

IN THE SUPREME COURT OF OHIO

STATE EX REL. JAMES DEITER, ET AL.) SUPREME COURT CASE NO. 2008-0720
APPELLANTS) ON APPEAL FROM THE SENECA COUNTY
) COURT OF APPEALS, 3RD APPELLATE
v.) DISTRICT
POLICE CHIEF JOHN MCGUIRE, ET AL.,) APPELLATE CASE NO. 13-07-23
APPELLEES.)

MERIT BRIEF OF APPELLEES CITY OF FOSTORIA,
POLICE CHIEF JOHN MCGUIRE AND FOSTORIA CIVIL SERVICE COMMISSION

Marilyn L. Widman (0068446)(Counsel of Record)
William D. Brady (0078345)
Allotta, Farley & Widman Co., L.P.A.
2222 Centennial Road
Toledo, Ohio 43617
Telephone: 419-535-0075
Facsimile: 419-535-1935
marilynw@afwlaw.com
wbrady@afwl.com

Attorneys for Appellants

Larry P. Meyer (0030626)
Manahan, Pietrykowski, Delaney &
Wasielewski
414 N. Erie St., P. O. Box 2328
Toledo, Ohio 43603
Telephone: 419-243-6148
Facsimile: 419-241-7759
lmeyer@mpdwl.com

Attorneys for Appellees City of Fostoria and
Police Chief John McGuire

Lisa E. Pizza (0022881) (Counsel of Record)
David M. Smigelski (0079411)
Spengler Nathanson P.L.L.
Four SeaGate, Suite 400
Toledo, Ohio 43604
Telephone: 419-241-2201
Facsimile: 419-241-8599
lpizza@snlaw.com
dsmigelski@snlaw.com

Attorneys for Appellees City of Fostoria,
Police Chief John McGuire and Fostoria Civil
Service Commission

Timothy J. Hoover (0077892)
Director of Law, City of Fostoria
123 South Main Street
Fostoria, Ohio 44830
Telephone: 419-435-7370
Facsimile: 419-435-1622
hooverlawoffice@yahoo.com

Attorney for Appellee
Fostoria Civil Service Commission

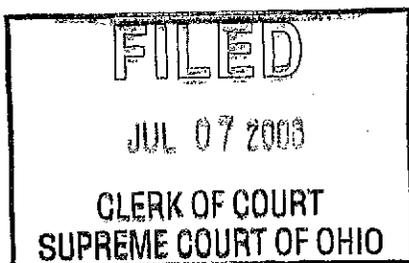


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STATEMENT OF THE CASE

In 2004, the Fostoria Chief of Police was fired. A competitive examination was administered. Two captains took the exam. Appellant James Deiter failed the exam. Captain Hobbs passed and accepted the position of Acting Police Chief. In October 2005, he declined to permanently accept the position of Police Chief.

In October 2005, the Fostoria Civil Service Commission (Commission) determined that the position of Fostoria Chief of Police required exceptional qualifications pursuant to R.C. 124.30, and the position could not appropriately be filled through competitive examination.

On October 14, 2005, the Ohio Patrolmen's Benevolent Association (OPBA), the collective bargaining representative for various employees of the City of Fostoria's (City's) police department, filed a complaint for injunctive and declaratory relief against the City and the Commission seeking to prevent the City from conducting a search of external candidates, and asking that the City be required to conduct another examination for the position. *OPBA v. Fostoria Civil Service Commission*, Seneca Co. Com. Pl. Case No. 05CV0497 (*OPBA*).

On January 20, 2006, the trial court rendered judgment in favor of the City and Commission. OPBA appealed the decision. In February 2006, appellee John McGuire was appointed to the position of Fostoria Chief of Police.

On August 14, 2006, the Seneca County Court of Appeals determined that the City had not shown circumstances, pursuant to R.C. 124.30, to justify suspending competitive examination, and remanded the matter to the trial court for further proceedings.

In November 2006, voters approved a Municipal Charter for the City, which became effective on January 1, 2007. At Section 7.01, the Charter provided a procedure for

selecting a police chief that was distinctly different from the competitive examination procedures provided under R.C. 124.44.

On January 3, 2007, while the *OPBA* case was awaiting a decision on remand, appellants James Deiter, William Brenner, Clayton Moore and Jeff Huffman filed their first quo warranto and mandamus action against the Police Chief, Commission and City, *State ex rel. Deiter, et al. v. Police Chief John McGuire, et al*, Seneca Co. Ct. App. Case. No. 13-07-01 (*Deiter I*). Just as in the present action, relators in that case sought orders ousting Chief McGuire and requiring the Commission and City to administer a competitive examination for the position under R.C. 124.44 as it was in effect in 2004.

On May 3, 2007, the Court of Appeals issued a Judgment Entry in *Deiter I*, in which the court acknowledged the respondents' position that the City's Charter instituted a new hiring process for the position of police chief which rendered moot the mandamus aspect of that action. The Court of Appeals determined that the relators were trying to usurp the trial court's discretion in the remanded *OPBA* case, and that the relators had an adequate remedy through that declaratory judgment and injunction action. The court concluded that the relators had failed to state a claim for relief in quo warranto or mandamus. Relators in *Deiter I* (appellants in the present case) did not appeal the dismissal of their first quo warranto and mandamus petition.

Also on May 3, 2007, the Seneca County Common Pleas Court issued its judgment entry on remand of the *OPBA* injunction and declaratory judgment action, holding:

1. No authority presently exists for this Court to remove Fostoria Police Chief John McGuire.
2. The City of Fostoria and City of Fostoria Civil Service Commission are not allowed to suspend the use of competitive examinations for filling vacancies in their police department as required by R.C. Section 124.44 which occurred prior to January 1, 2007 unless new or additional facts

have arisen since October 10, 2005 to allow the suspension of such requirements pursuant to R.C. Section 124.30.

3. If necessary, the Fostoria Civil Service Commission shall conduct competitive examinations required by R.C. 124.44 for any vacancy in the Fostoria Police Department which vacancy occurred prior to January 1, 2007.

OPBA did not appeal this judgment.

However, on July 25, 2007, appellants filed their second petition for writs of quo warranto and mandamus. *Deiter et al. v. Police Chief McGuire, et al.*, Seneca Co. Ct. App. Case No. 13-07-23 (*Deiter II*). Just as in *Deiter I*, appellants again sought the ouster of Chief McGuire and the opportunity to take an examination for that position. Appellees moved for dismissal. On March 12, 2008, the court dismissed appellants' petition. The Court of Appeals stated:

As stated, the instant action is the exact same as the previous, unsuccessful action filed by Relators prior to the trial court's decision on remand in the case initiated by the OPBA. Once again, no appeal was filed by the OPBA from the trial court's final order on remand, which allegedly failed to remove McGuire from the position of chief of police and order competitive examination. Instead, the Relators request that this court correct the alleged error by extraordinary remedy.

