

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL., MUNICIPAL)
 CONSTRUCTION EQUIPMENT)
 OPERATORS' LABOR COUNCIL, et al.,)
)
 Relators)
)
 -v-)
)
 CITY OF CLEVELAND, et al.,)
)
 Respondents.)

Case No. 2006-2056

Original Action in Mandamus

**RESPONDENTS' MOTION TO STRIKE OCTOBER 9 AND 15, 2007
 AFFIDAVITS IN SUPPORT OF PENDING MOTIONS FOR AN ORDER
 REQUIRING RESPONDENTS TO SHOW CAUSE AND FOR SANCTIONS AS
 THEY WERE FILED IN VIOLATION OF S. CT. PRAC. R. VIII, SECTION 8**

Stewart D. Roll (0038004)
 Persky, Shapiro & Arnoff Co., L.P.A.
 Signature Square II
 25101 Chagrin Boulevard, Suite 350
 Beachwood, Ohio 44122
 (216) 360-3737
 Fax No. (216) 593-0921
sroll@perskylaw.com

FILED

OCT 19 2007

CLERK OF COURT
 SUPREME COURT OF OHIO

COUNSEL FOR RELATORS

Robert J. Triozzi, Director of Law
 Theodora Monegan (0039357), Chief Assistant Director of Law
 William A. Sweeney (0041415), Assistant Director of Law
 City of Cleveland Department of Law
 601 Lakeside Avenue, Room 106
 Cleveland, Ohio 44114
 (216) 664-2800
 Fax No. (216) 664-2663
tmonegan@city.cleveland.oh.us

COUNSEL FOR RESPONDENTS

Introduction

Relators' supplemental filings of October 9 and 15, 2007 are affidavits in support of their new grounds seeking relief. Relators are "affidavitizing" legal conclusions not addressed in their original pleadings or subsequent filings. Relators' filings violate S. Ct. Prac. R. VIII, Section 8, which prohibits parties from supplemental filing in support of their merit briefs. Respondents assert that the Affidavits of Frank P. Madonia and Stewart D. Roll are actually their attempt to supplement Relators' merit brief. The statements made in their affidavits suggest an interpretation of this Court's August 15, 2007 order that Respondents respectfully submit is not supported by controlling case authority.

Frank P. Madonia's and Stewart D. Roll's Affidavits Introduce New Grounds for Relief in Violation of S. Ct. Prac. R. VIII, Section 8

On October 17, 2007, Respondents filed a Motion to Strike the Affidavits of Frank P. Madonia and Stewart D. Roll under S. Ct. Prac. R. X, Section 7. This additional filing includes as further justification Relators violation of the Supreme Court Rule prohibiting a party from filing supplemental briefs. Relators' are attempting to introduce legal arguments and conclusions of law that were not addressed in previous filings. Their attempts include seeking relief for other union members that were not named in the Original Action in Mandamus. Respondents filed a Supplemental Authority in response to these new issues. The Affidavits filed by Frank P. Madonia and Stewart D. Roll assert facts that they failed to address in their original pleadings, but further fail to recognize the differences in standing between the MCEO union and the individually named employees in seeking back pay awards. A claim for back pay is a private right that must be asserted

in the name of the individual employee.¹ Respondents have misinterpreted this Court's order as granting relief to the union in a representative capacity.

This Court's order must be viewed in light of the standing of the various relators. The statements in the Affidavits made by Messrs. Madonia and Roll, on behalf of the union and its membership, merely make legal conclusory statements that fail to demonstrate the union's personal knowledge or special interest in the action, and therefore, it is not entitled to any relief.² A union seeking to protect a private right of its individual members is without standing barring some other personal or special interest in the matter.³ The only correct interpretation of this Court's August 15, 2007 order is that it directs respondents to issue back pay to the 19 individually named employees.

¹ *State ex rel Internatl. Assn. of Fire Fighters, Local 381 v. Findlay* (Ohio App. 3 Dist. 2006), 2006 WL 903582, 2006 – Ohio – 1774 (holding union was without standing where it was trying to enforce a private right.)

