

IN THE SUPREME COURT OF OHIO

FRATERNAL ORDER OF POLICE,
AKRON LODGE NO. 7 AND AKRON
FIREFIGHTERS ASSOCIATION,
IAFF LOCAL 330, et al.,

Appellants,

v.

CITY OF AKRON, et al.,

Appellees.

08-0418

On Appeal from the Summit
County Court of Appeals,
Ninth Appellate District

Court of Appeals Case No. 23660

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS
FRATERNAL ORDER OF POLICE, AKRON LODGE NO. 7 AND
AKRON FIREFIGHTERS ASSOCIATION, IAFF LOCAL 330, et al.**

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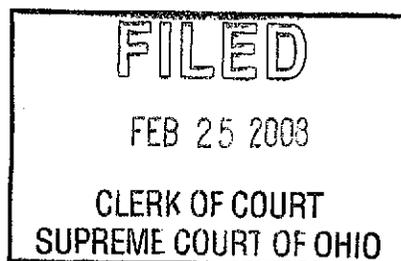


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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case involves three critical issues that involve substantial constitutional questions and are of great interest to public employees across the State of Ohio: (1) whether the General Assembly's broad authority to enact legislation under Article II, Section 34 of the Ohio Constitution is limited to enacting legislation that is for the "common welfare" of the public at large; (2) whether the residency requirement prohibition of R.C. 9.481 is constitutional under the Ohio Constitution; and (3) whether the residency requirement prohibition of R.C. 9.481 supersedes local legislation enacted under the Home Rule Amendment of the Ohio Constitution. Further, this case is of great public and general interest as a decision from this Court is necessary to reconcile the varying decisions from courts across Ohio on the issue of whether political subdivisions can impose residency requirements upon their employees in light of R.C. 9.481.

In the instant case, the court of appeals ruled that the General Assembly did not have the authority to enact R.C. 9.481 under Article II, Section 34 of the Ohio Constitution, and that a municipality has the authority to enforce a conflicting residency requirement under the Home Rule Amendment of the Ohio Constitution. In so holding, the court of appeals has limited the legislative authority of the General Assembly in a manner that is in direct conflict with the express language of Article II, Section 34 and an established body of precedent from this Court.

As recognized by the trial court and the dissenting opinion from the court of appeals' decision, this Court's precedent requires a holding that it was within the authority of the General Assembly to enact R.C. 9.481 under Article II, Section 34 of the

Ohio Constitution. In decisions such as *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 539 N.E.2d 103 (“*Rocky River IV*”) and *American Assn. of Univ. Professors v. Central State Univ.* (1999), 87 Ohio St.3d 55, 717 N.E.2d 286, this Court has repeatedly held that Article II, Section 34 is to be interpreted as a “broad grant of authority to the General Assembly, not as a limitation on its power to enact legislation.” In these cases and others discussed herein, this Court has determined that legislation such as enforcing the dispute resolution procedure of the Ohio Public Employees Collective Bargaining Act; requiring the development of standards for professors’ instructional workloads and exempting those standards from collective bargaining; creating a state police and firemen’s disability and pension fund; requiring more efficient management of fire departments, etc., are all valid exercises of the General Assembly’s legislative authority under Article II, Section 34. See *Rocky River IV, supra.*; *AAUP, supra.*; *State ex rel. Bd. of Trustees of Police and Firemen’s Pension Fund v. Bd. of Trustees of Police Relief and Pension Fund* (1967), 12 Ohio St.2d 105, 233 N.E.2d 135; *State ex rel. Strain v. Houston* (1941), 138 Ohio St. 203, 34 N.E.2d 219.

As this Court has held in such decisions, no other provision of the Constitution can impair or limit the broad authority of the General Assembly to enact legislation to provide for the welfare of employees. Yet, the court of appeals’, through the majority’s opinion, ignored this established precedent and instead imported a limitation on the General Assembly’s authority under Article II, Section 34 so that only legislation which serves the “societal notion of ‘common welfare’” will be deemed constitutional. The court of appeals recognized that this limitation had not been previously “explicitly articulated” by the Court. However, in what can only be described as a blatant

demonstration of judicial activism, the court of appeals proceeded to articulate this heightened constitutional standard for legislative enactments under Article II, Section 34, under which the General Assembly must enact legislation which serves “societal notice of common welfare,” as well as the welfare of employees, in order for the legislation to be constitutional.

This heightened constitutional standard constructed by the court of appeals is not rooted in the language of Article II, Section 34, nor is it drawn from the precedent of this Court. To the contrary, the court of appeals’ interpretation of the Ohio Constitution is at odds with both. Yet, it was under this new, heightened constitutional standard that the court of appeals deemed R.C. 9.481 unconstitutional, stating that it applied to a “small segment of the population” and sought to reinstate a “non-fundamental right.” In comparing the facts of the instant case and the standard of review articulated by the court of appeals with this Court’s previous decisions and their facts, it is apparent that the court of appeals’ decision represents a drastic change in how courts are to determine the constitutionality of legislation enacted pursuant to Article II, Section 34. Indeed, if the court of appeals’ heightened constitutional standard were applied to legislation previously enacted under Article II, Section 34, it is reasonable to conclude that such legislation as enforcing the State’s Public Employees Collective Bargaining Act; creating the State’s pension and disability fund for firefighters and police; and protecting retirees’ vested rights in sick leave, as well many others, would be deemed unconstitutional. Thus, the court of appeals’ decision threatens not only the authority of the General Assembly to enact legislation under the Ohio Constitution, but also unduly infringes upon the General Assembly’s ability to enact laws aiding the general welfare of all employees across Ohio.