....

For the same reasons set forth in this court's prior decision, we find that the instant action is duplicative and an attempt to usurp the trial court's discretion and the appellate process.

Deiter II, Case. No. 13-07-23, at pp. 3-4. Additionally, in *Deiter II*, at p. 5, the Court held:

... [D]uring the interim, the city of Fostoria's Municipal Charter took effect and superseded the competitive examination procedure set forth in R.C. 124.44. Thus, the holding in *Ohio Patrolmen's Benevolent Assn.* was rendered moot. In the event a vacancy after January 1, 2007, by court order removing or the retirement of McGuire, the applicable Charter provision and not R.C. 124.44 would control.

Appellants have now appealed from the dismissal of their second petition for writs of quo warranto and mandamus.

STATEMENT OF THE FACTS

Because this matter is before this Court on appeal from the granting of a motion to dismiss, the facts set forth herein are drawn from appellants' petition.

Four current members of the City of Fostoria Police Department asserted that they filed this action in quo warranto pursuant to R.C. 2733.01 *et seq.*, and mandamus pursuant to R.C. 2731.01 *et seq.* (Petition ¶ 10). Appellants alleged that Police Chief John McGuire “unlawfully holds and exercises duties” in that position (Petition ¶ 42), and that “Appellants are private persons with a claim of entitlement to the ... position”. (Petition ¶ 44).

Appellants stated that the vacancy in the position was originally created in August, 2004 upon the termination of the former police chief. (Petition ¶ 14). The position remained vacant prior to the appointment of appellee McGuire, because the only candidate who had passed the promotional examination repeatedly declined to accept permanent appointment to the position. (Petition ¶¶ 16, 18). The successful exam candidate (Hobbs) last refused to accept the position of Fostoria Police Chief in 2005. (Petition ¶ 18).

With the exception of appellant James Deiter, who admitted he failed the examination (Petition ¶ 16), the petition failed to allege that any other appellant was even eligible to take the promotional examination at the time the vacancy was created in 2004, or after Deiter's failure to pass the promotional examination, or even as of Hobbs' final refusal to accept the position in 2005.

In October 2005, after Hobbs' final refusal to be appointed to the position, the Fostoria Civil Service Commission authorized the City to seek an external candidate with special qualifications pursuant to R.C. 124.30. (Petition ¶ 19). Appellants' union and collective bargaining representative filed an action seeking declaratory and injunctive relief to prevent that

search. The trial court ruled in the City's favor in January, 2006. (Petition ¶ 22). *Ohio Patrolman's Benevolent Association v. Fostoria Civil Service Commission*, Seneca Co. Com. Pl. Case No. 05CV0497.

In February 2006, the vacancy was filled by the hiring of appellee Chief McGuire, (Petition ¶ 23), and OPBA appealed the trial court's decision. The appellate court reversed and remanded the matter to the lower court for further disposition. *OPBA, supra*, 2006-Ohio-4193.

On May 3, 2007, the Seneca County Common Pleas Court issued its decision on remand. Two aspects of the trial court's May 2007 decision are particularly noteworthy. First, the Court implicitly recognized that Chief McGuire was the incumbent pending his removal, which that Court also recognized it lacked jurisdiction to do in the action before it. Second, the Court acknowledged the significant change of circumstance that occurred on January 1, 2007.

January 1, 2007 is when appellee Fostoria's Municipal Charter became effective. Fostoria Municipal Charter, § 12.01. Fostoria Charter § 7.01 now provides local home-rule procedures for filling a vacancy in position of Police Chief, stating in pertinent part:

- (A) Job descriptions and other criteria to be considered in the hiring process for the Police Chief ... shall be prepared by the Mayor and shall be approved by the Council. Council approval shall be by a motion passed by a majority vote of the Council.
- (B)(1) The Police Chief ... shall be selected by the process set forth in this paragraph (B). When a vacancy exists in the position of Police Chief ..., the Mayor shall utilize the approved criteria and job description referenced in subsection (A) hereof, in selecting a person to fill the vacancy, and the method of advertising the positions. Members of the police ... services of the City ... may submit applications to fill the vacancy and the Mayor may also accept applications of persons who are not members of the City's police ... force for the position of Police Chief

- (B)(2)(i) A committee shall be formed consisting of one member of Council selected by a majority vote of the Council; one high-ranking member of a law enforcement agency if the appointment to be made is for the office of the City's Police Chief ..., and this committee member will conduct a professional background check specific to that position; the City's Safety Director, or Safety-Service Director if the positions are combined; a legal consultant selected by the Mayor; one resident of the City chosen by the Mayor; and one member of the City's Civil Service Commission designated by a majority vote of the City's Civil Service Commission.
- (B)(2)(ii) The Committee selected pursuant to (2) (i) of Division (B) of this Section 7.01 shall review all applications received and make a recommendation to the Mayor of the three best-qualified applicants, if there are at least three applicants for appointment. If there are fewer than three applicants, the Committee shall make a recommendation to the Mayor of the best-qualified applicant.
- (B)(3) The Mayor shall appoint the person the Mayor believes to be the best qualified person to fill the position of Police Chief ... pursuant to the criteria and job description for the office of Police Chief ..., as appropriate. The Mayor's appointment shall be subject to the approval of the Council, which approval shall be given by a vote of the majority of the members of Council at a regular or special meeting of the Council. Council shall take the vote pursuant to a motion to approve the Mayor's appointment.
- (B)(4) The person appointed to the position of Police Chief ... by the Mayor and confirmed by the Council as provided in Paragraph 7.01(B)(3) of this Charter shall be in the unclassified civil service of the City and shall be considered to be an employee at will, subject to receiving procedural due process of law. These positions shall serve at the pleasure of the Mayor and the Council. The Police Chief ... may be terminated by the Mayor, but only if the Council approves the termination by an affirmative vote of two thirds (2/3) of all its members, at a regular or special meeting of the Council. (Underlining added.).

ARGUMENT

A. STANDARD OF REVIEW

This matter is before the court on appeal from a dismissal for failure to state a claim for which relief could be granted. In *Perrysburg Township v. City of Rossford* (2004), 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5, the court recently stated:

An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review. See *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ... ¶ 4-5. In reviewing whether a motion to dismiss should be granted, we accept as true all factual allegations in the complaint. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192... (Parallel citations omitted.).

In this action, appellants' petition included not just allegations of fact, but also conclusory allegations. As specific examples, paragraphs 1 through 4 of the petition alleged that each appellant has been employed by the Fostoria Police Department at all relevant times, but alleged only appellants' current police ranks. Rather than allege any facts about whether they were qualified to compete for the position of police chief at the time the position was vacant, appellants merely made the conclusory allegation that "Relators are private persons with a claim of entitlement to the FPD Chief of Police Position". (Petition ¶ 44).

