

IN THE SUPREME COURT OF OHIO

Michael Dworning,

Plaintiff-Appellee,

vs.

The City of Euclid, et al.,

Defendants-Appellants.

) On Appeal from the Cuyahoga County
) Court of Appeals,
) Eighth Appellate District
)
) Appellate Case No. 87757
)
)

07-0307

MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANTS-APPELLANTS

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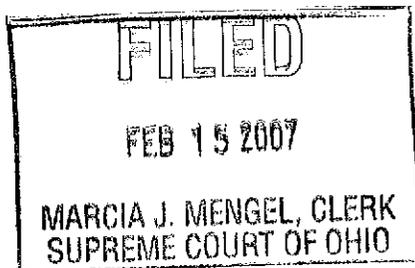
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EXPLANATION OF WHY THIS IS A CASE
OF PUBLIC OR GREAT GENERAL INTEREST

At issue in this appeal is the continued viability of civil service commission procedures to redress alleged employment wrongs in the public employment setting. The court of appeals' decision has created a gaping hole in Ohio's well-established doctrine requiring civil servants to exhaust their employer's internal administrative remedies before launching employment lawsuits for perceived wrongs in public workplaces in Ohio. The court of appeals, while claiming to "continue to believe in the efficacy of the exhaustion doctrine"¹ and to "adhere to the fundamental principles supporting [it],"² nonetheless refused to apply the exhaustion doctrine involving a civil service employee claiming unlawful discriminatory discharge under R.C. 4112.³ The court of appeals' decision is an unwise departure from the application of the exhaustion doctrine in the public employment arena by sister appellate courts in Ohio as well as the public policy of this State. If allowed to stand, it will also effectively nullify the application of the exhaustion doctrine for the benefit of public employees and public employers in Ohio.

The policies underlying Ohio's exhaustion doctrine requiring public employees to exhaust internal administrative remedies provided by their employers before asserting civil actions alleging discrimination under R.C. Chapter 4112 were delineated and applied by the Ninth District Court of Appeals:

The purposes of the exhaustion doctrine are "to afford the [employer] the ability to correct its own errors; to provide a trial court with an adequate factual record upon which to make an informed decision***, and to promote judicial economy through the resolution of these disputes without the premature need for judicial intervention." *Nemazee v. Mt. Sinai Medical Ctr.* [(1990)], 56 Ohio St. 3d 109, 114, 564 N.E.2d 477.

¹ (*Opinion of the Cuyahoga County Court of Appeals* (January 2, 2007), p. 22, ("*Opinion*")).

² (*Opinion*, p. 26).

³ Although the court of appeals' decision ostensibly carved out an exception to the exhaustion doctrine for claims brought under R.C. Chapter 4112, the court of appeals also reversed the trial court's dismissal of several unrelated employment claims left unaddressed in its decision. (*Opinion*, pp. 26-27).

Portis v. Metro Parks Serving Summit County (Apr. 20, 2005), Summit App. No. C.A. No. 22310, at ¶14, 2005 Ohio 1820 (affirming dismissal of public employee's civil action asserting an R.C. Chapter 4112 claim alleging discriminatory discharge as well as ancillary tort claims).

The court of appeals below, recognizing its decision is squarely at odds with *Portis*, *supra*, certified the following conflict under Ohio App. R.25 to this Court for resolution:

Whether a separated civil service employee who has administrative remedies available to him by way of an appeal to his public employer's civil service commission is required to exhaust those remedies as a predicate to filing a private disability discrimination action under R.C. Chapter 4112.

(See *Journal Entry* of the Cuyahoga County Court of Appeals granting Appellants' motion to certify conflict pursuant to App. R.25 (January 25, 2007)). Appellants timely filed the court of appeals Order certifying the above conflict with this Court on February 15, 2007. Because the court of appeals' decision will deter the application of the exhaustion doctrine beyond the certified conflict, however, this Court should also accept discretionary jurisdiction of this appeal.

First, the court of appeals erroneously concluded that the exhaustion doctrine applies to actions asserted under R.C. Chapter 4112 if the employment is governed by an employment contract, but does not apply to the same claim and the same (or even more meaningful) administrative remedies if the employment is not governed by contract. (See *Opinion*, pp. 19-20, 22-23).⁴ This distinction will have a particularly perverse impact on public employers in Ohio. Classified civil servants in Ohio, like Appellee, have constitutionally and statutorily protected rights to their employment that generally surpass the rights afforded by employment contracts. Accordingly, the court of appeals' decision confers no value on the clear, meaningful remedies available to non-contractual classified civil servants in Ohio, while enforcing the judicial

⁴ Notably, the court of appeals also remanded Appellee's breach of contract claim, asserted in Count VI of his Complaint, even though it recognized the applicability of the judicial exhaustion doctrine to employment relationships governed by contract. (*Opinion*, pp. 22-23, 26-27).

exhaustion doctrine to narrower, less effective remedies for contractual employees – an anomalous result that, in practice, will preclude the application of the exhaustion doctrine in the public employment setting in Ohio.⁵

Second, ignoring “decades of contrary law,” the court of appeals erroneously held that the use of the word “may” in administrative appeal procedures permits an employee to by-pass those procedures without consequence. Read in the context of administrative procedures, courts in Ohio have long held that the term “may” simply means that an employee may *either* appeal an adverse decision *or* drop the matter and forgo any further challenge to the decision. Unless the court of appeals’ decision is corrected, public entities will be subjected to unnecessary court actions defending administrative review procedures crafted in light of decades of contrary law in Ohio.

At issue in this appeal is the vindication – or the abrogation – of public policies underlying the exhaustion doctrine in Ohio’s public employment setting. If the court of appeals’ decision is permitted to stand, civil servants will be free to file unfettered employment lawsuits against public employers without first availing themselves of meaningful administrative remedies provided by civil service commissions aimed at avoiding the needless expense of premature civil lawsuits – a result contrary to the well-established judicial exhaustion doctrine and its underlying public policies.

⁵ As pointed out in the Memorandum of *Amicus Curiae* the Ohio Municipal League in Support of Jurisdiction on Behalf of Appellant The City of Euclid, the judicial exhaustion doctrine is particularly applicable in the public employment setting. Under Ohio law, only the decision of the highest administrative authority is a final order, adjudication, or decision. R.C. §2506.01 (“Final order, adjudication, or decision’ . . . does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided . . .”). In this case, asserting a civil action without first exhausting his administrative remedies with the City, Appellee, Michael Dworning (“Dworning”), prevented the City’s highest administrative authority, the City’s civil service commission, from reviewing, affirming or reversing his alleged “discharge.”

STATEMENT OF THE CASE AND FACTS

Appellee, Michael Dworning (“Dworning”), was the Fire Chief of Appellant, City of Euclid (“City”). (R.1, Complaint, ¶ 12). Dworning alleges that on March 2, 2004 he was terminated from his position effective February 20, 2004 because of a disability – alcoholism – in violation of R.C. Chapter 4112.02 and 4112.99. (R.1, Complaint, ¶¶ 13-17). Dworning also alleges the City breached its alleged contract with him by suspending and terminating his employment “without just cause” or a showing of “incompetency, gross neglect of duty, gross immorality and failure to obey orders of a proper authority” – the same standard specified in R. C. § 124.34 and applied by the Rules of the Euclid Civil Service Commission. (R.1, Complaint, ¶¶ 41-42). Dworning also asserts claims against Appellants Thomas Cosgriff, the City’s Deputy Fire Chief, and Appellant James Slivers, a rank and file firefighter, alleging a conspiracy pursuant to R.C. § 4112.02(J). (R.1, Complaint, ¶¶ 45-48). Dworning further asserts ancillary tort claims of defamation and invasion of privacy against all of the Defendants-Appellants. (R.1, Complaint, ¶¶ 26-36).