No doubt, such a threat poses significant constitutional questions and is clearly of considerable public and general interest.

Beyond the realm of the critical constitutional issues posed in this case is the reality that the court of appeals' decision to deem R.C. 9.481 unconstitutional directly impacts the lives of public employees and their families across Ohio. It is not an exaggeration to state that the eyes of hundreds of thousands of public employees and their family members will rest upon the Court in hearing the instant appeal and other appeals that may follow. The General Assembly through drafting and passing R.C. 9.481, and the Governor by signing R.C. 9.481, guaranteed these public employees and their families the right to choose where to live. This right was upheld by the trial court in this case, as well as all other trial courts in Ohio facing similar actions challenging R.C. 9.481.¹ Currently, two (2) decisions have been issued from courts of appeals on the residency issue and five (5) more decisions will be issued. While the appeals process takes its course, the public employees covered under R.C. 9.481 and their conflicting residency requirements sit idly by, cognizant that ultimately one decision must be issued by this Court to determine whether their right to choose where to live will be upheld.

The court of appeals' interpretation of the Ohio Constitution poses substantial constitutional questions relating to the proper interpretation of the Constitution,

¹ In addition to the trial court's decision in this case, R.C. 9.481 has been upheld by the following courts: *City of Lima v. State of Ohio*, Case No. CV 2006 0518 (Allen Co. Common Pleas, Feb. 16, 2007); *City of Cleveland v. State of Ohio*, Case No. CV-2006-590414 (Cuyahoga Co. Common Pleas, Feb. 23, 2007); *City of Dayton v. State of Ohio*, Case No. 06-3507 (Montgomery Co. Common Pleas, June 6, 2007); *City of Toledo and City of Oregon v. State of Ohio*, Case No. C106-3235 (Lucas Co. Common Pleas, July 27, 2007); *AFSCME Local #74 v. City of Warren*, unty Court of Common Pleas, Case No. 2006 CV 01489 (Trumbull Co. Common Pleas, Sept. 14, 2007); *City of Cincinnati v. State of Ohio*, Case No. A0604513 (Hamilton Co. Common Pleas, Oct. 31, 2007).

specifically Article II, Section 34, as well as how the Ohio Constitution is to be applied to the everyday lives of public employees and their families across the State. According to the court of appeals, the Ohio Constitution may be interpreted using subjective notions of “common welfare,” as opposed to the actual provisions of the Constitution and precedent interpreting said language. In terms of applying the rights afforded by the Constitution, the court of appeals has usurped the role of the General Assembly under Article II, Section 34 and declared that it is best suited to determine what is for the general welfare of employees, as opposed to the State’s representatives that serve these employees and the public at large. The court of appeals’ decision sets an incredibly dangerous precedent for both the Ohio Constitution and Ohio’s employees. Accordingly, this Court must grant jurisdiction to hear this case and review the erroneous decision of the court of appeals.

STATEMENT OF THE CASE AND FACTS

The case arises from the attempts of Appellants, Fraternal Order of Police, Akron Lodge No. 7 and the Akron Firefighters Association, IAFF Local 330, as well as Paul Hlynsky, personally and on behalf of FOP, Akron Lodge No. 7 and Phil Gauer, personally and on behalf of IAFF Local 330 (“Union Appellants” or “the Unions”), to enforce Section 9.481 of the Ohio Revised Code, which prohibits political subdivisions from requiring their employees to reside in any specific area of the state as a condition of employment.

On March 1, 2005, Senate Bill 82 (which would eventually become R.C. 9.481) was introduced to the Ohio Legislature. Senate Bill 82 stated, in part, “[N]o political subdivision shall require any of its employees, as a condition of employment, to reside in

any specific area of the state.” Following its introduction, the contents and purpose of Senate Bill 82 were repeatedly discussed at length and debated intensely within the General Assembly. Proponents and opponents of Senate Bill 82 across the State of Ohio provided both legal and lay opinion regarding the bill over the course of several hearings before the State and Local Government and Veterans’ Affairs Committee of the Ohio Senate. On June 14, 2005, after having considered weeks worth of testimony, documents, legal opinions, etc., the Committee passed Senate Bill 82. On June 21, 2005, Senate Bill 82 was passed by the Ohio Senate. Days later, on June 23, 2005, Senate Bill 82 was introduced to the Ohio House of Representatives to restart the deliberation process anew. After months of further deliberation, on January 18, 2006, the Ohio House of Representatives also passed Senate Bill 82. On January 27, 2006, Ohio Governor Robert Taft signed Senate Bill 82 into law, with an effective date of May 1, 2006.

On May 2, 2006, a day after Senate Bill 82 went into effect as R.C. 9.481, the Unions filed a Complaint for Declaratory Judgment seeking to enforce R.C. 9.481 over the residency requirement of Appellee, City of Akron (“the City”), Summit Co. Common Pleas, CV 2006-05-2797. The City’s residency requirement states, in relevant part, “[N]o person shall hold an appointed or promoted position in the classified service of the City of Akron unless he shall become a resident citizen of the City of Akron within twelve (12) months of his appointment or promotion, and remain a resident citizen of the City of Akron during the term of his employment.”

