

IN THE SUPREME COURT OF OHIO

City of Akron,) Case No. 2008-0418
Appellee,) ON APPEAL FROM THE ALLEN
-vs-) COUNTY COURT OF APPEALS
State of Ohio,) THIRD APPELLATE DISTRICT
Appellant.) Court of Appeals Case No. 23660

**BRIEF OF AMICUS CURIAE
CITY OF TOLEDO IN SUPPORT OF THE CITY OF AKRON**

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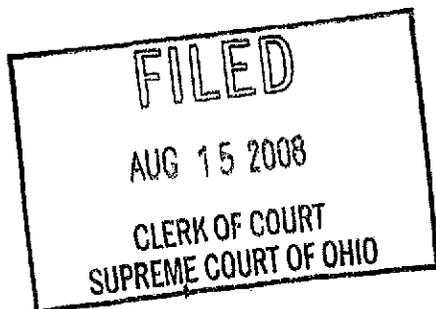


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INTRODUCTION

“Every matter, and thing that relates to the City ought to be transacted therein and the persons to whose care they are committed [should be] residents” (George Washington, 1796)¹

The City of Toledo (“Toledo”), as *Amicus Curiae*, on behalf of the City of Akron, Ohio, respectfully urges this Court to uphold the decision of the Allen County Court of Appeals and preserve Akron’s right of home rule.

On January 27, 2006, then Governor Taft signed into law Senate Bill 82. Senate Bill 82 was codified as Section 9.481 of the Ohio Revised Code. Revised Code 9.481 attempted to prohibit political subdivisions within the State of Ohio from requiring their permanent, full-time employees to live within the boundaries of the political subdivision. Enactment of Revised Code Section 9.481 resulted in a conflict between the State law and the Charters of several municipalities, including Akron’s. Several lawsuits arose as a result of the State’s enactment of R.C. 9.481

Article XVIII, Section 3 of the Ohio Constitution, the Home Rule Amendment, should control in this case. Because Akron’s Charter provision requiring residency involves a matter of local self-government, the Home Rule Amendment provides that the City law should enjoy supremacy over conflicting state statutes. Because it is beyond cavil that the City of Akron was properly exercising its Home Rule powers as to local self-government when it enacted its Charter, it is equally true that the City of Akron should prevail in the ensuing conflict with State law.

For its part, the State has argued, wrongly, that Article II, Section 34 of the State Constitution is controlling in this case. However, the State, in enacting Revised Code 9.481, was

¹ Governing Magazine (May 1995) *Residency Laws: Placing City Limits on Public Employees*; (<http://www.governing.com/archive/1995/resident.txt>)

not properly exercising its powers under Article II, Section 34, as that section of the Ohio Constitution only purports to give supremacy to the State legislature when the legislature is regulating for the “comfort, health, safety and general welfare of all employees.”

Because Revised Code, Section 9.481 is simply a transparent attempt by the State to circumvent cities’ Home Rule authority, it should be declared unconstitutional by this Court and the decision of the Court of Appeals should be affirmed.

STATEMENT OF *AMICUS* INTEREST

Toledo is a political subdivision and Charter municipality located in Northwest Ohio. Like the City of Akron, the City of Toledo has a Charter that requires employees of Toledo to live in Toledo. Like the City of Akron, Toledo has challenged the constitutionality of Section 9.481 of the Ohio Revised Code. In fact, this Court recently accepted an appeal by the State of a decision of the Sixth District Court of Appeals finding in Toledo’s favor. *City of Toledo v. State 2008-Ohio-0418*.

Toledo has a major stake in the outcome of this case as this Court’s decision will be dispositive to the pending appeal involving the City of Toledo. Further, Toledo has an interest in insuring that its Home Rule powers and the Home Rule powers of similarly situated cities in Ohio are protected so that the voter of those cities can continue to govern on matters of local interest without improper interference from the State.

STATEMENT OF THE CASE

Toledo incorporates, and adopts in their entirety, the Statement of the Case and Statement of Facts contained within the Brief of the Appellee City of Akron.

ARGUMENT

In recognition of the impossibility of passing Senate Bill 82 in light of the existence of the Home Rule amendment and the fact that most Ohio cities, like Akron, have residency requirements for employees, the Ohio legislature concocted a scheme to bolster the ill conceived Bill in an effort to make it pass judicial scrutiny. The state employed legislative fiat and simply pretended that the Bill was passed in furtherance of the goals contained in Article II, Section 34 of the Ohio Constitution. In so doing, Ohio impermissibly stretched Article II, Section 34 way beyond its intended scope and flagrantly violated Akron's home rule powers.²

Article II, Section 34 of the Ohio Constitution is entitled "Wages and Hours; Employee Health, Safety and Welfare". That section states in its entirety as follows:

"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."