Considering the appeal of a dismissal for failure to state a claim in *Lawson Milk, supra*, 40 Ohio St.3d at 193, the court stated:

Unsupported conclusions that appellant committed an intentional tort are not taken as admitted by a motion to dismiss and are not sufficient to withstand such a motion. (Underlining added.).

Also see *Schulman v. City of Cleveland* (1972), 30 Ohio St.2d 196, 198 ("While it is true that a demurrer (now motion to dismiss) technically admits certain allegations in a petition (now complaint), it is also well established that unsupported conclusions of the complainant are not so admitted").

Thus, unlike the factual allegations made in their petition, appellants' unsupported conclusory allegations, including their claim of entitlement to the position sought, cannot be accepted as true.

B. PROPOSITION OF LAW #1

Appellants' petition failed to include factual allegations sufficient to show a claim of entitlement to the office sought, as required for private persons petitioning for quo warranto.

The gist of appellants' quo warranto claim is that Fostoria Police Chief McGuire was not lawfully appointed to his position, because the appellate court *OPBA v. Fostoria Civil Service Commission* (Seneca Co. Ct. App. Case No. 13-06-03), 2006-Ohio-4193, determined that the City and Commission had not shown, pursuant to R.C. 124.30, a need to forego competitive examination for the position. Thus, appellants seek his removal from that position.

“A person claiming to be entitled to a public office unlawfully held and exercised by another may bring an action.” R.C. 2733.06. In order to bring a quo warranto action as private individuals, appellants' petition was required to “set forth the name of the person claiming to be entitled to the office, with an averment of his right thereto”. R.C. 2733.08. Appellants' petition did not meet that threshold.

In order to claim title to the office of Fostoria Police Chief, each appellant would necessarily have to assert that, as of the time the promotional examination was administered, or even as of the time that Chief McGuire was permanently appointed to fill the position, the appellant was eligible to take a promotional examination pursuant to R.C. 124.44, and, if successful, be placed on an eligibility list for the promotion.

No appellant has made such a factual assertion, nor can he. Instead, appellants' Petition, at ¶ 44, merely made the conclusory claim of entitlement to the position on behalf of all appellants, unsupported by any factual averment.

R.C. 124.44, as it was in effect at the time the vacancy was originally created in 2004, and continuing until Chief McGuire was appointed to fill the vacancy in February 2006¹, established certain eligibility criteria for the appointment of a police chief, by providing in pertinent part:

.... No position above the rank of patrolman in a police department shall be filled by any person unless he has first passed a competitive promotional examination. Promotion shall be by successive ranks so far as practicable, and no person in a police department shall be promoted to a position in a higher rank who has not served at least twelve months in the next lower rank. No competitive promotional examination shall be held unless there are at least two persons eligible to compete. Whenever a municipal or civil service township civil service commission determines that there are less than two persons holding positions in the rank next lower than the position to be filled, who are eligible and willing to compete, such commission shall allow the persons holding positions in the then next lower rank who are eligible, to compete with the persons holding positions in the rank lower than the position to be filled (Underlining added.).

Notably lacking in the petition is any allegation that, at any time prior to the appointment of Chief McGuire in February 2006, any appellant other than Deiter had “served at least twelve months in the next lower rank” to the Chief, specifically, the rank of Captain. Unless appellants Brenner, Moore or Huffman can truthfully so assert, none of them is qualified to bring a quo warranto action pursuant to R.C. 2733.06 or 2733.08.

In order to pursue a quo warranto action, a relator must be able to make at least a “good faith” claim of entitlement to the position. *State ex rel. Heer v. Butterfield* (1915), 92 Ohio St. 428 (syllabus) (“In order that a private relator may be entitled to maintain an action in quo

¹ A later version of R.C. 124.44 became effective on July 1, 2007.

warranto ... to recover a public office, he must show, not only that he is entitled to the office, but also that it is unlawfully held and exercised by the defendant in the action.”). Even under a liberal construction of the statutes, a relator still must meet a minimum standard of establishing his claim to the office “in good faith and upon reasonable grounds”. *State ex rel. Halak v. Cebula* (1977), 49 Ohio St.2d 291, 293.

The mere allegation that one was a member of the police department at the pertinent time (Petition ¶¶ 1-4) does not amount to an averment that appellants met the eligibility standard for promotion set forth in R.C. 124.44, *i.e.*, that “no person in a police department shall be promoted to a position in a higher rank who has not served at least twelve months in the next lower rank”. The lone appellant, Deiter, who held the rank of captain when the competitive examination was administered, took the test and failed it. (Petition ¶¶ 15-16).

Appellants’ petition fails to assert that any other appellant met this time-in-rank eligibility criteria as of the time that the examination was administered to fill the vacancy in the office position of police chief in 2004, or at any time before Chief McGuire was ultimately appointed to fill that vacancy in 2006. Yet, as explained by the court in *State ex rel. Delph v. Civil Service Commission of City of Greenfield* (4th Dist. 1988), 1988 Ohio App. LEXIS 1097, the eligibility standard of R.C. 124.44, mandating time in a lower rank, is a critical aspect of asserting entitlement to the position:

Lyle Delph’s (sic) was hired as a patrolman on January 5, 1984. R.C. 124.44 provides in relevant part:

“... no person in a police department shall be promoted to a position in higher rank who has not served at least 12 months in the next lower rank ...”

The language of the statute is clear. Delph would not be eligible for promotion to sergeant until January 5, 1985. The test done in August 1984, the appointment of McPherson and Roche, and any defects in these procedures, are irrelevant to Delph's standing to bring a mandamus action. Inasmuch as Delph had no right to any promotion prior to January 5, 1985, he had no standing to compel the appointing authority to act, by mandamus or otherwise. (Emphasis added).

Appellants cannot simply ignore the statutory provision requiring minimum time in the next lower rank. *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 237 ("It is a general rule that courts, in the interpretation of a statute, may not take, strike or read anything out of a statute, or delete, subtract or omit anything therefrom."). See also, *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 627. However, other than Captain Deiter (who failed the exam), appellants have failed to include factual allegations sufficient to demonstrate that they met the statutory eligibility standard to compete through examination, much less entitlement to the promotion they seek.

As recognized by the Ohio Supreme Court in *State ex rel. Halak v. Cebula* (1977), 49 Ohio St.2d 291, 293, when it affirmed dismissal of a quo warranto claim, "[a] mere possibility of appointment does not constitute entitlement in any way".

Here, three of the four appellants have failed to allege that they met the statutory eligibility requirement set forth in R.C. 124.44 to even allow them to have taken a competitive examination for the police chief position before the vacancy was filled by the appointment of Chief McGuire. The remaining appellant admits in the petition that he took the exam and failed, thereby failing to satisfy the R.C. 124.44 statutory requirement of passing the competitive examination, once offered. Thus, none of the appellants have, or can, make factual averments demonstrating even a good faith claim of entitlement to a promotional appointment to the position of Fostoria Police Chief at any time between the firing of the former police chief and the appointment of Appellee McGuire to fill that vacancy.