As a classified civil servant, Dworning was afforded full procedural and substantive rights to his job by law as well as Euclid’s Charter and Civil Service Rules. (R.38, Affidavit of Kosmetos, ¶ 3, Ex. B). Dworning, however, chose not to avail himself of these rights, including an appeal of his alleged “removal” to the Civil Service Commission of Euclid. (*Opinion*, p. 2). Instead, Dworning formally retired, foregoing his internal administrative remedies, and then launched this employment lawsuit against the City. (*Opinion*, p. 1-2, 32-35;

Dissenting Opinion, pp. 27-28).⁶

On January 18, 2006, the trial court held that Dworning's lawsuit was barred by his failure to exhaust his remedies with the City's civil service commission, granting Defendants--Appellants' motion for summary judgment. (R.67). On December 21, 2006, the court of appeals announced its decision reversing the grant of summary judgment and remanding the case to the trial court. The court of appeals' decision was journalized on January 2, 2007. (*Opinion and Journal Entry*, APP.1). On January 25, 2007, the court of appeals subsequently certified the following conflict of law to this Court:

Whether a separated civil service employee who has administrative remedies available to him by way of an appeal to his public employer's civil service commission is required to exhaust those remedies as a predicate to filing a private disability discrimination action under R.C. Chapter 4112.99.

(See *Journal Entry Granting [Defendant-Appellants'] Motion to Certify a Conflict Pursuant to App. R. 25* (January 25, 2007), APP.33). On February 15, 2007, Appellants timely filed the court of appeals' Order certifying the above conflict with this Court. Appellants now timely file this memorandum in support of jurisdiction, advancing additional reasons warranting this Court's review of the court of appeals' decision.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A public employee's failure to exhaust his employer's administrative remedies precludes a civil action seeking redress for adverse employment decisions, including claims asserted under R.C. Chapter 4112.

⁶ As discussed at length in both the majority and concurring opinions of the court of appeals, Dworning forewent his constitutionally protected civil service remedies to "retire" in order to reap significant benefits not available to discharged employees. (*Opinion*, pp. 1-2, 23-25; *Dissenting Opinion*, pp. 27-28). For the purpose of this appeal, however, Appellants accept as true Dworning's allegations that he was discharged. (*Opinion*, pp. 1-2, 23-25; *Dissenting Opinion*, pp. 27-28).

This Court in *Nemazee v. Mt. Sinai Medical Center* (1990), 56 Ohio St. 3d 109, 564 N.E. 2d 477, held that an employee is required to exhaust the “*internal*” administrative remedies afforded by his employer before filing a civil action contesting his discharge. *Nemazee*, 56 Ohio St. 3d at 115 (“Thus, we hold that appellee must exhaust all *internal* administrative remedies as provided for in his employment contract prior to seeking judicial review,” reversing appellate court’s reversal of trial court’s decision dismissing plaintiff-employee’s contract and tort claims arising out of his employment separation [emphasis added]). Similarly, this Court has applied the “well-established [exhaustion] principle of Ohio law” to public employees. *Noernberg v. City of Brook Park* (1980), 63 Ohio St.2d 26, 29, 406 N.E. 2d 1095 (reversing the decisions of the trial court and court of appeals, holding Brook Park firefighter failed to exhaust administrative remedies provided by the Brook Park Civil Service Commission).

Giving meaning to the important public policies underlying the exhaustion doctrine, an emerging body of Ohio case law has appropriately applied this Court’s holdings in *Nemazee* and *Noernberg* to a wide range of employment claims, including discrimination claims asserted under R.C. Chapter 4112. In *Portis v. Metro Parks Serving Summit County, supra.*, the Ninth Appellate District Court of Appeals held that the failure to exhaust internal administrative review procedures established in an employee handbook precluded a public employee from asserting a civil claim alleging discrimination in violation of R.C. §4112.02, a claim alleging violation of rights granted by R.C. §124.34, and a related tort claim of intentional and/or negligent infliction of emotional distress against his public employer. The public employer’s handbook in *Portis*, like the Euclid Civil Service Rules, provided an appeal to the Director within ten days of a discharge and, if necessary, a subsequent appeal to the Board of Park Commissions. *Id.* at ¶1-10. The same result was reached by another panel of the Ninth Appellate District Court of Appeals in *Sanders v. Summit County Veterans’ Serv. Comm’n* (May 29, 2002), Summit App. No. C.A.

No. 20800, 2002 Ohio 2653 – a decision left unaddressed by the court of appeals. In *Sanders*, a case on all fours with this case, the plaintiff bypassed her remedies provided by the Summit County Charter’s Veteran Service Commission and asserted a civil action for disability discrimination under R.C. §§ 4112.02 and 4112.99 (as well as claims for violation of due process, and tort claims of intentional and negligent infliction of emotional distress and wrongful discharge in violation of public policy). *Sanders*, 2002 Ohio 2653, at ¶2-8. Recognizing that authority addressing the alternative remedial scheme *within* R.C. Chapter 4112 was inapplicable to the judicial exhaustion doctrine that addresses meaningful administrative review procedures *outside* of R.C. Chapter 4112, the Ninth Appellate District Court of Appeals held that the plaintiff’s claims were barred, as a matter of law, by her failure to exhaust her administrative remedies provided by the County:

This Court is cognizant that the Supreme Court of Ohio has stated that an individual may assert a civil action for discrimination, pursuant to R.C. 4112.99, without first exhausting [external] administrative remedies [with the Ohio Civil Rights Commission]. *Elek v. Huntington Natl. Bank* (1991), 60 Ohio St.3d 135, 136, 573 N.E.2d 1056; *Smith v. Friendship Village of Dublin, Ohio, Inc.* (2001), 92 Ohio St.3d 503, 506, 751 N.E.2d 1010. Notwithstanding the Supreme Court of Ohio cases that interpret the statutory language of R.C. 4112.99, the Charter does not provide anything other than exhaustion of administrative remedies prior to asserting a claim in the court of common pleas. Accordingly, Appellant’s first assignment of error is overruled.

Id. at ¶8.

The court of appeals’ decision below also left unaddressed precedent from its own jurisdiction applying the judicial exhaustion doctrine to employment claims, including claims asserted under R.C. Chapter 4112. In affirming summary judgment for the City of Cleveland in an action brought by a civil servant arising out of his discharge, the Eighth Appellate District Court of Appeals held:

Plaintiff should have appealed his removal as Secretary of Police to the Civil Service Commission thereby permitting the commission to enter an order from which an appeal could be taken to the common pleas court. The Civil Service Commission's order would confer jurisdiction on the common pleas court so that it could properly hear the appeal from the commission pursuant to R.C. 2506.01.