During this same time period the City filed its own action for declaratory relief, seeking to have R.C. 9.481 held unconstitutional, and on June 14, 2006, the two suits were consolidated, Summit Co. Common Pleas, CV 2006-05-2759. The City, the

Unions, and the State of Ohio (“the State”) subsequently filed motions for summary judgment. On March 30, 2007, the trial court denied the City’s motion for summary judgment and granted summary judgment in favor of the Unions and the State, holding R.C. 9.481 was constitutional and that R.C. 9.481 prevailed over the City’s conflicting residency requirement. In so holding, the trial court cited this Court decision in *Rocky River IV* and concluded that R.C. 9.481 had been validly enacted under Article II, Section 34.

On April 3, 2007, the City appealed the trial court’s decision to the Ninth District Court of Appeals, Case No. 23660. The Ninth District Court of Appeals reversed the trial court’s decision, holding that R.C. 9.481 was unconstitutional (See Appendix A, attached hereto). The Unions now bring this appeal.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The General Assembly’s authority to enact legislation pursuant to Article II, Section 34 of the Ohio Constitution is not limited by “societal notions of common welfare.”

Legislative enactments enjoy a presumption of constitutionality and validity. *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St.3d 360, 361, 653 N.E.2d 212, 213-214. As a result, a statute that is subject to challenge will not be invalidated unless the challenging party proves that the statute is unconstitutional beyond a reasonable doubt. *State v. Anderson* (1991), 57 Ohio St.3d 168, 171, 566 N.E.2d 1224, 1226-1227; see also *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, ¶ 1 of the syllabus. In reviewing the validity of a statute, the reviewing court is to afford the challenged statute every possible presumption in favor of the validity. *State ex rel. Dickman*, 164 Ohio St. at 154, 566 N.E.2d at 67.

Article II, Section 34 of the Ohio Constitution states:

Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and **providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.** (Emphasis added).

The Court has held that Article II, Section 34 states in “‘clear, certain and unambiguous language’ that *no other provision* of the Constitution may impair the legislature’s power under Section 34.” *Rocky River IV*, 43 Ohio St.3d at 13, 539 N.E.2d at 114; see also *AAUP*, 87 Ohio St.3d at 61, 717 N.E.2d at 292 (“This court has repeatedly interpreted Section 34, Article II as a broad *grant* of authority to the General Assembly, not as a limitation on its power to enact legislation.”).

In *Rocky River IV*, this Court upheld the constitutionality of certain provisions of the Ohio Public Employees Collective Bargaining Act (specifically R.C. 4117.14(G)), which permit a third-party neutral to issue a final and binding award in collective bargaining disputes. In that case, the employer argued that R.C. 4117.14(G) was unconstitutional because it would allegedly deny municipalities the power to determine their employees’ compensation, a power of local-government protected by the Home Rule Amendment. The employer further argued that R.C. 4117.14(G) was not validly enacted under Article II, Section 34, as Article II, Section 34 was intended to apply only to matters involving minimum wage. The Court rejected both arguments based upon the clear and unambiguous terms of Article II, Section 34:

If the framers of our Constitution had intended this section to apply only to minimum wage, almost half of the forty-one words contained in this section must be regarded as mere surplusage...Are we to believe, as appellant apparently does, that these words were not intended to have meaning? To ask the question is to answer it.

The same may be said of the final phrase of Section 34, which states that “* * * no other provision of the constitution shall impair or limit” the General Assembly’s power to pass laws concerning the welfare of employees...Section 34 could not be clearer or more unequivocal. Appellant’s contention, that Section 34 does not mean what it so obviously says, is indefensible. This is especially true when one considers that this court has already held that Section 34 contains “clear, certain and unambiguous language” providing that “no other provision of the Constitution may impair the intent, purpose and provisions” of Section 34, including the home-rule amendment.

Rocky River IV, 43 Ohio St.3d at 16, 539 N.E.2d at 116 (citing *Pension Fund, supra.*).

Nearly a decade later, in *AAUP*, the Court would again affirm that Article II, Section 34 is not to be construed as a limitation on the General Assembly’s legislative authority. In *AAUP*, the AAUP urged the Court to hold that R.C. 3345.45 was unconstitutional under Article II, Section 34 on the basis that it burdened employees, and that only laws benefiting employees may be enacted under Article II, Section 34.² The Court rejected the argument, citing *Rocky River IV*. Similar to its decision in *Rocky River IV*, the Court cited its interpretation of the clear and unambiguous language of Article II, Section 34 as the basis for its conclusion. *AAUP*, 87 Ohio St.3d at 61, 717 N.E.2d at 292. The Court then cited several statutes that would be considered unconstitutional under AAUP’s urged interpretation of Article II, Section 34, pointing out that the listed statutes were not enacted solely for the benefit of employees, but were nonetheless within the General Assembly’s constitutional authority to enact. *Id.* As the Court stated, legislation enacted pursuant to Article II, Section 34 “must be upheld unless it constitutes a plain affront to a specific provision of the Constitution.”

² R.C. 3345.45 required state universities to “develop standards for instructional workloads for full-time and part-time faculty in keeping with the universities’ missions...”

In this case, the court of appeals imported a limitation on the legislative authority of the General Assembly under Article II, Section 34 that is not found within the specific provisions of the Constitution and is similar to the types of limitations that were expressly rejected by the Court in *Rocky River IV* and *AAUP*.

In deeming R.C. 9.481 unconstitutional, the court of appeals held that the General Assembly's authority under Article II, Section 34 is limited to legislation that serves "societal notion[s] of 'common welfare.'" In support of its imported limitation, the court of appeals cites the preamble of the Ohio Constitution ("We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution...") and the court of appeals decision of *Porter v. City of Oberlin* (1964), 3 Ohio App.2d 158, 164, in which the Ninth District stated, "It here appears that the Constitution was established to secure the blessings of freedom, and to promote the common welfare."