Article II, Section 34 of the Constitution was passed as a result of the 1912 Constitutional Convention and became effective on January 1, 1913. In intervening years, this constitutional section has rarely been the source of extensive conflict as previous legislatures did not treat Article II, 34 as *carte blanche* to take whatever action they wanted under the guise of constitutional imprimatur. Accordingly, there is no great wealth of case law interpreting the scope of this particular provision.

For the most part, however, past court decisions reviewing the scope of Article II, Section 34, involve issues that actually affected working conditions and/or remuneration of employees

² In comments to Senate Bill 82 contained in the Bill analysis prepared by the Legislative Service Commission, the Commission recognized the fundamental conflict between the Bill and Home Rule. Comment 1, for instance, notes that cities have Home Rule authority to regulate employee residency while Comment 3 points out that Article II, Section 34 might not authorize Ohio's attempt to overrule city residency provisions established under Home Rule. See Appendix attached hereto.

throughout the State. Cases have looked at the laws governing hours of labor, *American Association of University Professors v. Interstate University* (1999), 87 Ohio St.3d 55, minimum wage, *Twinsburg v. State Employment Relations Board* (1988), 39 Ohio St.3d 226, Collective Bargaining Agreement, *City of Rocky River v. State Employment Relations Board* (1989), 43 Ohio St.3d 1, and pension plan, *State ex rel. Board of Trustees v. Board of Trustees* (1967), 12 Ohio St.2d 105. While it is true that the common thread in the case law is that Article II, Section 34 is entitled to broad construction, and the common factor in all the cases is that the State action would have some benefit on the working conditions or remuneration of employees.³

Article II, Section 34 does not authorize, nor was it intended to authorize, the adoption of statewide legislation to regulate conditions outside the workplace. Nor does the Constitution contemplate all action prohibiting Home Rule municipality from executing its constitutional right to regulate job qualifications of its employees. While this Court, in a closely decided Opinion, held that properly enacted State legislation, pursuant to Article II, Section 34, prevails over conflicting local legislation, *City of Rocky River v. State Employment Relations Board*, *supra*, there nevertheless must be a nexus between the State legislation and the goals of Article II, Section 34.

In *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, this court held that the State's constitutional authority with respect to municipal civil service, derives solely from Article XV, Section 10, the Ohio Constitution. Because residency requirements are a qualification of employment with the City, they are a matter of civil service. Accordingly, *Canada* rather than *Rocky River* controls in cases of this sort. In *Canada* this court found that

³ As the Third District Court of Appeals accurately pointed out in *Akron v. State*, 2007-Ohio-6419, the legislative history of Article II Section 34 does not support this broader application sought by the State. Id ¶¶37-47.

“the matter of regulating civil service of the city is particularly a matter of municipal concern”.
Id. at 196.

Since the ruling in *Canada* this Court has not wavered from holding that, in matters pertaining to civil service, local laws prevail. See for instance, *State ex rel. FOP, Ohio Labor Council v. City of Sidney*, 2001-Ohio-79, 91 Ohio St.3d at 399; *State ex rel. Regetz v. Cleveland Civil Service Commission*, 1995-Ohio-238, 72 Ohio St.3d 167; *State ex rel. Lightfield v. Indian Hill* (1994), 69 Ohio St.3d 441; *State ex rel. Bedner v. North Canton* (1994), 69 Ohio St.3d 278; *State ex rel. Bardo v. City of Lindhurst* (1988) 37 Ohio St. 106. The power of the General Assembly to enact legislation pursuant to Article II, Section 34 does not preempt a municipality’s home rule civil service authority.

While the General Assembly with the enactment of Revised Code 9.481 declared its intention to recognize that individuals generally have an inalienable and fundamental right to choose where to live pursuant to Section 1 of Article I of the Ohio Constitution is well established in both Ohio and in Federal courts that it is the judiciary not the General Assembly that is the conclusive authority of constitutional question. See for instance, *Cincinnati, Wilmington and Zanesville Railroad v. Commissioners of Clinton County* (1852), 1 Ohio 77; *State ex rel. Shkrti v. Withrow* (1987), 32 Ohio St.3d 424. Accordingly, declarations of the Ohio General Assembly are of little precedential value to Ohio courts.