² *Id.* at *6. (“The only “special interest” the union can assert is that it is protecting the interests of its members. However, that interest is sufficiently protected through the use of a declaratory judgment action, which the union has already brought. Since there is an adequate remedy at law to protect that interest a mandamus proceeding is inappropriate....Therefore, the interest that the union asserts is not appropriate to a mandamus claim. The real interest at issue-Captain Lonyo's interest in receiving his promotion-is entirely personal to Captain Lonyo, and therefore he must be the one to bring the action in mandamus.”); *State ex rel. Internatl. Heat & Frost Insulators and Asbestos Workers Local # 3 v. Court Of Common Pleas Of Cuyahoga County*, (Ohio App. 8 Dist.2006) 2006 WL 178631 at *6 (“Because relators acknowledge that the union relators have no personal or private right to secure judicial review, we hold that the union relators lack standing to prosecute this action.”); cf. *State ex rel Kabert v. Shaker Hts City School Dist. Bd. Of Edn.* (1977), 78 Ohio St. 3d 37 (awarding back pay to the 11 named relators.)

³ *Id.*

In Order To Enforce A Private Right Through Mandamus, The Relator Must Demonstrate Some Personal Or Special Interest In The Subject Matter.⁴

This Court has distinguished between those cases where the extraordinary aid of a mandamus is invoked merely for the purpose of enforcing or protecting a private right, unconnected with the public interest, and those cases where the purpose of the application is the enforcement of a purely public right, where the people at large are the real party in interest, in determining the requisite interest to establish standing. "...[W]here the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject matter, since he is regarded as the real party in interest and his rights must clearly appear. . ."⁵

The instant case was clearly brought to enforce a private right as opposed to a purely public right. The general public does not benefit from this action. Rather, the individuals entitled to an order directing respondents to issue back pay are the 19 individually named relators. They are the only parties with a sufficient personal interest in the claim to receive mandamus relief.

The union's sole interest in this matter is as a representative for its members.⁶ The union does not claim any separate personal or special interest. Such an interest is insufficient to establish standing necessary to obtain mandamus relief.⁷

⁴ *State ex rel. River Grove Park, Inc., v. City of Kettering*, (Ohio App. 1962) 118 Ohio App. 143, 145 quoting *State ex rel. v. Henderson*, (Ohio 1833) 38 Ohio St. 644, 648.

⁵ *Id.*

⁶ Relators' Original Action In Mandamus, filed November 6, 2006, at ¶3.

⁷ *State ex rel Internatl. Assn. of Fire Fighters, Local 381 v. Findlay* (Ohio App. 3 Dist. 2006), 2006 WL 903582, 2006 – Ohio – 1774; *State ex rel. Internatl. Heat & Frost*

In *State ex rel Internatl. Assn. of fire Fighters, Local 381 v. Findlay*,⁸ the court found that the relator-union was without standing to obtain mandamus relief on behalf of a member who had been denied promotion. In ruling that the union lacked standing, the court noted that a private right was being enforced.

“It is clear in the instant case that Local 381 is seeking the enforcement of a private right, and is not asserting a public interest. The only interest asserted in the mandamus action is having Captain Lonyo promoted to the position of battalion chief. Although this is a public office, the public at large does not have any specific interest in seeing Captain Lonyo promoted to this position, when the position has already been filled by another qualified candidate. Were the position vacant, or were there some claim that Captain Clark was not qualified, there may be a public interest involved ... However, where the only interest sought is having a private individual promoted to a position to which he believes that he is entitled, the interest asserted is a private right.”⁹

The court concluded that the union’s only interest was in a representative capacity and that such an interest was insufficient to entitle to union to mandamus relief.¹⁰

Similarly, in *State ex rel. Internatl. Heat & Frost Insulators and Asbestos Workers Local # 3 v. Court Of Common Pleas Of Cuyahoga County*, the court concluded that the relator-union was without standing to obtain mandamus relief where the union failed to demonstrate a private or personal right separate from that of its members.¹¹ In denying the union relief, the court first determined that the union-relator sought to enforce a

Insulators and Asbestos Workers Local # 3 v. Court Of Common Pleas Of Cuyahoga County, (Ohio App. 8 Dist.2006) 2006 WL 178631 at *6.