The court of appeals' citation to the preamble of the Ohio Constitution and a case that does not involve the legislative authority of the General Assembly or Article II, Section 34 demonstrates that its constitutional authority for its proposition is, at best, incredibly tenuous.³ The fact that the court of appeals cites no actual authority for its proposition is even more surprising in light of its recognition that the Court has not previously articulated such a limitation on the General Assembly's authority under Article II, Section 34. Indeed, upon scrutiny of the court of appeals' rationale, it becomes

³ *Porter v. City of Oberlin* involved an action by a resident of the city of Oberlin challenging a housing ordinance on the basis that it interfered with his property rights under Article I, Section 19 of the Ohio Constitution.

clear that its “common welfare” limitation is not so much based upon constitutional authority as it is the court of appeals’ belief that such a limitation is necessary.

Under separation of powers, courts such as the court of appeals are to interpret the provisions of the Ohio Constitution based upon its express terms, existing constitutional precedent and other principles of statutory construction. The court of appeals does not have the authority to rewrite the provisions of the Ohio Constitution under the guise of interpretation. Even if out of a perceived “necessity,” this is the role of the legislature, not the court of appeals.

That being said, the court of appeals’ assertion that it must import a limitation on the General Assembly’s authority under Article II, Section 34 because the “general welfare” language of Article II, Section 34 provides it authority with “no ascertainable limit” is inaccurate. The clear and unambiguous language of Article II, Section 34 expressly states that the General Assembly may enact legislation “providing for the comfort, health, safety and general welfare of all employees.” This Court has both upheld and invalidated legislation enacted under Article II, Section 34 in accordance with this requirement. See e.g. *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E. 2d 722 (Court held statute enacted under Art. II, Sec. 34 that removed employees’ rights to remedy under common law in an intentional tort action was unconstitutional as it did not further the comfort, health, safety and general welfare of all employees); *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298, 707 N.E.2d 1107 (Court held statute enacted under Art. II, Sec. 34 that provided immunity to employers from civil liability for employee injuries caused by intentional tortuous conduct was unconstitutional as it did not further the comfort, health, safety and general welfare of all employees).

Moreover, the court of appeals' rationale that the General Assembly's authority under Article II, Section 34 must be limited so legislation is not enacted that "further[s] the interests of a few employees, yet harm[s] the welfare of the public at large" is unsubstantiated. The court of appeals does not indicate the circumstances under which legislation that benefits employees across Ohio would constitute harm to the public's welfare; yet, it reasons that a limitation must be imported into the Constitution on this basis. However, under this limitation is R.C. 742.26 now unconstitutional because it furthered the interest of police officers and firefighters through the creation of a statewide relief and pension fund for police and firefighters? Is R.C. 4115.03 through 4115.15 now unconstitutional because it set a prevailing wage for private construction employees and potentially raised the costs of public construction projects? Is R.C. Chapter 4117 now unconstitutional because it furthered the collective bargaining rights of public employees? The Court has previously held that these enactments are constitutional under Article II, Section 34. *Pension Fund, supra.*; *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 431 N.E.2d 311; *Rocky River IV, supra.* The court of appeals' new limitation on the General Assembly's authority suggests otherwise. All of these enactments, R.C. 742.26, R.C. 4115.03 through 4115.15, R.C. 4117.14, enhanced the economic well-being of segments of Ohio employees at the expense of State and/or local governments. If the court of appeals' rationale were to stand, all of these employee economic improvement efforts of the General Assembly are arguably now subject to constitutional review. As such, this decision of the court of appeals must be reversed.

The court of appeals' holding that Article II, Section 34 authorizes the General Assembly to enact legislation that serves the general welfare of employees and "societal

notions of common welfare” is contrary to the express language of the Constitution and this Court’s well-established precedent. The limitation the court of appeals has applied in this case is based not upon law, but upon subjective opinions of whether R.C. 9.481 is for the “general welfare” of employees. Permitting this limitation to stand will pose a significant threat not only to existing legislation enacted under Article II, Section 34, but future attempts by the General Assembly to enact legislation for the improvement of employees’ lives. Therefore, this Court must accept jurisdiction and reverse the court of appeals’ decision.

Proposition of Law No. 2: R.C. 9.481 is constitutional as it was enacted under Article II, Section 34 for the general welfare of public employees.

In addition to deeming R.C. 9.481 unconstitutional for allegedly failing to satisfy the requirement that it concurrently serve “societal notions of common welfare,” the court of appeals also states that R.C. 9.481 “bears no similarity” to employee “general welfare” legislation that has previously been upheld by the Court because R.C. 9.481 does not address “any significant social issues impacting the public at large; it is not part of any comprehensive legislative scheme, but deals with a single issue; and it applies to a relatively small segment of the population.”

As Judge Slaby succinctly states in his dissent on the court of appeals’ decision, “the majority’s distinction between this case and other cases arising under Article II Section 34 [are] unpersuasive.” *Rocky River IV*, *Pension Fund* and *AAUP* do not involve “significant social issues impacting the public at large.” *Pension Fund* and *AAUP* do not involve a “comprehensive legislative scheme.” And the public employees effected by R.C. 9.481 is a larger segment of the State’s population than those involved in *Rocky River IV* (non-striking public employees represented by a union and certified by SERB),

Pension Fund (retired police officers and firefighters), and *AAUP* (public university professors). Thus, the court of appeals' bases for distinguishing R.C. 9.481 from prior cases upholding employee "general welfare" legislation are without support.