In summary, appellants' petition failed to include factual allegations sufficient to demonstrate that any of them have standing to bring a quo warranto action under R.C. 2733.06 and 2733.08. Without standing, appellants can prove no set of facts in support of their claim which would entitle them to relief, the standard under which a Rule 12(B) motion to dismiss is reviewed. Accordingly, appellants' petition was properly dismissed under Civil Rule 12(B). *State ex rel. Turner v. Houk* (2007), 112 Ohio St. 3d 561, 562, 2007 Ohio 814, ¶ 5; *State ex rel. Hawthorn v. Russell*, 107 Ohio St. 3d 269, 2005-Ohio-6431.

C. PROPOSITION OF LAW # 2

Appellants are bound by the courts' determination in an action brought by their union on their behalf that Chief McGuire's position is not currently vacant, and that in the event he is hereafter removed, the competitive examination procedures under R.C. 124.44 have been superseded by Fostoria's Municipal Charter; appellants cannot relitigate those claims in this action.

Appellants claim that they should not be foreclosed from reasserting claims or issues raised in *OPBA v. Fostoria Civil Service Comm'n* because their individual rights are independent from claims brought by their union. In support of their claim, they have cited to a line of federal cases that distinguish between employment discrimination claims that may be arbitrated and claims that may be pursued in court. Compare *Alexander v. Gardner-Denver Co.* (1974), 415 U.S. 36, and *Gilmer v. Interstate/Johnson Lane Corp.* (1991), 500 U.S. 20. No such issue exists in the present case.

However, in *OPBA, supra*, appellants' union pursued claims for injunctive and declaratory relief specifically seeking an order directing the City and Commission to conduct a competitive examination for the purpose of appointing a new police chief. Two issues that were

ultimately resolved in that litigation were whether the position of Fostoria Police Chief is currently occupied by Appellee McGuire, and not vacant; and, whether the Fostoria Municipal Charter would govern selection procedures in the event that a vacancy arises in that position. Both questions were answered affirmatively. It is beyond question that appellants should be precluded from relitigating those issues in the current mandamus action.

In *UAW v. Brock* (1986), 477 U.S. 274, 281-282, the Court determined that a union may bring claims on behalf of its members in certain situations, stating:

It has long been settled that “[even] in the absence of injury to itself, an association may have standing solely as the representative of its members. *E.g.*, *National Motor Freight Assn. v. United States*, 372 U.S. 246 (1963).” *Warth v. Seldin*, 422 U.S. 490, 511 (1975). While the “possibility of such representational standing . . . does not eliminate or attenuate the constitutional requirement of a case or controversy,” *ibid.*; see *Sierra Club v. Morton*, 405 U.S. 727 (1972), we have found that, under certain circumstances, injury to an organization’s members will satisfy Article III and allow that organization to litigate in federal court on their behalf....

....

Subsequently, this doctrine was stated as a three-part test:

“[An] association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” (Some citations omitted.)

Based on the foregoing test, the Court determined, 477 U.S. at 293, that the UAW could bring claims on its members’ behalf. Ohio courts have since applied the same test to determine that unions may bring claims on behalf of their members. *OAPSE/AFSCME, Local 4 v. Berdine* (8th Dist. 2007), 174 Ohio App. 3d 46; 2007-Ohio-6061, ¶ 19. Also see *In re 730 Chickens* (4th Dist. 1991), 75 Ohio App. 3d 476, 483-485. By bringing claims on behalf of its members in *OPBA*, *supra*, the union has precluded the individual members, specifically including appellants, from relitigating the issues.

In *OPBA v. City of Munro Falls* (9th Dist. 2008), 2008-Ohio-659; 2008 Ohio App.

LEXIS 571, the court considered whether claims initially brought by the union on behalf of its members could be brought again by individual members of the group, stating at ¶¶ 15-16:

We must first determine whether the parties in the two actions are the same or in privity with one another. The Ohio Supreme Court has explained that “[w]hat constitutes privity in the context of res judicata is somewhat amorphous. A contractual or beneficiary relationship is not required[.]” *Brown*, 89 Ohio St.3d at 248. The court further explained that

“In certain situations ... a broader, definition of ‘privity’ is warranted. As a general matter, privity is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.” *Id.* at 248.

“[A] mutuality of interest, including an identity of desired result, creates privity” for res judicata purposes. *Id.*

In this matter, the parties are in privity with one another. The first grievance, filed on December 27, 2005, was filed on behalf of all part-time bargaining members of the OPBA, concerning Munro Falls Police Department's decision to schedule Officer Post for three additional shifts. The second grievance, filed by part-time Officers Burgess and Alestock, concerned the identical matter as the first grievance. Any part-time officer of the Munro Falls Police Department clearly shares a mutuality of interest with a party representing all part-time bargaining members of the OPBA. The relationship between the party who filed the first grievance and the party who filed the second grievance is so close that the second party – the individual officers – are subsumed within the first party – all part-time bargaining members of the OPBA. See *Brown*, 89 Ohio St.3d at 248. (Underlining added; some citations omitted.)

In *OPBA v. Fostoria Civil Service Commission*, *supra*, the OPBA union asserted its representation of members of the Fostoria police department. See January 20, 2006 Judgment Entry, Findings of Fact, ¶ 3 (Supplement p. 13). In the present action, appellants’ Petition asserts OPBA’s representation of appellants in connection with the union’s suit. (Petition at ¶ 21, Supplement p. 5). Clearly the requisite privity exists between OPBA and the appellants in the present action. In *OPBA*, *supra*, the union asked that the City and Commission be enjoined to

administer a competitive exam for the Fostoria Police Chief position. The same claim is being pursued again by appellants in the present case.

In *O'Nesti v. DeBartolo Realty Corp.* (2007), 113 Ohio St.3d 59, 2007-Ohio-1102, the court recently considered when the res judicata doctrine applies to bar relitigation of a claim or an issue, stating at ¶¶ 6-7:

The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel. *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381.... Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395.... Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter. *Grava*, 73 Ohio St.3d at 382....

Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. *Fort Frye*, 81 Ohio St.3d at 395.... Issue preclusion applies even if the causes of action differ. *Id.* (Parallel citations omitted; underlining added.).

Appellants have now litigated their claim for quo warranto twice (*Deiter I* and *Deiter II*), and have sought in three different actions to have the City and Commission directed to conduct a competitive examination (*Deiter I*, *Deiter II* and *OPBA*). This history was noted by the Court of Appeals in its *Deiter II* Journal Entry at pp. 1-3. Furthermore, in *Deiter II* the court noted that on remand in *OPBA*, *supra*, 2006-Ohio-4193, the trial court held that it had no authority to remove Chief McGuire from his position, and that “[i]f necessary, the Fostoria Civil Service Commission shall conduct competitive examinations required by R.C. 124.44 for any vacancy in the Fostoria Police Department which vacancy occurred prior to January 1, 2007”. (Appellants’ Supplement, p. 32). The union did not appeal.