McNea v. Cleveland (1992), 78 Ohio App. 3d 123, 128-29, 603 N.E. 2d 1158 (reversing judgment of the Common Pleas Court and granting dismissal in favor of the City of Cleveland). In *Hall v. City of Cleveland Department of Public Utilities* (Apr. 17, 2003), Cuyahoga App. No. 82034, 2003 Ohio 1964, another panel of the Eighth Appellate District considered the applicability of the exhaustion doctrine to a civil servant's claim of *disability* discrimination asserted under *R.C. 4112.99* (as well as public policy tort claims premised on 4112.99 and the Family Medical Leave Act). In affirming summary judgment in favor of the City of Cleveland, the court of appeals found that the civil servant's failure to exhaust his contractual grievance and "civil service appeal" rights barred, as a matter of law, his statutory and tort claims. *Id.* at ¶6-8 (affirming summary judgment as to *disability* discrimination claim asserted under *4112.99* due to civil servant's failure to "exhaust [his] administrative remedies" under collective bargaining agreement in the form of a "civil service appeal."). *See also Frick v. University Hosps. of Cleveland* (1999), 133 Ohio App. 3d 224, 227-230, 727 N.E. 2d 600 (affirming dismissal of a private employee's claim of discriminatory discharge under the FMLA due to the employee's failure to exhaust the internal administrative remedies provided by her employer.).

As recognized by the above decisions, the policies underlying the exhaustion doctrine – (1) affording an employer the ability to correct its own errors; (2) developing a factual record; and (3) promoting judicial economy – are vindicated by the application of the judicial exhaustion doctrine to public employment lawsuits, including claims asserted under Chapter 4112.

First, had Dworning exercised his statutory right to appeal his separation as Fire Chief to the City's civil service commission – and could advance the facts he claims supports his Complaint in this civil action – such an action would, *ipso facto*, have violated R.C. 124.34 and, accordingly, resulted in his reinstatement with full economic relief. (R.38, Affidavit of Kosmetos, ¶2, Ex. A, *Civil Service Rules, Section 8.3 (B)* (“The commission, upon hearing testimony, may affirm, disaffirm or modify the decision or judgment of the Appointing Authority.”)); *City of Cincinnati v. Dixon* (1992), 78 Ohio App. 3d 164, 169-170, 604 N.E. 2d 193 (recognizing that the authority of the civil service commission of Cincinnati to address a job reduction pursuant to R.C. 124.34 is “broad enough to encompass a review of the employment action at issue in the case at bar;” affirming decision of the civil service commission reinstating employee to civil service position despite City's own contention the Commission did not have authority to address employee's claim of discrimination under R.C. Chapter 4112). Accordingly, by failing to appeal his removal to the Euclid Civil Service Commission, Appellee has frustrated the City's ability to “correct its own [alleged] error[]” of unlawfully removing him as Fire Chief. *Nemazee*, 56 Ohio St. 3d at 114. No conflict exists between affording a civil service commission the opportunity to review and, if warranted, correct unjust employment decisions and the important policies underlying R.C. Chapter 4112. The Supreme Court of the United States and Ohio this Courts have expressly *endorsed* one of the policies underlying the exhaustion doctrine in fashioning employer liability standards in the discrimination context:

[A] defending employer may raise an affirmative defense to liability, ... [which is compromised of] two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer

Burlington Industries, Inc. v. Ellerth (1998), 524 U.S. 742, Syllabus (f), 118 S.Ct. 2257, 141 L.Ed.2d 633 [emphasis added]. See also *Queener v. Windy Hill Ltd* (Dec. 20, 2001), Cuyahoga

App. Nos. 78067 and 78217, 2001 Ohio App. LEXIS 5742 (adopting *Ellerth/Faragher* defense to discrimination-harassment claims asserted under R.C. Chapter 4112).

Second, classified civil servants in Ohio, like Dworning, are afforded the constitutional right to a full hearing to protect their job. During this process both the civil servant and the public employer gain the benefit of airing the facts relating to the legitimate – or unlawful – basis of an employee’s discharge. With the benefit of this evidentiary review procedure, both parties, and the Court, will save substantial resources in any subsequent civil lawsuit arising out of the civil servant’s employment. Moreover, like the review of a physician’s performance by the Hospital’s internal review process at issue in *Nemazee*, civil service commissions are uniquely equipped to address the legitimate basis requiring the removal of civil servants, including a municipal Fire Chief. *Brice v. Oregon* (1996), 111 Ohio App. 3d 7, 11, 675 N.E.2d 545 (“[M]atters relating to municipal fire protection are matters of local self-government,” including “the process within the municipality’s fire department for disciplining and removing firefighters.”).⁷

Third, in an era when Ohio Courts are already overburdened, excusing employees from exhausting their right to obtain a meaningful internal review of adverse employment decisions will only serve to delay the potential resolution of employment disputes, guarantee full employment to lawyers, while burdening courts with excessive – and unnecessary (or premature) – employment lawsuits. Conversely, as recognized by this Court, affording public employers the right to review and, when appropriate, correct their employment decisions before being forced to defend expansive (and expensive) civil litigation undisputedly serves judicial economy.

⁷ Moreover, regardless of the outcome of the Commission review process, Appellee was free, if he chose, to use this record in pursuing a civil action contesting his treatment by the City. If he prevailed before the Commission, however, his prompt return to his former position with full relief would have benefited the City in any subsequent civil action by eliminating damages – while also providing the civil servant the prompt remedy delayed in any judicial action.

Nemazee, 56 Ohio St. 3d at 114 (“[W]e hold that a physician in a private hospital whose employment and/or hospital privileges have been terminated must exhaust all *internal administrative remedies provided by a hospital’s charter, bylaws, rules, regulations and employment contract prior to seeking judicial review*. . . . Our ruling is consistent with the purposes of the exhaustion doctrine, to wit: . . . to *promote judicial economy through the resolution of these disputes without the premature need for judicial intervention*,” affirming dismissal of not only breach of contract claim, but also employment-related *tort* claim against hospital [emphasis added]).

Giving scant attention to the judicial exhaustion doctrine, the court of appeals chose to depart from this well-settled principle of law in sole reliance on *Elek v. Huntington Nat’l Bank* (1991), 60 Ohio St. 3d 135, 573 N.E.2d 1056 and *Smith v. Friendship Village of Dublin* (2001), 92 Ohio St. 3d 503, 751 N.E.2d 1010. Neither *Elek* nor *Smith*, however, allude to, let alone analyze the judicial exhaustion doctrine requiring the exhaustion of internal administrative remedies provided by an employer. Instead, *Elek* and *Smith* addressed the statutory construction of R.C. Chapter 4112 relating to the alternative remedial scheme *within* Chapter 4112: the remedies provided by the Ohio Civil Rights Commission under RC. §4112.05 and the civil remedies provided under R.C. §4112.99. *Elek*, 60 Ohio St. 3d at 136-140; *Smith*, 92 Ohio St. 3d at 504-507. Accordingly, contrary to the court of appeals’ assertion, enforcing the judicial exhaustion doctrine does not offend the statutory principle of “liberally constru[ing]” R.C. Chapter 4112 any more than it requires an interpretation of the alternative remedial scheme within R.C. Chapter 4112.

Proposition of Law No. 2: The judicial doctrine requiring a public employee to exhaust his employer's administrative remedies before filing a civil action is not contingent on the existence of an employment contract.