In considering Senate Bill 82, the General Assembly held hearings and committee meetings to hear testimony and arguments from employees and employers across the State. After months of debate and crafting of Senate Bill 82 in consideration of the testimony and arguments presented, the General Assembly enacted R.C. 9.481 for the general welfare of public employees in Ohio. However, at one fell-swoop, the court of appeals undid this determination, opining that providing public employees the right to choose where to live does not rise to the level of what is for the "general welfare" of employees. According to the court of appeals, the right to choose where to live was "voluntarily surrendered" when the public employees accepted employment.

This conclusion of the court of appeals as to the merit of R.C. 9.481 flies in the face of the work and role of the General Assembly. Moreover, the court of appeals' rationale that the right to choose where to live is not a right of "general welfare" because it was "voluntarily surrendered" is without judicial support and poses a significant threat to existing and future legislation. Certainly, construction workers hired on a public works project at a certain wage prior to enactment of R.C. 4115.03 through 4115.15 did not "voluntarily surrender" their right to a prevailing wage. Indeed, an employee cannot "voluntarily surrender" a right that has not previously been enforced through legislation.

The General Assembly has determined that it is in the general welfare of public employees to be able to choose where to live, free of employment conditions to the contrary. This determination of general welfare is on par with previous legislative

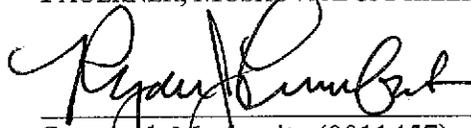
enactments of the General Assembly. In holding otherwise, the court of appeals has failed to adequately distinguish this case from governing precedent and has improperly opined as to the merit of R.C. 9.481 in a manner that is a threat to existing and further legislation enacted pursuant to Article II, Section 34. As such, this Court must accept jurisdiction and reverse the court of appeals' decision that R.C. 9.481 is unconstitutional.

CONCLUSION

For the reasons discussed above, Union Appellants respectfully request that this Court accept jurisdiction to review the decision of the Ninth District Court of Appeals, as the case involves constitutional questions of substantial importance and is of great and public interest to citizens across the State of Ohio.

Respectfully submitted,

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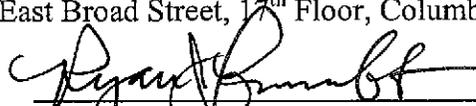


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION was served via regular U.S. mail this 21 day of February, 2008, upon Deborah M. Forfia, Assistant Director of Law, City of Akron, 161 South High Street, Suite 202, Akron, Ohio 44308, and Sharon A. Jennings, Assistant Attorney General, Constitutional Offices Section, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.



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STATE OF OHIO
COUNTY OF SUMMIT

COURT OF APPEALS
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)ss: THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2008 JAN -9 AM 7:48

STATE OF OHIO

SUMMIT COUNTY A. No. 23660
CLERK OF COURTS

Appellees

v.

CITY OF AKRON, et al.

Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2006-05-2759

DECISION AND JOURNAL ENTRY

Dated: January 9, 2008

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

DICKINSON, Judge.

THE QUESTION

{¶1} This case presents one of the classic legal questions: who gets to decide? In this case, the question is who gets to decide whether people unwilling to live in the City of Akron should be employed by the city, the citizens of Akron or members of the Ohio General Assembly.

{¶2} For the past few decades, under amendments to its charter that were adopted by its citizens, Akron has required its employees to live in the city. Currently, Akron requires people it hires into classified positions to agree to

become city residents within 12 months and to continue to live in the city for as long as they are employed by the city. Section 9.48.1 of the Ohio Revised Code, which became effective on May 1, 2006, prohibits political subdivisions from requiring their employees to live within their boundaries.

{¶3} Because Section 9.48.1 conflicts with, and purportedly supersedes, Akron's employee residency requirements, Akron challenged the statute's constitutionality through a declaratory judgment action. Through a separate action, Akron police and firefighter unions sought a declaration that Section 9.48.1 is constitutional and that it supersedes the city's residency requirements. On cross-motions for summary judgment in this consolidated case, the trial court held that Section 9.48.1 is constitutional and that it invalidates Akron's employee residency requirements. This Court concludes that Section 9.48.1 of the Ohio Revised Code is unconstitutional and, therefore, the trial court erred in granting summary judgment to the state and the unions and against the city of Akron.

BACKGROUND

{¶4} Section 9.48.1 of the Ohio Revised Code provides, in relevant part, that "no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state." The statute exempts unpaid volunteers, as well as part-time and temporary employees. Section 9.48.1 further authorizes political subdivisions to require emergency response workers to

reside within the county or an adjacent county, if the political subdivision adopts a local law or resolution to that effect through the filing of an initiative petition.

{¶5} The city of Akron filed an action for declaratory judgment against the state of Ohio, its governor, and its attorney general, seeking both a declaration that Section 9.48.1 of the Ohio Revised Code is unconstitutional and an order enjoining its enforcement. Akron specifically maintained that Section 9.48.1 infringes upon its right of self-government and that the statute was not enacted pursuant to the General Assembly's authority under Article II Section 34 of the Ohio Constitution to pass legislation "providing for the comfort, health, safety and general welfare" of employees. Akron also sought a declaration that Section 9.48.1 is unconstitutional because it violates other provisions of the Ohio Constitution.