Appellees maintain that, as of May, 2007, the position of Fostoria Police Chief was not vacant, but was occupied by Appellee McGuire. In their merit brief, appellants acknowledge, as the trial court concluded on remand, that Chief McGuire could not have been removed through OPBA's injunction action, but appellants fail to address the duplicative nature of their current request for mandamus seeking a competitive examination for the position. As noted by the Court of Appeals at p. 4 of its Judgment Entry in *Deiter II*:

[N]o appeal was filed by the OPBA from the trial court's final order on remand, which allegedly failed to remove McGuire from the position of chief of police and order competitive examination....

....

.... For the same reasons set forth in this Court's prior decision [in *Deiter I*] we find that the instant action is duplicative and an attempt to usurp the trial court's discretion and the appellate process.

In summary, appellants are in privity with their union, OPBA, which sought, on behalf of appellants and other members of the Fostoria police department, to compel competitive examination for the position of police chief through an action for injunctive and declaratory relief. While that action was pending on remand to the trial court, these appellants filed *Deiter I*, an action seeking both a writ of quo warranto to remove Chief McGuire from his position, and a writ of mandamus to compel competitive examination to fill that position. The Court of Appeals told appellants in *Deiter I* that their action was duplicative of the *OPBA* matter pending on remand, and would not be allowed to circumvent that *OPBA* matter. In the present action, *Deiter II*, at p. 5 of its Journal Entry (Appellants' Supplement, p. 44), the Court of Appeals summarized the remand decision in *OPBA, supra*, and its effect, as follows:

As Respondents correctly note, McGuire was not removed from office by that [*OPBA* remand decision] or any other court order. Rather, during the interim, the City of Fostoria's Municipal Charter took effect and superseded the competitive examination procedure set forth in R.C. 124.44. Thus, the holding in *Ohio Police Patrolmen's Benevolent Assn.* was rendered moot.

Despite the previous warning in *Deiter I* that appellants would not be permitted to circumvent the *OPBA* decision by pursuing mandamus, the union chose not to appeal the remand decision.

Applying the doctrine of *res judicata*, appellants cannot now be permitted to relitigate the issues of whether the chief of police position is presently vacant, or whether the adoption of the Fostoria Municipal Charter has obviated the competitive examination procedures under R.C. 124.44 if the event the position is subsequently vacated. *O'Nesti, supra*.

D. PROPOSITION OF LAW # 3

In the event that a vacancy were to be created by Appellee McGuire's resignation, discharge or removal from office in a properly brought action, that vacancy would be filled according to the selection procedures provided under Fostoria's Charter §7.01; appellants have no clear legal right to a competitive examination, and appellees have no clear legal duty to offer one.

In the event that appellants are permitted to relitigate their quest for a competitive examination, their claims must fail.

Appellants acknowledge that Chief McGuire was appointed to fill the position in February 2006, after the trial court in the *OPBA* injunction and declaratory judgment action had determined that no competitive examination was necessary. (Petition ¶¶ 22-23). Yet, they continually claim, with no supporting legal authority, that the position of police chief should be deemed to have been vacant since 2004.

Appellants have specifically noted (Appt. Merit Br., p. 17) that the Fostoria Municipal Charter, § 12.02, states in pertinent part:

Except as otherwise provided by this Charter, all persons holding office at the time this Charter takes effect shall continue in office and in the performance of their duties until other provisions have been made in accordance with this Charter, or the General Laws of Ohio, for the performance or discontinuance of the duties of the office. (Underlining added.)

Therefore, a vacancy in the office of Fostoria Police Chief, if any, would not be created unless Appellee McGuire retires, resigns, is terminated from his employment, or a court in a properly brought action removes him from the position. None of those circumstances has yet occurred. This was reinforced by the Court of Appeals statement (Supplement, p. 44), that “in the event [of] a vacancy after January 1, 2007, by court order removing or the retirement of McGuire, the applicable Charter provision and not R.C. 124.44 would control” the selection process to fill such a vacancy.

This is further supported by *State ex rel. Hanley v. Roberts* (1985), 17 Ohio St.3d 1, where the new police chief was still in his probationary period, when the unsuccessful candidate filed a quo warranto action seeking his removal. The court held that an improperly scored exam was void, and ordered the removal of the incumbent chief. In so doing, the court expressly stated that “[b]y this decision, the office of chief of police is vacant”. (Emphasis added.). 17 Ohio St.3d at 7.

Regarding the issue of what selection procedure would be used in the event a vacancy occurs, one may look to *State ex rel. Reed v. Rudnick* (2nd Dist. 1995), 1995 WL 737911, cited by appellants. There, a city failed to calculate efficiency points when it appointed the police chief. While Reed’s suit to oust the police chief was pending, the statute that established the procedure for placement on promotional lists after competitive examination was amended to eliminate the need to calculate efficiency points. The court ordered the selection process to be re-done, but “in accordance with existing law”, not the law in effect at the time of the original vacancy. *Reed, supra*, 1995 WL 737911 at *4.

It is undisputed that Fostoria’s Municipal Charter came into effect January 1, 2007. See, e.g., Petition, ¶ 6. Also see Fostoria Charter, § 12.01. Thus, appellants’ claims that

applying the procedure provided in Fostoria Charter § 7.01 to fill any new vacancy would retroactively affect their rights is unsupportable.

The appointment of officers within a city's police department constitutes an exercise of local self-government within the meaning of the Home Rule Amendment to the Ohio Constitution. Where a municipal charter provision clearly conflicts with a statute, the charter provision supersedes the general law. *State ex rel. Meyers v. City of Columbus* (1995), 71 Ohio St.3d 603, 606. Here, the procedures for selection of a police chief pursuant to Fostoria Charter § 7.01 are utterly in conflict with R.C. 124.44, and clearly supersede the statutory procedure. Ohio Constitution, Article XVIII, § 7.

Considering a police promotions case, the court in *State ex rel. Lightfield v. Indian Hill* (1994), 69 Ohio St.3d 441, 443, succinctly stated:

The Home Rule Amendment to the Ohio Constitution governs the respective legislative roles of the state and its municipalities. Section 3, Article XVIII, Ohio Constitution. In matters of local self-government, if a portion of a municipal charter expressly conflicts with a parallel state law, the charter provisions will prevail. Sections 3 and 7, Article XVIII, Ohio Constitution; *State ex rel. Bardo v. Lyndhurst* (1988), 37 Ohio St.3d 106, 108-109. The appointment of officers to a municipality's police force is an exercise of local self-government within the meaning of the Ohio Constitution. *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191.... (Emphasis added; parallel citations omitted.).