The court of appeals went to great lengths to declare that its holding is not applicable to “employment relationships defined by contract:”

We stress that our holding does not apply to employment relationships defined by contract, whether private or by way of a collective bargaining agreement, which set forth agreed upon disciplinary procedures, regardless of whether the right to invoke those procedures is couched in discretionary language.

(*Opinion*, pp. 22-23).

Ohio courts have rightly recognized that the judicial exhaustion doctrine is not a creature of contract and, accordingly, is not conditioned on employment relationships governed by contract. Accordingly, in *Frick, supra*, another panel of the Eighth Appellate District considered – and expressly rejected – this distinction, even as to employees who do not possess the same constitutional and statutory protections to their jobs afforded to civil servants, like Appellee. The court in *Frick* held that a lack of “mutual assent” to a grievance policy “unilaterally adopted” by her employer did not excuse the plaintiff’s failure to exhaust her review rights under the policy because the judicial exhaustion doctrine is *not* contingent on a pre-dispute agreement entered into by an employee:

[T]he rule requiring exhaustion of internal, administrative procedures by which to review challenges to termination has been applied even where the employee alleges that he is simply an at-will employee. . . . Moreover, . . . a grievance which arises after the lapse of a collective bargaining agreement may still be arbitrable even though there is no longer a contract between the parties. Finally, the defense of failure to exhaust administrative remedies also applies in various land use and other contexts where the parties do not enter into a written agreement to submit to the administrative tribunal before bringing suit. [citations omitted].

Frick, 133 Ohio App. 3d at 228-229 (affirming summary judgment as to tort claim of wrongful discharge in violation of public policy and statutory *FMLA* claim due to plaintiff’s failure to

exhaust internal administrative review procedure provided by employer [emphasis added]). See also *McIntosh v. Cuyahoga Metropolitan Housing Authority* (Feb. 7, 2002), Cuyahoga App. No. 79316, 2002 Ohio 485, 2002 Ohio App LEXIS 445, *3-4 (affirming summary judgment in favor of CMHA as to plaintiff's tort claim of wrongful termination and claim of promissory estoppel, applying "policies behind the exhaustion doctrine explained in *Nemazee*" to plaintiff's failure to avail herself of CMHA's "two-step grievance procedure" for the internal review of employee disputes, even though the grievance procedure was unilaterally adopted – as a personnel policy – by the CMHA Board of Commissioners rather than a function of any employment agreement); *Sanders, supra.*, at ¶¶5-8 (affirming summary judgment based on failure to exhaust non-contractual administrative remedies provided by civil service commission); *Portis, supra.*, at ¶¶1-16 (affirming summary judgment based on failure to exhaust non-contractual administrative remedies provided by employee handbook).

Proposition of Law No. 3: The judicial doctrine requiring a public employee to exhaust his employer's administrative remedies are not excused when the statute, rule or regulation providing the remedy provides that the aggrieved party 'may' pursue the remedy.

While conceding the employer's internal administrative review process at issue in *Nemazee* used the word "may," the court of appeals nonetheless refused to give the word the same compulsory meaning with respect to Euclid's civil service rules "absent an explicit discussion on this point by the supreme court." (*Opinion*, p. 12). The court of appeals' decision threatens the continued viability of long established rules governing administrative procedures. Analyzing "decades of case law," another panel of the Eighth Appellate District explained that the term "may" in administrative procedures simply recognizes that an employee may *either* appeal an adverse employment decision to his or her employer's internal administrative review process *or* drop the matter and forgo further challenge to the adverse decision:

With particular relevance to plaintiff's observation that the hospital's grievance procedure states that an employee "may file a grievance regarding a perceived violation of hospital or departmental policy or [other] matter," the *Pappas* [*Pappas & Associates Agency, Inc. v. State Automobile Mutual Insurance Agency*, (Jan. 7, 1998), Summit App. No. 18458, 1998 Ohio App. LEXIS 22] considered the question of whether an administrative scheme which provides that the complaining party "may" invoke it had to be exhausted prior to obtaining judicial relief. The court stated:

Pappas contends that the word "may" in the statute makes the provision "optional, permissive, or discretionary." [citation omitted] Pappas' assertion is correct, but only to a limited extent. Pappas may file his request for review with the superintendent of insurance, or Pappas may forgo taking any further action on the matter. Because of the doctrine of administrative exhaustion, Pappas may not by-pass administrative review and file his claim directly in the common pleas court. See, e.g., *Nemazee v. Mt. Sinai Medical Ctr.* (1990), 56 Ohio St. 3d 109, 111, 564 N.E.2d 477.

* * *

In *Nemazee v. Mt. Sinai Medical Ctr.*, 56 Ohio St. 3d at 113, 564 N.E.2d 477, the administrative remedy provided that the complainant "may request review of the matter by a hearing committee." (Emphasis added.) The Ohio Supreme Court dismissed the plaintiff's complaint for failure to exhaust administrative remedies.

* * *

These recent decisions are consistent with decades of case law which has compelled exhaustion of administrative remedies even when the statute providing the remedy stated that the grieved party 'may' pursue that remedy.

Frick, 133 Ohio App.3d at 229-30 [emphasis added]. See also *Nemazee*, 56 Ohio St. 3d at 111-113 (requiring physician to utilize internal review procedure provided by his Hospital to appeal a termination even though procedures provided "the resident may request review of the matter by a hearing committee...." [emphasis added]). *Sanders*, 2002 Ohio 2653, at ¶5-8 (holding 4112 claim barred due to plaintiff's failure to exhaust internal administrative remedies provided by civil service rules providing that an employee "may file an appeal" [emphasis added]); *Danis*

Clark Landfill Co., v. Clark Cty. Solid Waste Mgt. Dist. (1995), 73 Ohio St.3d 590, 599-600, 653 N.E. 2d 646 (applying exhaustion doctrine to procedures providing that an aggrieved person “may file” an administrative appeal under R.C. Chapters 3734 and 3745 [emphasis added]); *Portis*, 2005 Ohio 1820, at ¶9-12 (holding 4112 claim barred due to plaintiff’s failure to exhaust employer’s internal review process providing that an employee “may submit a written appeal” [emphasis added]).

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request that this Court accept jurisdiction of this appeal on the grounds that it presents a case of public or great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2007, a copy of the foregoing Memorandum In Support of Jurisdiction was sent by first class U.S. mail, postage prepaid, to:

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APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87757

MICHAEL DWORNING

PLAINTIFF-APPELLANT

vs.

CITY OF EUCLID, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-546231

BEFORE: Corrigan, J., Gallagher, P.J., and McMonagle, J.

RELEASED: December 21, 2006

JOURNALIZED:

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FILED IN JOURNALIZED
PER APP. R. 22(E)

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GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: [Signature] DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

DEC 21 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

MICHAEL J. CORRIGAN, J.:

R.C. Chapter 4112 permits individuals to seek private remedies in the event they suffer adverse job action as a result of discrimination. The issue in this appeal is whether a separated civil service employee who has administrative remedies available to him by way of a civil service appeal is required to exhaust those remedies as a predicate to filing a private disability discrimination action under R.C. Chapter 4112.99.