{¶6} The Fraternal Order of Police, Akron Lodge No. 7, and the Akron Firefighters Association, International Association of Firefighters Local 330, AFL-CIO, filed a separate action for declaratory judgment against the city, its mayor, and the state of Ohio through its attorney general, seeking a declaration that the Ohio General Assembly had enacted Section 9.48.1 pursuant to its authority under Article II Section 34 of the Ohio Constitution. They sought further declaration that Akron's employee residency requirements violate Section 9.48.1 and exceed Akron's home rule authority and, therefore, are unenforceable.

{¶7} The trial court consolidated the two cases and the parties eventually filed cross-motions for summary judgment. The trial court determined that Section 9.48.1 of the Ohio Revised Code is constitutional and that it prevails over the city's employee residency requirements. It, therefore, granted summary judgment to the state and the unions and denied Akron's motion for summary judgment. The trial court concluded that the Ohio General Assembly enacted Section 9.48.1 pursuant to its authority under Article II Section 34 of the Ohio Constitution to pass laws providing for the "general welfare" of employees. Because Article II Section 34 explicitly provides that "no other provision of the constitution shall impair or limit this power[,]" the trial court further held that the constitutional authority of the General Assembly to enact Section 9.48.1 supersedes the city's home rule authority to pass a local employee residency requirement. Consequently, the trial court held that Section 9.48.1 invalidated the city's employee residency requirement. The city has assigned four errors.

THIS COURT'S STANDARD OF REVIEW

{¶8} All of the city's assignments of error are challenges to the trial court's granting of summary judgment to the state and the unions and its denial of summary judgment to the city. In reviewing a trial court's order ruling on a motion for summary judgment, this Court applies the same standard the trial court was required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of

law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990). There are no disputed material facts in this case. Rather, the issues presented are legal questions.

GENERAL WELFARE

{¶9} By its first assignment of error, the city has argued that the trial court incorrectly rejected its argument that, in adopting Section 9.48.1 of the Ohio Revised Code, the General Assembly was not properly acting within the authority granted it by Article II Section 34 of the Ohio Constitution. Article II Section 34 provides:

Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.

{¶10} The parties agree that the General Assembly's authority under Article II Section 34 supersedes the city's home rule authority to pass local legislation. Therefore, if this Court concludes that the General Assembly enacted Section 9.48.1 pursuant to its authority under Article II Section 34 of the Ohio Constitution, the state statute prevails and invalidates Akron's local residency requirement.

{¶11} In *Rocky River v. State Emp. Relations Bd.*, 39 Ohio St. 3d 196 (1988) ("*Rocky River I*"), the Ohio Supreme Court held that the legislative authority under Article II Section 34 did not encompass laws pertaining to public employee collective bargaining rights, but that it was limited to laws pertaining to

employee wages and hours. On reconsideration, the Supreme Court reversed its holding six months later and held that the General Assembly's authority under Article II Section 34 encompasses laws pertaining to the general welfare of employees. *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St. 3d 1 (1989) ("*Rocky River IV*").

{¶12} In *Rocky River IV*, the Court's more expansive interpretation of the General Assembly's authority under Article II Section 34 focused on the language "and providing for the comfort, health, safety and general welfare of all employees." The Court applied a basic rule of construction that this phrase must have been included for a reason, indicating a clear intention by the framers to expand the General Assembly's authority under Article II Section 34 beyond wage and hour legislation. Focusing in particular on the term "general welfare," the majority in *Rocky River IV* held that the Ohio Public Employees Collective Bargaining Act, set forth in Chapter 4117 of the Ohio Revised Code, was enacted within the General Assembly's broad authority under Article II Section 34 of the Ohio Constitution.

{¶13} The majority in *Rocky River IV* explained that the General Assembly's authority under Article II Section 34 is broad:

This provision constitutes a broad grant of authority to the legislature to provide for the welfare of all working persons, including local safety forces. The provision expressly states in "clear, certain and unambiguous language" that *no other provision* of the Constitution may impair the legislature's power under Section

34. This prohibition, of course, includes the “home rule” provision contained in Section 3, Article XVIII.

Rocky River IV at 13 (internal citations omitted, emphasis in original). The Ohio Supreme Court has continued to follow the *Rocky River IV* holding that Article II Section 34 of the Ohio Constitution is a broad grant of authority to the General Assembly to enact laws pertaining to the “general welfare” of employees. See, e.g., *American Assoc. of Univ. Professors v. Central State Univ.*, 87 Ohio St. 3d 55, 61 (1999).

{¶14} The focus of the parties’ dispute is whether the legislative authority to pass laws providing for the “general welfare” of employees under Article II Section 34 includes authority to enact Section 9.48.1 of the Ohio Revised Code, a law that prohibits Akron’s existing employee residency requirement. As was noted above, Akron requires applicants for classified positions to agree that, if they are hired, they will become residents of Akron within 12 months and remain Akron residents throughout their employment. No one is disputing that, prior to the effective date of Section 9.48.1, Akron’s employee residency requirement was valid and enforceable. The dispute is whether Akron’s employee residency requirement is now unenforceable due to the state’s enactment of Section 9.48.1.

{¶15} It is the position of the state and the unions that the General Assembly’s constitutional authority under Article II Section 34 to pass laws providing for the “general welfare” of employees encompasses the authority to enact Section 9.48.1, which prohibits employee residency requirements by

political subdivisions so that employees will have the freedom to choose where to reside. Akron's position, on the other hand, is that the scope of the General Assembly's authority to pass laws for the general welfare of employees under Article II Section 34 is not without limits and does not extend to this legislation.