Clearly, in the event that a vacancy were to be created by Appellee McGuire's resignation, discharge or removal from office in a properly brought action, that vacancy would be filled according to the selection procedures provided under Fostoria's Charter §7.01.

The standards that a relator must meet in order for a writ of mandamus to be issued were enunciated by the Court in *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St. 2d 42 (syllabus ¶ 1), as follows:

In order to grant a writ of mandamus, a court must find that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law. (*State, ex rel. Harris, v. Rhodes, 54 Ohio St. 2d 41.*)

All three of these requirements must be met in order for mandamus to lie. *State ex rel. Kirtz v. Corrigan* (1991), 61 Ohio St. 3d 435, 438.

Appellants cannot demonstrate that appellees City and Commission are under a clear legal duty to administer a new promotional examination as the position of Fostoria Police Chief is not currently vacant, and appellants' Petition failed to include factual averments sufficient to show even a good faith claim to entitlement to that office. Moreover, even if the Fostoria Police Chief position were to become vacant, given Fostoria Charter § 7.01 which would govern the selection procedures to fill any such vacancy, appellants cannot demonstrate that they have a clear legal right to a promotional examination. Additionally, as previously discussed, appellants' mandamus action seeking competitive examination is barred by the doctrine of res judicata.

Accordingly, appellants cannot meet the prerequisites for the grant of the writ of mandamus that they have sought, and appellants have failed to state a claim for which the relief sought can be granted. Appellants' mandamus petition was properly dismissed under Civil Rule 12(B).

CONCLUSION

For the reasons, and based upon the authorities discussed herein and in the court below, Appellees City of Fostoria, Police Chief John McGuire and Fostoria Civil Service Commission respectfully submit that Appellants' Petition for a Writ of Quo Warranto and for Mandamus Relief must be dismissed.

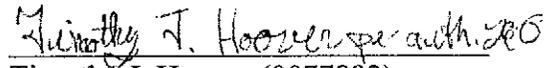
Respectfully submitted



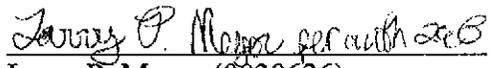
Lisa E. Pizza (0022881) (Counsel of Record)

David M. Smigelski (0079411)
Spengler Nathanson P.L.L.
Four SeaGate, Suite 400
Toledo, Ohio 43604
Telephone: 419-241-2201
Facsimile: 419-241-8599

Attorneys for Appellees City of Fostoria,
Police Chief John McGuire and
Fostoria Civil Service Commission



Timothy J. Hoover (0077892)
Director of Law, City of Fostoria
123 South Main Street
Fostoria, Ohio 44830
Telephone: 419-435-7370
Facsimile: 419-435-1622
Attorney for Appellee
Fostoria Civil Service Commission



Larry P. Meyer (0030626)
Manahan, Pietrykowski,
Delaney & Wasielewski
414 N. Erie St., P. O. Box 2328
Toledo, Ohio 43603
Telephone: 419-243-6148
Facsimile: 419-241-7759

Attorneys for Appellees City of Fostoria and
Police Chief John McGuire

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of July, 2008, a copy of the foregoing was sent via ordinary United States mail, postage prepaid and addressed to Marilyn L. Widman and William D. Brady, Allotta, Farley & Widman Co., L.P.A., 2222 Centennial Road, Toledo, Ohio 43617, Attorneys for Appellants.



Lisa E. Pizza

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APPENDIX

Ohio Constitution, Article XVIII, § 7. Home rule

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

History:

(Adopted September 3, 1912.)

R.C. 124.30. Filling of position by noncompetitive examination; temporary or intermittent appointments; positions requiring peculiar and exceptional qualifications

(A) Positions in the classified service may be filled without competition as follows:

(1) Whenever there are urgent reasons for filling a vacancy in any position in the classified service and the director of administrative services is unable to certify to the appointing authority, upon its request, a list of persons eligible for appointment to the position after a competitive examination, the appointing authority may fill the position by noncompetitive examination.

A temporary appointment may be made without regard to the rules of sections 124.01 to 124.64 of the Revised Code. Except as otherwise provided in this division, the temporary appointment may not continue longer than one hundred twenty days, and in no case shall successive temporary appointments be made. A temporary appointment longer than one hundred twenty days may be made if necessary by reason of sickness, disability, or other approved leave of absence of regular officers or employees, in which case it may continue during the period of sickness, disability, or other approved leave of absence, subject to the rules of the director.

(2) In case of a vacancy in a position in the classified service where peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character are required, and upon satisfactory evidence that for specified reasons competition in this special case is impracticable and that the position can best be filled by a selection of some designated person of high and recognized attainments in those qualities, the director may suspend the provisions of sections 124.01 to 124.64 of the Revised Code that require competition in this special case, but no suspension shall be general in its application. All such cases of suspension shall be reported in the annual report of the director with the reasons for each suspension. The director shall suspend the provisions when the director of job and family services provides the certification under section 5101.051 [5101.05.1] of the Revised Code that a position with the department of job and family services can best be filled if the provisions are suspended.

(3) The acceptance or refusal by an eligible person of a temporary appointment shall not affect the person's standing on the eligible list for permanent appointment, nor shall the period of temporary service be counted as a part of the probationary service in case of subsequent appointment to a permanent position.

(B) Persons who receive temporary or intermittent appointments are in the unclassified civil service and serve at the pleasure of their appointing authority.

History:

GC § 486-14; 103 v 698, § 14; 106 v 400; 123 v 268; Bureau of Code Revision, RC § 143.23, 10-1-53; 128 v 1049(1062) (Eff 11-2-59); 133 v S 297 (Eff 8-18-69); RC § 124.30, 135 v S 174 (Eff 12-4-73); 141 v H 428 (Eff 12-23-86); 142 v H 178 (Eff 6-24-87); 146 v S 99 (Eff 10-25-95); 147 v H 408 (Eff 10-1-97); 147 v S 144 (Eff 3-30-99); 148 v H 470. Eff 7-1-2000; 151 v H 187, § 1, eff. 7-1-07.