I

Although there is a significant amount of evidentiary material in the record, the question on appeal concerns an interpretation of the law, not an application of the facts to that law. Hence, except as otherwise noted, we consider the facts to be undisputed for purposes of Civ.R. 56, and review the court's summary judgment for an error of law. In doing so, we list only those facts which are germane to the issue on appeal.

Defendant city of Euclid employed plaintiff Michael Dworning as a fireman for about 30 years. At the time of his separation, he served as chief of the fire department. On March 4, 2004, the mayor informed the civil service commission ("commission") that "Fire Chief Michael Dworning was terminated from his position with the City of Euclid effective February 20, 2004." In a letter dated

March 9, 2004, the mayor again wrote the commission, this time informing it that "Euclid Fire Chief Michael Dworning submitted his retirement notice to my office on March 8, 2004 and is effective as of February 20, 2004." The exact nature of Dworning's separation is contested. The second letter apparently memorialized an arrangement whereby the city agreed to characterize Dworning's separation as an early retirement, as opposed to termination, in order to give him a payout of sick time benefits that would not be available to him were he in fact terminated.

Dworning took no administrative action with the commission to contest his separation. Nor for that matter did the city inform Dworning of his right to appeal his separation to the commission. Instead, Dworning filed this action, alleging that he had been discharged because of a disability — alcoholism — in violation of R.C. Chapter 4112.02. In addition to his discrimination claims, he set forth conspiracy claims against certain members of the department, defamation, invasion of privacy, and breach of contract claims. He sought economic and non-economic damages, back wages, benefits, and any other equitable relief the court might grant.

The city filed a motion for summary judgment in which it argued that Dworning's failure to file an appeal with the commission constituted a failure to exhaust administrative remedies. Dworning opposed the motion, arguing that

his right to seek a judicial remedy for discrimination under R.C. Chapter 4112 was not contingent upon him first exhausting what administrative remedies he might have. He maintained that the state has a liberal policy of private enforcement of discrimination laws that would be incompatible with a requirement to exhaust administrative remedies.

The court granted summary judgment without opinion, merely stating that the city's motion for summary judgment "for failure to exhaust administrative remedies *** is granted."

The issue framed above is apparently one of some importance. A number of amici curiae have joined in briefs filed with this court, urging affirmation or reversal consistent with their respective interests. Those interests can be broadly stated as supporting: (1) a private litigant's right to initiate a lawsuit under the broadly interpreted remedial statutes of R.C. Chapter 4112, regardless of any administrative remedies available to that person or (2) a municipality's desire to compel the use of administrative remedies as a means of promoting the internal resolution of disputes and promoting judicial economy.

These positions require us to consider the law relating to handicap discrimination and exhaustion of administrative remedies.

II

We first address Dworning's arguments relating to his private right to seek redress of illegal discrimination in the courts.

A

R.C. 4112.02(A) states:

"It shall be an unlawful discriminatory practice:

"(A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause; to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

A "disability" is defined in R.C. 4112.01(A)(13) as "a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment."

Alcoholism is considered a disability for purposes of R.C. 4112.02(A). See *Hazlett v. Martin Chevrolet, Inc.* (1986), 25 Ohio St.3d 279, syllabus.

B

Under either federal or state law, an aggrieved party has the right to file an action to redress a claim of discrimination. A discrimination claim can be filed with either the state administrative agency, the Ohio Civil Rights Commission (OCRC) or the federal Equal Employment Opportunity Commission (EEOC). Although Ohio discrimination laws closely track federal laws, there are significant differences in how the separate agencies process claims. For our purposes here, it is important to understand that under federal law, a party must first file a claim with the EEOC before it can pursue a private action against an employer. Even then, the right to file a private action under federal law is conditioned upon the EEOC issuing a right to sue letter.

Ohio, on the other hand, does not require a filing with the OCRC as a prerequisite for pursuing a discrimination claim directly in court. Individual claims for employment discrimination are authorized by R.C. 4112.99, which provides for a private right of action, stating that "whoever violates [R.C. Chapter 4112] is subject to a civil action for damages * * *." In *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131, 133, the Ohio Supreme Court stated:

"On the first point there appears to be little question that R.C. Chapter 4112 is comprehensive legislation designed to provide a wide variety of remedies

for employment discrimination in its various forms. Appellees agree that claims for employment discrimination must be asserted under the aegis of R.C. Chapter 4112.”

In *Elek v. Huntington Natl. Bank* (1991), 60 Ohio St.3d 135, 137, the supreme court found that “R.C. 4112.99 is to be liberally construed to promote its object (elimination of discrimination) and protect those to whom it is addressed (victims of discrimination). *** As such, R.C. 4112.99 must be interpreted to afford victims of handicap discrimination the right to pursue a civil action.”

It requires no citation to authority to say that the elimination of workplace discrimination is a beneficial goal.

III

We next consider the doctrine of exhaustion of administrative remedies.

A

In *McKart v. United States* (1969), 395 U.S. 185, 193-194, the United States Supreme Court explained the purpose behind exhaustion of administrative remedies:

“The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. The doctrine provides ‘that no one is entitled to judicial relief for a supposed or threatened injury until the

prescribed administrative remedy has been exhausted.' The doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions. Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved.

"Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand. A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at

various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals.

“Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, ‘the exhaustion doctrine is, therefore, an expression of executive and administrative autonomy.’ This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise.” (Citations and footnote omitted.)

Ohio law recognizes the importance of exhaustion of administrative remedies. While the failure to exhaust administrative remedies is not a jurisdictional defect, it may constitute an affirmative defense if timely asserted and maintained. See *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, syllabus.

B

The city is a home rule municipality with a duly adopted city charter. Article IV, Section D of the city charter grants the mayor the power to “*** remove any officer or employee of the City, but such power shall be subject to the

other provisions of this Charter ***.” The charter also establishes a civil service commission (“the commission”). Article V, Section 7 of the charter provides that the commission shall “provide by rule for the ascertainment of merit and fitness as the basis for appointment and promotion in the service of the City, *** and for appeals from the action of the Mayor in any case of transfer, reduction, or removal.”

The commission operates under local rules. Rule 8.2 states that “no person in the classified service shall be discharged or reduced in rank or compensation without being notified, in writing, by the Appointing Authority or officer of the reasons of such discharge or reduction.” Rule 8.3 states that “any employee or officer or holder of a position in the classified service may request a hearing before the Appointing Authority to appeal the notice of any suspension, discharge or reduction in rank or compensation.” Section (A) of Rule 8.3 requires a request for appeal to be made within 10 days of the suspension, discharge or reduction in rank or compensation.

It is undisputed that Dworning did not appeal his separation to the commission.

IV

We come then to the issue in this appeal — was Dworning barred from filing a private action under R.C. Chapter 4112 when he did not appeal his separation to the commission?

A

Dworning challenges the mandatory aspect of the civil service appeal provided to him. He notes that Rule 8.3 states that “any employee or officer or holder of a position in the classified service *may* request a hearing before the Appointing Authority to appeal the notice of any suspension, discharge or reduction in rank or compensation.” (Emphasis added.) He argues that the use of the permissive word “may” did not require mandatory resort to the administrative appeal provided by the city, therefore negating any exhaustion requirement.

It has long been the rule that “[i]n statutory construction, the word ‘may’ shall be construed as permissive and the word ‘shall’ shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage.” *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, paragraph one of the syllabus.

