riepenhoff, L.L.P, and Marc A. Fishel, urging
affirmance for amicus curiae Ohio Public Employers Labor Relations Association.