R.C. 124.44. Promotions in police department (*Version in effect prior to 7-1-2007*)

No position above the rank of patrolman in the police department shall be filled by original appointment. Vacancies in positions above the rank of patrolman in a police department shall be filled by promotion from among persons holding positions in a rank lower than the position to be filled. No position above the rank of patrolman in a police department shall be filled by any person unless he has first passed a competitive promotional examination. Promotion shall be by successive ranks so far as practicable, and no person in a police department shall be promoted to a position in a higher rank who has not served at least twelve months in the next lower rank. No competitive promotional examination shall be held unless there are at least two persons eligible to compete. Whenever a municipal or civil service township civil service commission determines that there are less than two persons holding positions in the rank next lower than the position to be filled, who are eligible and willing to compete, such commission shall allow the persons holding positions in the then next lower rank who are eligible, to compete with the persons holding positions in the rank lower than the position to be filled. An increase in the salary or other compensation of anyone holding a position in a police department, beyond that fixed for the rank in which such position is classified, shall be deemed a promotion, except as provided in section 124.491 [124.49.1] of the Revised Code. Whenever a vacancy occurs in the position above the rank of patrolman in a police department, and there is no eligible list for such rank, the municipal or civil service township civil service commission shall, within sixty days of such vacancy, hold a competitive promotional examination. After such examination has been held and an eligible list established, the commission shall forthwith certify to the appointing officer the name of the person receiving the highest rating. Upon such certification, the appointing officer shall appoint the person so certified within thirty days from the date of such certification. If there is a list, the commission shall, where there is a vacancy, immediately certify the name of the person having the highest rating, and the appointing authority shall appoint such person within thirty days from the date of such certification.

No credit for seniority, efficiency, or any other reason shall be added to an applicant's examination grade unless the applicant achieves at least the minimum passing grade on the examination without counting such extra credit.

History:

GC § 486-15a; 117 v 241; 118 v 215; Bureau of Code Revision, RC § 143.34, 10-1-53; 126 v 835 (Eff 10-5-55); 135 v H 276 (Eff 11-21-73); RC § 124.44, 135 v S 174 (Eff 12-4-73); 135 v H 513 (Eff 8-9-74); 136 v H 1 (Eff 6-13-75); 137 v H 412. Eff 5-23-78.

R.C. 124.44. Promotions in police department (*Version in effect as of 7-1-2007*)

No positions above the rank of patrol officer in the police department shall be filled by original appointment. Vacancies in positions above the rank of patrol officer in a police department shall be filled by promotion from among persons holding positions in a rank lower than the position to be filled. No position above the rank of patrol officer in a police department shall be filled by any person unless the person has first passed a competitive promotional examination. Promotion shall be by successive ranks insofar as practicable, and no person in a police department shall be promoted to a position in a higher rank who has not served at least twelve months in the next lower rank. A municipal civil service commission may require a period of service of longer than twelve months for promotion to the rank immediately above the rank of patrol officer.

No competitive promotional examination shall be held unless there are at least two persons eligible to compete. Whenever a municipal or civil service township civil service commission determines that there are less than two persons holding positions in the rank next lower than the position to be filled, who are eligible and willing to compete, the commission shall allow the persons holding positions in the then next lower rank who are eligible, to compete with the persons holding positions in the rank lower than the position to be filled.

An increase in the salary or other compensation of anyone holding a position in a police department, beyond that fixed for the rank in which that position is classified, shall be deemed a promotion, except as provided in section 124.491 [124.49.1] of the Revised Code.

If a vacancy occurs in a position above the rank of patrol officer in a police department, and there is no eligible list for such rank, the municipal or civil service township civil service commission shall, within sixty days of that vacancy, hold a competitive promotional examination. After the examination has been held and an eligible list established, the commission shall forthwith certify to the appointing officer the name of the person on the list receiving the highest rating. Upon the certification, the appointing officer shall appoint the person so certified within thirty days from the date of the certification. If there is a list, the commission shall, when there is a vacancy, immediately certify the name of the person on the list having the highest rating, and the appointing authority shall appoint that person within thirty days from the date of the certification.

No credit for seniority, efficiency, or any other reason shall be added to an applicant's examination grade unless the applicant achieves at least the minimum passing grade on the examination without counting that extra credit.

History:

GC § 486-15a; 117 v 241; 118 v 215; Bureau of Code Revision, RC § 143.34, 10-1-53; 126 v 835 (Eff 10-5-55); 135 v H 276 (Eff 11-21-73); RC § 124.44, 135 v S 174 (Eff 12-4-73); 135 v H 513 (Eff 8-9-74); 136 v H 1 (Eff 6-13-75); 137 v H 412. Eff 5-23-78; 151 v H 187, § 1, eff. 7-1-07.

R.C. 2733.06. Usurpation of office

A person claiming to be entitled to a public office unlawfully held and exercised by another may bring an action therefor by himself or an attorney at law, upon giving security for costs.

History:

RS § 6764; S&C 1270; 37 v 70; GC § 12307; Bureau of Code Revision. Eff 10-1-53.

R.C. 2733.08. Petition against person for usurpation of office

When an action in quo warranto is brought against a person for usurping an office, the petition shall set forth the name of the person claiming to be entitled to the office, with an averment of his right thereto. Judgment may be rendered upon the right of the defendant, and also on the right of the person averred to be so entitled, or only upon the right of the defendant, as justice requires.

All persons who claim to be entitled to the same office or franchise may be made defendants in one action, to try their respective rights to such office or franchise.

History:

RS §§ 6766, 6767; S&C 1265, 1266; 36 v 68, §§ 3, 7; GC §§ 12309, 12310; Bureau of Code Revision. Eff 10-1-53.

Fostoria Municipal Charter § 7.01 Police Chief and Fire Chief

(A) Job descriptions and other criteria to be considered in the hiring process for the Police Chief and the Fire Chief shall be prepared by the Mayor and shall be approved by the Council. Council approval shall be by a motion passed by a majority vote of the Council.

(B)(1) The Police Chief and the Fire Chief shall be selected by the process set forth in this paragraph (B). When a vacancy exists in the position of Police Chief or Fire Chief, the Mayor shall utilize the approved criteria and job description referenced in subsection (A) hereof, in selecting a person to fill the vacancy, and the method of advertising the positions. Members of the police or fire services of the City, as applicable, may submit applications to fill the vacancy and the Mayor may also accept applications of persons who are not members of the City's police or fire force for the position of Police Chief or Fire Chief.

(2)(i) A committee shall be formed consisting of one member of Council selected by a majority vote of the Council; one high-ranking member of a law enforcement agency if the appointment to be made is for the office of the City's Police Chief, or one high ranking member of a fire department or agency if the appointment to be made is for the office of the City's Fire Chief, and this committee member will conduct a professional background check specific to that position; the City's Safety Director, or Safety-Service Director if the positions are combined; a legal consultant selected by the Mayor; one resident of the City chosen by the Mayor; and one member of the City's Civil Service Commission designated by a majority vote of the City's Civil Service Commission.

(2)(ii) The Committee selected pursuant to (2) (i) of Division (B) of this Section 7.01 shall review all applications received and make a recommendation to the Mayor of the three best-qualified applicants, if there are at least three applicants for appointment. If there are fewer than three applicants, the Committee shall make a recommendation to the Mayor of the best-qualified applicant.

(3) The Mayor shall appoint the person the Mayor believes to be the best qualified person to fill the position of Police Chief or Fire Chief pursuant to the criteria and job description for the office of Police Chief or Fire Chief, as appropriate. The Mayor's appointment shall be subject to the approval of the Council, which approval shall be given by a vote of the majority of the members of Council at a regular or special meeting of the Council. Council shall take the vote pursuant to a motion to approve the Mayor's appointment.