But in ways that only the law can accomplish, there are times when “the word, ‘may,’ must be construed to mean ‘shall,’ and ‘shall’ must be construed to

mean 'may,' in such cases the intention that they shall be so construed must clearly appear." *Dennison v. Dennison* (1956), 165 Ohio St. 146, 149.

This does not mean that "up" is "down." It does mean that we give words their ordinary meaning, particularly when they are terms of art, except in cases where it would be absurd to do otherwise. Hence, when the context conclusively shows that something is mandatory, the use of the word "may" will not necessarily dictate a conclusion that a thing is permissive.

With this in mind, the city argues that its appeals process was mandatory, despite the use of the word "may." It cites to *Portis v. Metro Parks Serving Summit Cty.*, Summit App. No. 22310, 2005-Ohio-1920, where the Ninth District Court of Appeals held under virtually identical facts that the use of the word "may" in an administrative appeal process was mandatory in nature. *Id.* at ¶19. The court of appeals cited to *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, in which the supreme court held that "a physician in a private hospital whose employment and/or hospital privileges have been terminated must exhaust all internal administrative remedies prior to seeking judicial review." *Id.* at syllabus. The court of appeals noted that:

"The Ohio Supreme Court in *Nemazee* was also presented with a 'may' clause. It found that the plaintiff-appellant was required to first pursue his administrative remedies. *Nemazee*, 56 Ohio St.3d at 114. The *Nemazee* Court

followed a history of the Ohio Supreme Court compelling exhaustion of administrative remedies even when the statute providing the remedy stated that the aggrieved party 'may' pursue that remedy." Id. at ¶17.

While *Nemazee* indeed concerned an internal appeals process that used the permissive word "may," there is no discussion of that word as a basis for ordering *Nemazee* to first exhaust his administrative remedies as a predicate for filing a complaint. Absent an explicit discussion of this point by the supreme court, we think it improvident to ascribe to the opinion an express finding that the permissive word "may" must be interpreted as being the mandatory "shall."

B

But all of this may be of no moment. Just one year after issuing *Nemazee*, the supreme court issued *Elek v. Huntington Natl. Bank*. In *Elek*, the supreme court found that "R.C. 4112.99 is to be liberally construed to promote its object (elimination of discrimination) and protect those to whom it is addressed (victims of discrimination). * * * As such, R.C. 4112.99 must be interpreted to afford victims of handicap discrimination the right to pursue a civil action."

The supreme court reaffirmed these principles in *Smith v. Friendship Village*, 92 Ohio St.3d 503, 506, 2001-Ohio-1272:

"In *Elek*, we held that, under R.C. 4112.99, an individual may institute an independent civil action for discrimination on the basis of a physical handicap

even though that individual has not invoked and exhausted his or her administrative remedies. However, because the plaintiff in *Elek* had not instituted administrative proceedings prior to filing his civil action, our holding in that case does not quite answer whether the General Assembly intended that handicapped persons be barred from instituting a judicial action after electing to commence administrative proceedings.”

The court went on to state:

“R.C. 4112.02(N) provides that ‘an aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age *** by instituting a civil action.’ An individual may also file an age discrimination charge with the commission pursuant to R.C. 4112.05(B)(1). However, the General Assembly has specifically provided that individuals alleging age discrimination must choose between an administrative or judicial action. R.C. 4112.08 states that ‘any person filing a charge under division (B)(1) of section 4112.05 of the Revised Code, with respect to the unlawful discriminatory practices complained of, is barred from instituting a civil action under section 4112.14 or division (N) of section 4112.02 of the Revised Code.’

“These provisions relating to age discrimination demonstrate that the General Assembly was aware that individuals might attempt to commence both administrative and judicial proceedings pursuant to R.C. Chapter 4112. So, in

clear language, the General Assembly expressed its intent that an election must be made. *However, in regard to handicap discrimination claims, the General Assembly has not manifested a similar intent requiring a plaintiff to elect between an administrative or judicial remedy.* Thus, had the General Assembly intended that individuals alleging handicap discrimination be forced to choose between an administrative or civil proceeding, it would have specifically stated so, as it did with respect to age discrimination. In this respect, we are guided by the Latin maxim *expressio unius est exclusio alterius*, which translated means that the expression of one item of a class implicitly excludes other items of the class that are not specifically mentioned. *State v. Droste* (1998), 83 Ohio St.3d 36, 39, 697 N.E.2d 620, 622. The General Assembly has specifically limited an individual's ability to bring both an administrative and civil proceeding in the context of age discrimination only. Its exclusion of other forms of discrimination from this limitation makes clear that it intended that both remedies be available for other forms of discrimination." *Id.* at 506-507 (emphasis added).

Accordingly, the court held that "[t]he filing of an unlawful discriminatory practice charge with the Ohio Civil Rights Commission under R.C. 4112.05(B)(1) does not preclude a person alleging handicap discrimination from instituting an independent civil action under R.C. 4112.99." *Id.* at syllabus.

Consistent with these holdings, the supreme court has refused to apply the exhaustion of administrative remedies doctrine when there is a “judicial remedy that is intended to be separate from the administrative remedy ***.” See *Basic Distribution Corp. v. Ohio Dept. of Taxation*, 94 Ohio St.3d 287, 290, 2002-Ohio-794, citing *Larkins v. G.D. Searle & Co.* (1991), 68 Ohio App.3d 746, 589 N.E.2d 488.

The preceding authorities leave us no doubt that an individual’s private right of action under R.C. 4112.99 is a judicial remedy separate from an administrative remedy offered by a civil service commission. The statutes imply — and the supreme court’s most recent cases compel — this conclusion. With all due respect, *Portis* failed to mention any of the supreme court’s holdings subsequent to *Nemazee*. Moreover, it failed to take into account the remedial nature of R.C. Chapter 4112 claims, and the General Assembly’s intent to create a private right of action. Instead, it engaged in a one-sided analysis of the exhaustion doctrine, without a word on the policy underlying a private right of action under R.C. 4112.99. Given this lack of discussion by the court of appeals, we do not consider *Portis* to be persuasive authority and will not apply it to find that the use of the word “may” in the city’s civil service appeals process is mandatory.

We likewise distinguish *Frick v. University Hosp. of Cleveland* (1999), 133 Ohio App.3d 224. In *Frick*, a divided panel of this court held that a hospital employee making a claim under the Family Medical Leave Act had to first exhaust administrative remedies through her employer's three-step grievance procedure. Again, although the panel strongly endorsed exhaustion of administrative remedies as a prerequisite to the filing of a discrimination claim, it too failed to mention *Elek* and other cases which reaffirmed the remedial nature of the private right of action under R.C. Chapter 4112.

We also believe it is significant that none of the adverse opinions cited above make mention of the interplay between the applicable administrative remedies and R.C. 4112.08. That section specifically states that "[t]his chapter shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply." (Emphasis added.) The city's civil service rules have the force of law. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.* (1994), 68 Ohio St.3d 377, 382. Applying the exhaustion doctrine to those rules has the undeniable effect of limiting, and in some circumstances superseding, the private right of action under R.C. 4112.99. Hence, application of the exhaustion doctrine would be inconsistent with the remedial purposes of R.C. Chapter 4112.