⁸ *State ex rel Internatl. Assn. of Fire Fighters, Local 381 v. Findlay* (Ohio App. 3 Dist. 2006), 2006 WL 903582, 2006 – Ohio – 1774.

⁹ *Id.* at paragraph 19.

¹⁰ *Id.* at paragraph 21.

¹¹ *State ex rel. Internatl. Heat & Frost Insulators and Asbestos Workers Local # 3 Relators v. Court Of Common Pleas Of Cuyahoga County*, (Ohio App. 8 Dist.2006) 2006 WL 178631 at *6.

private right as opposed to public right. Relators had sought to challenge the constitutionality of Am.Sub.H.B. No. 292, 150 Ohio Laws ___ (“Asbestos Litigation Bill”). The court determined that the scope of the bill was limited and affected only those tort claimants seeking recovery for exposure to asbestos.¹² The court thereafter concluded that the union-relator lacked standing given its lack of a private or personal right at issue in the litigation.¹³

The MCEO union in the instant case similarly lacked standing to obtain mandamus relief. The claim for back pay is clearly a private right benefiting only the individually named employees. The only logical interpretation of this Court’s August 15, 2007 order is that that order directed respondents to pay back pay to the 19 individually named employees. As reflected in the separate notice of compliance filed with this Court, respondents have now fully complied with this Court’s order.

Affidavits not based on personal knowledge.

“Affidavits shall be made on personal knowledge, setting forth facts admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters stated in the affidavit.”¹⁴ Paragraph 5 of Frank P. Madonia’s affidavit makes conclusions regarding Respondents’ actions and asserts that those actions are “deliberate” and “implemented as part of a scheme to resist and defy this Court’s lawful Entry and Writs.” Mr. Madonia cannot have personal knowledge regarding the Respondents’ motives.

¹² Id. at *4.

¹³ Id. at *6. (“Because relators acknowledge that the union relators have no personal or private right to secure judicial review, we hold that the union relators lack standing to prosecute this action.”)

¹⁴ Sup.Ct.Prac.R. X(7).

10/13/2007 11:59 FAX 2166642000 CITY OF CLEV. DEPT OF LAW 1000

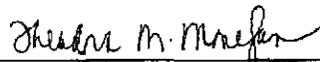
Paragraph 6 of Stewart D. Roll's affidavit asserts, "Respondents are well aware" of what he believes is obligated. Mr. Roll cannot have personal knowledge regarding what awareness the Respondents have.

Conclusion

In light of the foregoing, as well as the authority previously presented to this Court in response to Relators' motion for the issuance of an order to show cause, Respondents respectfully request that the Affidavits submitted by Frank P. Madonia and Stewart D. Roll filed in support of the Relators' motion stricken as they are in violation of S. Ct. Prac. R. VIII, Section 8, and their motion denied.

Respectfully submitted,

ROBERT J. TRIOZZI
Director of Law

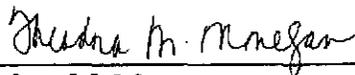
By: 
Theodora M. Monegan (0039357)
Chief Assistant Director of Law
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114
(216) 664-2800
(216) 664-2663 facsimile
tmonegan@city.cleveland.oh.us

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

Respondents mailed a copy of this Respondents' Supplemental Authority for Brief in Opposition to Relators' Motions for an Order Requiring Respondents to Show Cause and for Sanctions on the 19th day of October, 2007 to the attorney for Relators at the following address:

Stewart D. Roll
Persky, Shapiro & Arnoff Co., L.P.A.
Signature Square II
25101 Chagrin Blvd., Suite 350
Cleveland, Ohio 44122-5687



Theodora M. Monegan
Chief Assistant Director of Law