(4) The person appointed to the position of Police Chief or Fire Chief by the Mayor and confirmed by the Council as provided in Paragraph 7.01(B)(3) of this Charter shall be in the unclassified civil service of the City and shall be considered to be an employee at will, subject to receiving procedural due process of law. These positions shall serve at the pleasure of the Mayor and the Council. The Police Chief or Fire Chief may be terminated by the Mayor, but only if the Council approves the termination by an affirmative vote of two thirds (2/3) of all its members, at a regular or special meeting of the Council.

Fostoria Municipal Charter § 12.01**Effective Date of Charter**

This Charter shall be submitted to the electors of the City at an election to be held November 7, 2006. If approved by a majority of the persons voting, the Charter shall take effect from the date the final result of the election is certified by the election authorities for the purpose of designating, nominating and electing officers of the City and conducting municipal elections. For all other purposes, this Charter shall take effect January 1, 2007.

Fostoria Municipal Charter § 12.02**Effect of Charter on Existing Offices**

Except as otherwise provided by this Charter, all persons holding office at the time this Charter takes effect shall continue in office and in the performance of their duties until other provisions have been made in accordance with this Charter, or the General Laws of Ohio, for the performance or discontinuance of the duties of the office. When that provision shall have been made, the term of any officer shall expire and the office shall be abolished. The powers conferred and the duties imposed upon any officer, body, commission, board, department, or division of the City under the General Laws of Ohio or under any municipal ordinance, resolution or contract in force at the time this Charter takes effect, if the office, body, commission, board, department or division is abolished by this Charter, shall be thereafter exercised and discharged by those upon whom are imposed corresponding functions, powers and duties by this Charter or by any ordinance or resolution of Council thereafter enacted.

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

SENECA COUNTY

**STATE, EX REL.,
JAMES DEITHER, ET AL.,**

RELATORS,

CASE NO. 13-07-01

v.

**JOHN McQUIRE, CHIEF OF
POLICE, CITY OF FOSTORIA,
ET AL.,**

**JOURNAL
ENTRY**

**FILED IN THE COURT OF APPEALS
SENECA COUNTY, MARY K. WARD,
CLERK**

MAY - 3 2007

ESPONDENTS.

This cause comes on for determination of Relators' petition for a Writ of Quo Warranto and for Mandamus relief; Respondents' motion to dismiss; Relators' memorandum in opposition to dismissal; and Respondent's reply memo in support of dismissal.

On January 20, 2006, the Seneca County Court of Common Pleas issued a judgment denying the request of the local Patrolmen's Association, the labor organization that represents officers within the Fostoria Police Department, for declaratory and injunctive relief regarding the process, and specifically whether competitive examination was required, for hiring the Fostoria Chief of Police. Thereafter, in February 2006, Respondents City of Fostoria and Fostoria Civil

Service Commission suspended competitive examination requirements and hired Respondent John McGuire as Fostoria Chief of Police.

The trial court's decision was appealed and, on August 14, 2006, this Court reversed, holding that it was against the weight of evidence to conclude that a competitive examination under R.C. 124.44 would be impracticable. See *Ohio Patrolmen's Benevolent Assn. v. Fostoria Civ. Serv. Comm.*, 3rd Dist.No. 13-06-03, 2006-Ohio-4193. The matter was remanded to the trial court for further proceedings consistent with the opinion. The Ohio Supreme Court has since declined to accept jurisdiction. See *Patrolmen's Benevolent Assn. v. Fostoria Civ. Serv. Comm.*, 112 Ohio St.3d 1442, 2006-Ohio-4193.

The instant petition, filed by two Captains and two Patrol Officers with the Fostoria Police Department, seeks a Writ of Quo Warranto ousting Respondent John McGuire from the office of Fostoria Chief of Police and a Writ of Mandamus commanding that the remaining Respondents conduct a competitive examination for promotion to the vacant chief of police position, all pursuant to this Court's decision and mandate in *Patrolment's Benevolent Assn., supra.*

Respondents argue that the petition should be dismissed for two reasons. They assert that Relators are members of the Plaintiff Association and have an adequate remedy at law because the matter was remanded for further proceedings and it remains pending on the trial court's docket, and a writ will not lie to control

the trial court's judicial discretion. Moreover, Respondents assert that the entire action was rendered moot because Respondent City of Fostoria passed a charter amendment, effective January 1, 2007, which institutes a new hiring process for the position of police chief.

Upon consideration of same, the Court finds that the instant petition fails to state a claim for relief in quo warranto or mandamus and, thus, the motion to dismiss should be granted.

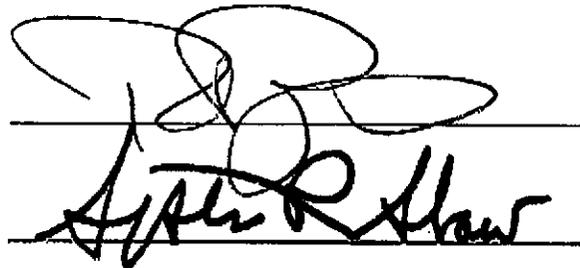
Extraordinary remedies are not alternative remedies and cannot be used where the applicant has an adequate remedy in the ordinary course of law. See *State ex rel. Burch v. Morris* (1986), 25 Ohio St.3d 18; *State ex rel. Non-Employees of Chateau Estates Resident Assn. v. Kessler*, 107 Ohio St.3d 197, 2005-Ohio-6182.

Relators are, admittedly, the beneficiary members of the organization that is currently prosecuting the action to remove the current Fostoria Police Chief and to require competitive examination. That action was decided on appeal, remanded and remains pending with the Seneca County Court of Common Pleas. It is the responsibility of the trial court to conduct further proceedings in that action consistent with the appellate opinion, and based upon existing law. We agree with Respondent's assertion that the instant action is duplicative and, in essence, an attempt to usurp and direct the trial court's discretion. Accordingly, we find that

Relators have a plain and adequate remedy in the ordinary course of the law sufficient to preclude petitioning for extraordinary relief. R.C. 2731.05.

Accordingly, Respondents' motion to dismiss is well taken.

It is therefore **ORDERED** that Relators' Petition for Writ of Quo Warranto and Mandamus Relief be, and hereby is, dismissed at the costs of the Relators for which judgment is hereby rendered.

A handwritten signature in black ink, appearing to read "John R. How", is written over a horizontal line. Above the signature, there are several large, overlapping loops and scribbles, possibly representing a stamp or additional markings.

JUDGES

DATED: May 2, 2007

/jlr

FILED IN THE COURT OF APPEALS
SENECA COUNTY, MARY K. WARD,
CLERK

MAY - 8 2007