Both Ohio and Federal case law suggests that residency requirements do not run afoul of the Constitution. For instance, in 1980 the Ohio Supreme Court upheld the constitutionality of local residency requirements and held that “[t]here is no constitutional right to be employed by a municipality while living elsewhere.” *Buckley v. City of Cincinnati* (1980), 63 Ohio St.2d 42, citing *McCarthy v. Philadelphia Civil Service Commission* (1976), 424 U.S. 645, 96 Supreme

Court 1154, 47 L.Ed.2d 366 (“In this case, Appellant claims a constitutional right to be employed by the City of Philadelphia while he is living elsewhere. There is no support in our cases for such a claim.” Id. 424 U.S. at 646-647.) A municipal residency requirement is a “condition of employment whose constitutionality is beyond peradventure under both Federal and Ohio law as a result of the decision in *McCarthy and Buckley*”. *Fraternal Order of Police v. City of Dayton* (Southern District of Ohio), No. C-3-89-367, 1990 WL 1016521 at footnote 9. See also, *Hegye v. City of Bedford* (May 10, 1979), 8th District No. 38745. In fact, the Federal Court of Appeals for the Sixth Appellate Circuit has recently as of September of 2007 ruled that residency requirements are constitutional. *Association of Cleveland Firefighters v. Cleveland*, 502 F3d 545.

In fact, the Legislative Service Commission in its critique of Senate Bill 82, before the language was codified as Revised Code Section 9.481, wrote as follows:

“Section 34 of Article II of the Ohio Constitution authorizes passage of laws dealing with wages and hours of employment and laws providing for comfort, health, safety and general welfare of all employees. This Section was originally enacted to ensure that laws regarding minimum wages and the like would not unconstitutionally impair contracts; no consideration was given to its affect on Ohio constitutions home rule provision. Without a court interpretation it is difficult to say whether this section would apply to the acts prohibition, despite the General Assembly’s recognition of it, where the subject of the State law is not all employees but instead only certain government employees.” See Exhibit 1.

The State’s attempt to interfere with Akron’s residency requirement has nothing to do with any of the purposes set forth in Article II, Section 34. Certainly, Akron’s requirement is a condition, or qualification of taking a job with the City. But this prerequisite to city employment has nothing to do with, for instance, hours of labor. Nor does R.C. 9.481 address minimum wage (or remuneration of any sort). In fact, the requirement that those seeking employ

with a city maintain residences in that city does not impair the employees comfort nor does the requirement threaten the health, safety or general welfare of that small percentage of employees throughout the State that choose to work for the City of Akron. It is simply absurd to suggest, as the legislature did when it passed the law, that R.C. did anything except meddle with the prerogatives of Ohio's cities.⁴

R.C. 9.481 does not even attempt to regulate pay or on the job conditions. Nor does the ill-conceived law even attempt to uniformly regulate on behalf of all employees. Rather the law attempt to create arbitrary and artificial distinctions between various types of employees. In this regard the statute would seem to be inconsistent not just with the language of Article II, Section 34, but also with the legislature's legally incorrect finding⁵ that there is a fundamental right of a person to choose where to live. See text of S.B. 82 attached as Appendix.

Amicus will not discuss the appropriate and well-settled analysis of Home Rules as applied to the facts of this case. Rather Toledo adopts the argument of the City or Akron in this regard.

CONCLUSION

For the foregoing reasons, the ruling of the Court of Appeals should be affirmed and R.C. 9.481 should be found to unconstitutionally infringe upon Akron's right of home rule.

⁴ The Ninth District Court of Appeals in *State v. Akron*, 2008-Ohio-38, correctly observed "...[U]nlike 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 9.481 does not pertain to the protection or regulation of any existing right or obligation of affected employees. Instead it is an attempt to circumvent municipal home rule authority and reinstate a 'right' that employees voluntarily surrendered when they accepted government employment" Id. ¶25.

⁵ In declaring a right under the Ohio Constitution to choose to live wherever one pleases, the General Assembly implicitly overruled judicial authority to the contrary, see *Buckley, supra*. Interpretation of the Ohio Constitution, however, presents "not a legislative but a judicial question, which ultimately this Court must decide." *State ex rel Shkurti v. Withrow* (1987), 32 Ohio St.3d 424, 429.

Respectfully,



John T. Madigan
General Counsel

AL/db/ecs
8/14/08

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing *Brief of Amicus Curiae City of Toledo in Support of the City of Akron* has been mailed via Federal Express Overnight on the 14th day of August, 2008 to the Office of the Clerk, Supreme Court of Ohio, 65 South Front Street, 8th Floor Columbus, Ohio 43215-3431.