{¶16} The majority in *Rocky River IV* stressed that the language of Article II Section 34 is clear and unequivocal and that "it is the duty of courts to enforce the provision as written." See *Rocky River IV*, 43 Ohio St. 3d at 15. Nonetheless, the focus of dispute in the *Rocky River I* and *Rocky River IV* was whether Article II Section 34 encompassed employment legislation beyond wages and hours. The majority in *Rocky River IV* did not define "general welfare," for it concluded that "the Public Employees' Collective Bargaining Act[] is indisputably concerned with the 'general welfare' of employees." *Rocky River IV*, 43 Ohio St. 3d at 13. It is not so clear, however, whether the legislation at issue in this case pertains to the "general welfare" of employees within the meaning of Article II Section 34.

{¶17} It is a basic rule of construction that words should be given their reasonable, ordinary meaning. *In re Adoption of Huitzil*, 29 Ohio App. 3d 222, 223 (1985). On its face, the term "general welfare" is so broad and vague that it provides no ascertainable limit on the scope of the General Assembly's authority under Article II Section 34. See *The Legitimate Objectives of Zoning*, 91 Harvard Law Review 1443, 1445 (1978). The meaning of the term "general welfare" "is as

incapable of specific definition as is the police power itself.” 16A American Jurisprudence 2d, Constitutional Law, Section 363.

{¶18} This, however, does not mean that the phrase “general welfare” as used in Article II Section 34 is without limits. As vague and all-encompassing as the term “general welfare” may appear to be, it cannot reasonably encompass everything that arguably benefits some employees. Without some boundaries on the scope of the term “general welfare,” the General Assembly would feasibly have the authority under Article II Section 34 to enact legislation that furthered the interests of a few employees, yet harmed the welfare of the public at large. Moreover, as Article II Section 34 explicitly provides that “no other provision of the constitution shall impair or limit this power,” the General Assembly’s authority under this provision would be virtually endless and could potentially undermine the home rule authority of municipalities to make any employment decisions.

{¶19} While Article II Section 34 explicitly authorizes legislation for the general welfare of employees, legislation adopted under it must also either secure the blessings of freedom to citizens of Ohio or further the “general welfare” of the state. “All government power derives from the people, but these grants of power are limited.” Akhil Reed Amar, *The Bill of Rights* 123 (Yale University Press) (1998). The scope of the power granted Ohio by its citizens is found in the preamble of the Ohio Constitution:

We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.

As this Court noted in *Porter v. City of Oberlin*, 3 Ohio App. 2d 158, 164 (1964), the Ohio Constitution only authorizes laws that secure freedom for its citizens or further their common welfare:

It here appears that the Constitution was established to secure the blessings of freedom, and to promote the common welfare. All laws enacted pursuant thereto must be subject to such mandate.

{¶20} In interpreting the General Assembly's broad authority under Article II Section 34, the Ohio Supreme Court has recognized the societal notion of "common welfare." Although the Court has not explicitly articulated a limitation on the General Assembly's authority under Article II Section 34 to enact legislation for the "general welfare" of employees, it has been unnecessary for it to do so in the prior cases before it.

{¶21} The legislation at issue in *Rocky River IV*, the Ohio Public Employees Collective Bargaining Act, encompassed the entire Chapter 4117 of the Ohio Revised Code, which includes dozens of provisions that burden as well as benefit public employees and public employers, in the public interest. Chapter 4117 includes comprehensive provisions that apply to public collective bargaining units throughout the state, define the scope of collective bargaining rights and obligations, and provide for uniform dispute resolution throughout the state. Chapter 4117 also includes provisions that offer primarily a public benefit such as

limitations on the ability of certain public employees to strike and the requirement that records of the state employment relations board be kept public. See Section 4117.15 and 4117.16; Section 4117.17. Moreover, Chapter 4117 did not purport to create collective bargaining rights that did not previously exist, but instead defined the scope of existing rights and obligations of public employees and employers.

{¶22} In an earlier decision by the Ohio Supreme Court, *State ex rel. Bd. of Trustees of Pension Fund v. Bd. of Trustees of Relief Fund*, 12 Ohio St. 2d 105 (1967), the Court determined that Chapter 742 legislation providing for creation, administration, maintenance, and control of a state police and fireman's disability and pension fund was validly enacted within the General Assembly's authority under Article II Section 34. Again, the legislation at issue involved a comprehensive statutory scheme that included over 100 separate provisions and encompassed an entire chapter of the Ohio Revised Code. This legislation likewise did not create employee pension rights that had not previously existed, but sought to preserve and regulate the pension and disability benefits of police and firefighters through the creation and maintenance of a state fund. See Chapter 742.

{¶23} In its most recent decision interpreting the General Assembly's authority under Article II Section 34, the Supreme Court held that "the public's interest in the regulation of the employment sector" includes legislation that

burdens as well as benefits employees. *American Association of Univ. Professors v. Central State Univ.*, 87 Ohio St. 3d 55, 61-62 (1999). The statute at issue, Section 3345.45 of the Ohio Revised Code, required public universities to develop standards for professors' instructional workloads and exempted the issue from collective bargaining. The Court made reference to many other employment-related laws enacted under the authority of Article II Section 34, emphasizing that state legislation in the employment area under Article II Section 34 is focused on public interest, not necessarily benefit to the employees. *Id.*

{¶24} Section 9.48.1 of the Ohio Revised Code, on the other hand, bears no similarity to any of the employee "general welfare" legislation discussed above. The sole purpose of Section 9.48.1 is to invalidate employee residency requirements by political subdivisions. This legislation does not address any significant social issues impacting the public at large; it is not part of a comprehensive legislative scheme, but deals with a single issue; and it applies to a relatively small segment of the population (those who are employed by political subdivisions, are subject to residency requirements, and would choose to live elsewhere if allowed to do so).