The city argues that neither *Elek* nor *Smith* addressed the issue of exhaustion of "internal" administrative remedies of the kind provided by the city. It maintains that those cases recognize that an independent cause of action exists under R.C. 4112.99 separate from the statutory protections afforded by the Ohio Civil Rights Commission in R.C. 4112.05 — in other words, an administrative review system based wholly on the remedial scheme intrinsic to R.C. Chapter 4112.

We fail to see how this argument advances the city's position. First, there is nothing in the text of R.C. 4112.02 to suggest that the General Assembly meant to treat employees subject to civil service commission rules (or any other disciplinary procedure) differently than non-civil service employees. R.C. 4112.01(A)(2) includes within the definition of "employer" "any political subdivision of the state." An "employee" is defined as "an individual employed by any employer ***." It makes no distinction between public and private employers or their employees. Yet the city's argument would create a distinction based on nothing more than exempt or non-exempt status under the civil service.

Second, the differentiation of employees based on nothing more than civil service status could create scenarios which end up frustrating the right to exercise a statutory remedy. Suppose that a civil service appeal is considered

a predicate to filing a discrimination claim. It is conceivable that a civil service appeal (and subsequent court review of a civil service appeal) might take more than six months to be resolved. This time period would extend beyond the limitations period set forth for filing a claim of discrimination with the Ohio Civil Rights Commission. R.C.4112:05(B)(1). If this scenario plays out, it would have the practical effect of elevating by priority the administrative remedy above the remedy expressly provided by statute. That would be a clear violation of R.C. 4112.08. In fact, the city's position could have the ultimate effect of undermining a person's right to file a charge of discrimination with the civil rights commission.

Third, the "internal" administrative remedies provided by the commission are nowhere near as expansive as those available to a litigant filing a discrimination action. R.C. 4112.99 authorizes Dworking to seek "damages, injunctive relief, or any other appropriate relief." The civil service appeal process, on the other hand, is silent on Dworking's remedies. Rule 8.4(B) of the commission states that the commission, "upon hearing testimony may affirm or disaffirm or modify the decision or judgment of the Appointing Authority." The rules make no provision for money damages. Additionally, the commission is not quasi-judicial, and therefore lacks the ability to enter an injunction or any other equitable relief that is available under R.C. 4112.99.

The city's position in essence argues that we should prefer an exhaustion of the very limited remedies available in a civil service appeal over the significantly more expansive rights provided under R.C. 4112.99. This position is inconsistent with the spirit of *Elek*, where the supreme court held that a party did not have to exhaust the more expansive civil rights commission review before initiating a private action. If the right to private action is so remedial as to trump the very well-established statutory process created through the civil rights commission, that private remedy will certainly trump a civil service appeal with significantly more limited remedies.

Our view is consistent with *Nemazee*. To be sure, *Nemazee* ordered a litigant to exhaust "internal" administrative remedies provided by his employer. But *Nemazee* did not file a disability discrimination claim subject to private action under R.C. 4112.99. He filed a breach of contract and intentional infliction of emotional distress claim. *Nemazee*, 56 Ohio St.3d at 110. Making a special note of its reluctance to involve itself in the staffing decisions of a hospital, the supreme court reached the unremarkable conclusion that *Nemazee's* contract complaint was best resolved with resort to the hospital's grievance procedure, which itself was listed in *Nemazee's* employment contract. *Id.*

Here, the applicability of the civil service appeals process is not contractual in nature. We have been provided no evidence to show that there were contractual terms and conditions of Dworning's employment. Dworning was employed under civil service rules. Of course, he was subject to work rules, but these work rules are unlike the employment contract in *Nemazee*. Similarly, Dworning was not subject to a collective bargaining agreement which would have defined the exclusive rights and liabilities of the parties. Absent such contractual obligations, we cannot interpret *Nemazee* in the expansive way suggested by the city.

D

We have been provided no reason to think that a civil service appeal in this case would promote judicial efficiency in a manner consistent with the exhaustion doctrine's goal to preserve judicial resources.

The holding in *Elek* — that a party who has first initiated proceedings with the civil rights commission has no obligation to exhaust that remedy before seeking private redress of discrimination claims — compels the conclusion that a municipality's civil service commission should not be treated any differently. It would make no sense to say that the civil rights commission, with its established expertise in dealing with discrimination cases, is a less viable place to initiate a claim of discrimination than a municipal civil service commission

which has no authority to redress a claim of discrimination beyond reinstatement. In fact, the opposite conclusion holds. There is no doubt that Dworning could have initiated a claim with the civil rights commission before filing a claim with the civil service commission. If the filing of a civil service appeal is not a prerequisite for filing a claim with the civil rights commission, and a party need not exhaust a civil rights commission claim before filing a private action, the city cannot rationally argue that a party must first file a civil service appeal before filing a private discrimination action.

We likewise fail to see how the purposes of judicial economy are served by requiring a party to exhaust administrative remedies with a civil service commission before filing a private discrimination action. The civil service commission's own rules severely limit its review of employment decisions. As we previously noted, the city civil service commission may simply affirm, disaffirm or modify the "appointing authority's" decision. This mandate does not encompass the relief sought by Dworning in his discrimination action. In *City of Whitehall ex rel. Wolfe v. Ohio Civil Rights Comm.*, 74 Ohio St.3d 120, 122, 1995-Ohio-302, the supreme court stated, "*** the issues involved in a civil service appeal before either the State Personnel Board of Review or a municipal civil service commission and an unlawful discriminatory practice charge before OCRC are different." As we read its rules, the city civil service commission could

only order reinstatement of employment — something Dworning has not requested. And even if it did have authority to determine whether the city had discriminated against Dworning, the civil service commission does not appear to have the authority to order money damages as a remedy. This is opposed to the private right of action which specifically permits money damages and other injunctive relief. In other words, Dworning's civil service remedy would be no remedy at all. This is the antithesis of conservation of judicial resources.

E

To summarize thus far: the remedial nature of R.C. 4112.99 trumps the availability of an administrative appeal which cannot consider a disability discrimination claim or provide relief in a manner consistent with the purposes of the exhaustion doctrine. This conclusion is compelled by the nature of the claims involved: one being a statutory right; the other being a judge-made rule of convenience. While we continue to believe in the efficacy of the exhaustion doctrine, the convenience of the courts cannot overcome a right so remedial in purpose as expressed by the General Assembly and a long line of court decisions.

We stress that our holding does not apply to employment relationships defined by contract, whether private or by way of a collective bargaining agreement, which set forth agreed upon disciplinary procedures, regardless of whether the right to invoke those procedures is couched in discretionary

language. However, unless and until the General Assembly expressly incorporates an exhaustion requirement into R.C. Chapter 4112, we have no basis for requiring it as a matter of course to those workers who have available civil service remedies.

V.

This brings us to the factually contested portion of this case — did Dworning retire or was he terminated?

The city maintains that it did not terminate Dworning — he retired. To support this argument, it offered into evidence a letter sent by Dworning dated March 8, 2004 in which he told the mayor, “*** I have chosen to retire from my position as the Chief of the Euclid Fire Department.”