JOHN T. MADIGAN (0023614)
General Counsel



Pamela Goshay

Final Analysis
Legislative Service Commission

Sub. S.B. 82

126th General Assembly

(As Passed by the General Assembly)

Sens. Grendell, Jacobson, Brady, Mumper

Reps. Wolpert, Bupp, Brinkman, Yuko, Fende, Domenick, Uecker, Walcher, Collier, Blessing, Cassell, Chandler, Evans, D., Flowers, Hagan, Hartnett, Hughes, Kilbane, Law, Oelslager, Patton, T., Perry, Peterson, Redfern, Reidelbach, Sayre, Schneider, Seitz, Stewart, D., Taylor, Woodard

Effective date: May 1, 2006

ACT SUMMARY

- Generally prohibits political subdivisions from requiring their permanent full-time employees to reside in any specific area of the state.
- Permits citizens of a political subdivision, by initiative, or the legislative authority of a political subdivision, by ordinance or resolution, to require the political subdivision's employees, as a condition of employment, to reside either in the county where the political subdivision is located or in an adjacent county.

CONTENT AND OPERATION

Prohibition, right, and exceptions

The act generally prohibits any political subdivision from requiring its employees, as a condition of employment, to reside in any specific area of the state (R.C. 9.481(B)(1)). It relatedly states that political subdivision employees generally have the right to reside any place they desire (R.C. 9.481(C)). (See COMMENT 1.)

The act, however, creates three exceptions to the prohibition and the right. A political subdivision may have residency requirements for volunteers (R.C. 9.481(B)(2)(a)); "volunteer" is defined as a person who is not paid for service or is employed on less than a permanent full-time basis (R.C. 9.481(A)(2)). The act

also authorizes citizens of any political subdivision to propose a local law by initiative, or the legislative authority of any political subdivision to adopt an ordinance or resolution, to require any employee of the political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in the state.¹ The act states that the exceptions (other than the "volunteer" exception) result from the state's interest in ensuring adequate response times by certain employees of political subdivisions to emergencies or disasters and, at the same time, the state's interest in ensuring that those employees generally are free to reside throughout the state. (R.C. 9.481(B)(2)(b).)

General Assembly intent statement and finding

The act states in uncodified law (Section 2) that the General Assembly, in enacting R.C. 9.481, declares its intent to recognize (a) the inalienable and fundamental right of an individual to choose where to live under Section 1 of Article I of the Ohio Constitution (see COMMENT 2 below) and (b) that Section 34 of Article II of the Ohio Constitution specifies that laws may be passed providing for the comfort, health, safety, and general welfare of all employees and that no other provision of the Ohio Constitution, including its home rule provisions, impairs or limits this power (see COMMENT 3 below). The act also states that the General Assembly finds, in enacting R.C. 9.481, that it is a matter of statewide concern to generally allow the employees of Ohio's political subdivisions to choose where to live, and that it is necessary to generally prohibit political subdivisions from requiring their employees, as a condition of employment, to reside in any specific area of the state in order to provide for the comfort, health, safety, and general welfare of those employees (Section 3).

COMMENT

1. The prohibition contained in the act, insofar as it relates to municipal corporations, may violate the "home rule" provisions of the Ohio Constitution. The power of local self-government is granted to municipal corporations in Section 3 of Article XVIII. Residency requirements for municipal employees most likely are a matter of local self-government, which can be overcome only when there is a state law expressing a matter of statewide concern. Case law has shown Ohio courts recognize the local nature of employment matters involving residency issues. While there may be some extraterritorial impact from municipal

¹ The act directs, in R.C. 9.481(B)(2)(b), citizens and their political subdivisions to use the initiative petition procedures in the Municipal Law, with substitution of political subdivision fiscal officers for municipal officials when necessary (R.C. 731.28 and 731.31--not in the act).

ordinances creating residency requirements, courts may find the issue to be predominantly one of local concern, and, therefore, such a municipal ordinance would be upheld.

2. The United States Supreme Court and the Ohio Supreme Court have held that there is *no* constitutional right to be employed by a municipality while residing elsewhere. *McCarthy v. Philadelphia Civil Service Comm'n.* (1976), 424 U.S. 645; *Buckley v. Cincinnati* (1980), 63 Ohio St.2d 42.

3. Section 34 of Article II of the Ohio Constitution authorizes the passage of laws dealing with wages and hours of employment and laws providing for the comfort, health, safety, and general welfare of all employees. This section was originally enacted to ensure that laws regarding minimum wages and the like would not unconstitutionally impair contracts; no consideration was given to its effect on the Ohio Constitution's home rule provisions. Without a court interpretation, it is difficult to say whether this section would apply to the act's prohibition, despite the General Assembly's recognition of it, where the subject of the state law is not *all* employees, but instead only *certain government* employees.

HISTORY

ACTION	DATE
Introduced	03-01-05
Reported, S. State & Local Gov't & Veterans Affairs	06-15-05
Passed Senate (19-13)	06-21-05
Reported, H. Local & Municipal Gov't & Urban Revitalization	01-17-06
Passed House (68-28)	01-18-06

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