{¶25} Further, unlike any of the legislation that the Supreme Court has determined falls within the scope of Article II Section 34 as providing for the general welfare of employees, Section 9.48.1 does not pertain to the protection or regulation of any existing right or obligation of the affected employees. Instead, it

is an attempt to circumvent municipal home rule authority and reinstate a “right” that the employees voluntarily surrendered when they accepted government employment.

{¶26} As the New Jersey Supreme Court stressed when it addressed a challenge to Newark’s employee residency requirement as an infringement upon the employees’ rights and freedom under its state constitution:

The question is not whether a man is free to live where he will. Rather the question is whether he may live where he wishes and at the same time insist upon employment by government.

Kennedy v. Newark, 29 N.J. 178, 183, 148 A.2d 473 (1959). The “right” to insist upon employment by government is not a “freedom” within the meaning of the preamble of the Ohio Constitution.

{¶27} Although the parties dispute whether Akron’s residency requirement is a condition of or qualification for city employment, it is undisputed that Akron city employees voluntarily agreed to give up their “right” to choose to live elsewhere when they accepted employment with the city. Residency was required by their employer as either a condition of or qualification for employment, “similar in this regard to minimum standards of age, health, education, experience, or performance in civil service examinations.” *Ector v. Torrance*, 10 Cal. 3d 129, 132, 514 P.2d 433 (1973). Akron city employees surrendered any “right” that they once had to choose where to live when they agreed to become employees of the city of Akron, just as they may have agreed to other limitations on their personal

freedoms, such as their freedom to dress, groom themselves, or behave as they choose.

{¶28} Laws passed for the “general welfare” of employees do not encompass a single-issue statute that seeks to reinstate a non-fundamental right that the employees voluntarily surrendered when they accepted employment. Applying another fundamental rule of construction, Article II Section 34 should not be interpreted in a manner that would yield an absurd result. See *Mishr v. Poland Bd. of Zoning Appeals*, 76 Ohio St. 3d 238, 240 (1996). To construe the legislative authority under Article II Section 34 to pass laws providing for the “general welfare” of employees to be so broad as to encompass a law that reinstates a right that employees voluntarily surrendered upon accepting employment would yield an absurd result, and could potentially give limitless power to the General Assembly to undermine all home rule authority of municipalities to make decisions about their employees.

{¶29} Consequently, the trial court erred when it concluded that the General Assembly’s enactment of Section 9.48.1 of the Ohio Revised Code was within its authority under Article II Section 34 to pass laws providing for the “general welfare” of employees. The first assignment of error is sustained.

HOME RULE

{¶30} Akron’s second assignment of error is that Section 9.48.1 is an unconstitutional infringement of its home rule authority to pass local legislation.

It is not disputed that Akron's residency requirement was enacted pursuant to the city's home rule authority.

{¶31} Section 3, Article XVIII of the Ohio Constitution provides:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Therefore, Section 9.48.1 of the Ohio Revised Code prevails over the city's residency requirement only if it qualifies as a "general law." In *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, syllabus, the Ohio Supreme Court announced a four-part test defining what constitutes a general law for purposes of home-rule analysis: "a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally."

{¶32} As explained above, Section 9.48.1 is an attempt by the General Assembly to circumvent the home rule authority of municipalities to maintain residency requirements for their employees. The Third District Court of Appeals recently held, in *Lima v. State*, 3d Dist. No. 1-07-21, 2007-Ohio-6419, at ¶80, that Section 9.48.1 of the Ohio Revised Code is not a general law because it "does not set forth police, sanitary, or similar regulations but merely limits the

municipality's power to do the same[.]” It further held that “prohibiting political subdivisions from requiring residency as a condition of employment is not an overriding state interest.” *Id.* This Court agrees.

{¶33} Consequently, Section 9.48.1 of the Ohio Revised Code is not a general law, but violates the city's home rule authority under the Ohio Constitution to enact local employee residency requirements. Akron's second assignment of error is sustained.

III.

{¶34} Akron's first and second assignments of error are sustained. The third and fourth assignments of error are moot because of this Court's disposition of the first and second assignments of error and are, therefore, overruled. The judgment of the Summit County Court of Common Pleas is reversed and the cause is remanded.

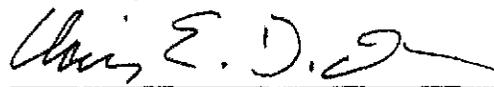
Judgment reversed and
the cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellees.



CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
CONCURS

SLABY, P. J.
DISSENTS, SAYING:

{¶35} I respectfully dissent. I would affirm the decision of the trial court because R.C. 9.481 is a valid exercise of the authority granted to the legislature by Article II, Section 34, of the Ohio Constitution pursuant to *City of Rocky River v. State Emp. Rel. Bd.* (1989), 43 Ohio St.3d 1.

{¶36} The plain language of Article II Section 34 of the Ohio Constitution is expansive: "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all

employees; and no other provision of the constitution shall impair or limit this power.” It may be, as the majority concludes, that the phrase “general welfare” is “incapable of specific definition” and “vague and all-encompassing.” Nevertheless, these words are those used in the Ohio Constitution, and we must apply them under the guidance of the Supreme Court of Ohio. I find the majority’s distinction between this case and other cases arising under Article II Section 34 unpersuasive, and I would affirm the judgment of the trial court.

APPEARANCES:

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