Dworning does not deny that he sent the March 8, 2004 letter, but maintains he did so in order to receive certain retirement benefits that he would not be entitled to if he had been terminated. These claims were substantiated by the mayor, who said at deposition that he met with Dworning on February 20, 2004 and “I informed him that I was contemplating considering terminating his employment and that we discussed him voluntarily retiring.” The mayor went on to say that “I thought the best way under the situation would be for retirement.” Dworning exited the meeting by giving the mayor his badge. On February 24, 2004, the mayor wrote Dworning to request a “written statement

that you have in fact resigned your position as Chief of the Euclid Fire Department ***. A written statement is necessary in order to process your payment for accumulated vacation, sick and personal days, etc.” On March 2, 2004, the mayor again wrote Dworning to say that he had not received Dworning’s “written indication of resignation or retirement” and that “you are hereby terminated from your position with the City of Euclid for poor work performance. Your effective date of termination is February 20, 2004.” This letter prompted Dworning’s March 8, 2004 letter announcing his retirement. In response, the mayor wrote the civil service commission to inform it of Dworning’s resignation effective retroactively to February 20, 2004. In a subsequent correspondence to members of the fire department, Dworning noted his separation in an email sent on February 24, 2004, saying that “I know in my heart, the Mayor did not have an easy task on [sic.] making the decision that he did. Yet, please do not think for one minute that I am prepared to go away silently.” The city did not ask Dworning to waive his rights in exchange for the early retirement and benefits payout.

The dispute over the voluntariness of Dworning’s separation is counterintuitive. If, as the city argues, Dworning actually retired, the commission appeals process would be unavailable to him as it expressly applies only upon “suspension, discharge or reduction.” No exhaustion of remedies

would be required. See *Vedder v. City of Warrensville Hts.*, Cuyahoga App. No. 81005, 2002-Ohio-5567, at ¶24. On the other hand, Dworning's insistence that he had been terminated is at odds with his acceptance of a payment for accumulated sick and leave time that he would not have been entitled to in the event of a termination.

There are reasons for these strange positions. If Dworning "retired," he would seriously weaken (perhaps even obviate) his claim that he had been discharged on account of his disability. So it is in the city's ultimate interest to say that Dworning "retired" even though this position nullifies the argument concerning the exhaustion of administrative remedies. At the same time, the absence of a constructive discharge claim for relief in Dworning's complaint is likely explained by his unwillingness to tender back the cash payment he received for his early retirement — we presume that if he had been discharged, the city could have counterclaimed for those benefits it granted Dworning.

The precise characterization of Dworning's separation as an issue of fact is of no moment for purposes of appeal. If we accept as a matter of fact that Dworning was terminated, our holding that he has no obligation to exhaust his administrative remedies is unaffected. Likewise, if we accept as a matter of fact that Dworning retired, we would find that the exhaustion doctrine would not apply because the city's civil service commission rules do not encompass

voluntary separations. So regardless of how we characterize Dworning's separation, there is no requirement that he exhaust administrative remedies.

V

In the end, we are left with choosing between a judge-made rule of convenience over a clearly defined statutory right. We continue to adhere to the fundamental principles supporting the exhaustion doctrine. In the main, they have the salutary effect of promoting judicial economy and efficiency. We cannot however, apply a doctrine of "judicial convenience" when the General Assembly has so very clearly provided for a right of private action with the intent that it has priority over other laws. The remedial purposes of the discrimination laws are not served by requiring exhaustion of administrative remedies. We therefore hold that a separated civil service employee who has administrative remedies available to him by way of a civil service appeal is not required to exhaust those remedies as a predicate to filing a private disability discrimination action under R.C. Chapter 4112.99.

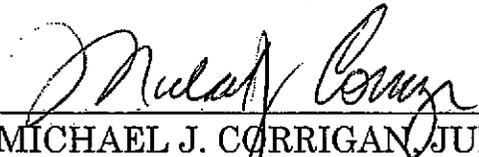
At the same time it granted summary judgment to the city, the court denied as moot Dworning's motion to compel discovery. Our reversal of the summary judgment necessarily vitiates that ruling.

This cause is reversed and remanded for proceedings consistent with this opinion.

It is, therefore, ordered that said appellant recover of said appellees his costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


MICHAEL J. CORRIGAN, JUDGE*

CHRISTINE T. McMONAGLE, J., CONCURS

SEAN C. GALLAGHER, P.J., CONCURS IN
JUDGMENT ONLY WITH SEPARATE OPINION

(*Sitting by Assignment: Judge Michael J. Corrigan, Retired, of the Eighth District Court of Appeals.)

SEAN C. GALLAGHER, P.J., CONCURRING IN JUDGMENT ONLY:

I concur with the majority conclusion. I agree that Dworning was not required to exhaust administrative procedures prior to bringing a civil disability discrimination action in common pleas court. The General Assembly has given an aggrieved party a separate and direct route to the courts under R.C. 4112.99. I write only to note that while the city argues that Dworning should have exhausted his administrative remedies, the city record reflects Dworning

“retired” and was given a windfall payment for unused sick time. Dworning could not be compelled to exhaust an administrative remedy after voluntarily “retiring.” I am at a loss to see how Dworning can in good faith take a windfall payment from the city for unused sick time by voluntarily “retiring,” then, after securing that payment, turn around and assert a claim for wrongful discharge based on his disability.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

MICHAEL DWORNING

Appellant

COA NO.
87757

LOWER COURT NO.
CP CV-546231

COMMON PLEAS COURT

-vs-

CITY OF EUCLID, ET.AL.

Appellee

MOTION NO. 392092

Date 01/25/2007

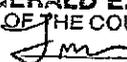
Journal Entry

THE MOTION BY DEFENDANT-APPELLEES CITY OF EUCLID, ET AL., TO CERTIFY A CONFLICT PURSUANT TO APP.R. 25 IS GRANTED. THIS COURT'S JUDGMENT AND OPINION IS IN CONFLICT WITH PORTIS V. METRO PARKS SERVING SUMMIT CTY., SUMMIT APP. NO. 20800, 2005-OHIO-1820, ON THE FOLLOWING QUESTION:

"WHETHER A SEPARATED CIVIL SERVICE EMPLOYEE WHO HAS ADMINISTRATIVE REMEDIES AVAILABLE TO HIM BY WAY OF AN APPEAL TO HIS PUBLIC EMPLOYER'S CIVIL SERVICE COMMISSION IS REQUIRED TO EXHAUST THOSE REMEDIES AS A PREDICATE TO FILING A PRIVATE DISABILITY DISCRIMINATION ACTION UNDER R.C. CHAPTER 4112."

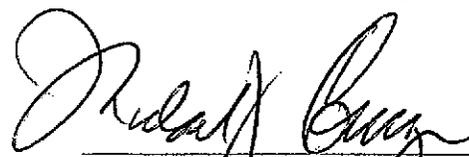
RECEIVED FOR FILING

JAN 25 2007

GERALD E. FURST
CLERK OF THE COURT OF APPEALS
BY:  DEP.

Presiding Judge SEAN C. GALLAGHER,
Concurs

Judge CHRISTINE T. MCMONAGLE, Concurs



Judge MICHAEL J. CORRIGAN*
(*SITTING BY ASSIGNMENT: JUDGE MICHAEL
CORRIGAN, RETIRED, OF THE EIGHTH
DISTRICT COURT OF APPEALS.)

FOR ALL PARTIES-COSTS TAXER