

ORIGINAL

IN THE SUPREME COURT OF OHIO

KELLY BLAIR,  
  
Appellant,

vs.

BOARD OF TRUSTEES OF  
SUGARCREEK TOWNSHIP,  
  
Appellee.

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CASE NO. 11-0864

ON APPEAL FROM THE SECOND  
DISTRICT COURT OF APPEALS  
FOR GREENE COUNTY, OHIO  
CASE NO. 2010-CA-0003

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MEMORANDUM IN SUPPORT OF JURISDICTION

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## PROPOSITIONS OF LAW

Proposition of Law No. 1: Under R.C. 505.49(B), a township chief of police, who moved from a position as a certified township police officer to the position as township chief of police, has the right to keep his employment as a certified township police officer after being removed as township chief of police other than for cause by the township commission, even if R.C. 505.49(C) does not apply to the township.

Proposition of Law No. 2: In order for a terminated township police chief, officer or constable to perfect an appeal from his or her termination under R.C. 505.49(B)(3), R.C. 2505.05, and R.C. 2506.01, all that the terminated township employee must include in his or her notice of appeal is the name of the body which made the determination being appealed, the nature of the determination being appealed, and the body to which the appeal is being made.

Proposition of Law No. 3: A township chief of police who is also appointed a township police constable, and who is removed from his position as chief of police, forced to return his badge, firearm and other equipment, barred from the township police department, and no longer paid, has been discharged, either explicitly or constructively, as a township police constable.

Proposition of Law No. 4: A township employee who holds two positions within the township, one of which has a statutory right of retention, and who receives one salary for performance of both positions, is entitled to reinstatement and back wages if unlawfully removed from the position which provides him with a statutory right of retention.

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

In its decision in this case, the Second District Court of Appeals has chosen to overturn more than twenty years of established precedent with regard to the employment rights of township police officers in Ohio, by holding that “Appellant was a former certified police officer employee with the township and is not automatically entitled to return to the classified service in the position that he held previous to his appointment as chief.” *Blair v. Bd. of Trustees of Sugarcreek Township*, 2nd Dist. No. 2010 CA 3, 2011-Ohio-1725, ¶16 (*Blair II*). In so holding, the Court of Appeals ignored a decision which has stood unchallenged for decades, *Staley v. St. Clair Township Board of Trustees* (Dec. 15, 1987), 7th Dist. No. 87-C-44, 1987 Ohio App. LEXIS 10087. Township police officers in this State have built their careers in reliance on the rule of *Staley*, and in reliance on their statutory rights, all of which the Second District has tossed out the window with its decision in this case.

R.C. 505.49(B) states that a township police officer who has been certified by the State cannot be terminated other than for cause, and references the hearing requirements in R.C. 505.491 to 505.495. For more than two decades, the law in Ohio has been that when a township police officer becomes the township chief of police, that individual retains the right to return to his position as a township police officer upon removal from the position of chief. In *Staley v. St. Clair Township Board of Trustees*, 1987 Ohio App. LEXIS 10087, \*5-6, the Seventh District Court of Appeals held that a township is required to allow a removed chief to resume his position as township police officer unless the individual was removed for cause pursuant to R.C. 505.491 et seq. That decision cited this Court’s decision in *Smith v. Fryfogle* (1982), 70 Ohio St.2d 58, where it was uncontested that a township police chief who was removed pursuant to R.C. 505.49(A)—now 505.49(B)—had the right to retain his position as a township police officer.

Kelly Blair's testimony established that he relied on this rule of law when he decided to accept the position as Sugarcreek Township Chief of Police. Mr. Blair stated that he would never have accepted the position as chief of police if he thought he could be terminated not only as chief, but as a police officer as well, at the whim of the Township Board of Trustees. Kelly Blair relied on the Ohio Courts to protect the property interest in his employment granted to him by R.C. 505.49(B). Countless other township police officers over the past twenty years, confronted with the decision of whether to serve as chief of police for their township, have relied on the same principle of law. The Second District Court of Appeals has decided to change this longstanding rule based on nothing but its own nonsensical reading of the statute.

This decision, if allowed to stand, will deter any township police officer from accepting the position of township chief of police. Why would any township officer give up a position with job security in favor of a position where he or she can be terminated, for no reason at all, at the whim of a three-person board of trustees? The end result of this decision will be the refusal of experienced township police officers to serve as chiefs of police. Instead, less experienced officers from outside these small communities will take these positions. This lack of experience and local insight at the highest levels will have the predictable effect of eroding the quality and professionalism of law enforcement in these communities. For these reasons, this case presents a question of public and great general interest, as well as a substantial constitutional question.

The Court of Appeals also held Mr. Blair to a ridiculously high standard regarding his notice of appeal of his termination. Mr. Blair filed his notice of appeal, pursuant to R.C. 505.49(B)(3), R.C. 2506.01, and R.C. 2505.05, on September 18, 2006, and filed an amended notice of appeal on September 26, 2008, within the ten-day time limit for appealing from his termination. R.C. 505.49(B)(3). Mr. Blair cited to R.C. Chapter 505, and specifically to R.C.

505.491, in his notice of appeal. However, the Court of Appeals held that Mr. Blair had not appealed his termination as a certified police officer, but only as a certified police constable, even though he cited to these provisions and stated that he “is a police constable who was awarded a certificate attesting to his satisfactory completion of an approved basic training program.” *Blair II*, 2011-Ohio-1725, ¶18. Essentially, the Court of Appeals stated that because Mr. Blair did not use the magic words “‘certified police officer’ or ‘police officer,’” his notice of appeal was insufficient to raise the issue of his status as a certified township police officer. *Id.*

The Court of Appeals thus held that a township police officer or constable filing a notice of appeal from his termination under R.C. 2506.01 and R.C. 505.49(B)(3) must not only designate “the final order appealed from and whether the appeal is on questions of law or questions of law and fact,” as required by R.C. 2505.05; but must also designate every error in the final order upon which the appellant may seek to base his appeal. The applicable case law holds that “if the notice of appeal substantially informs all parties of the order and tribunal (or court) from which the appeal is taken and to what court the appeal is taken, so that no parties are prejudiced, then it is sufficient notice for R.C. 2505.05.” *Woods v. Civil Serv. Commission* (1982), 7 Ohio App.3d 304, 306. However, the Second District Court of Appeals ignored both the statute and the caselaw interpreting it, and added the extra requirement that a notice of appeal pursuant to R.C. 505.49(B)(3), R.C. 2505.05, and 2506.01 must list every basis for the appeal.

In so doing, the Court of Appeals has set an impossibly high standard for appealing administrative decisions terminating township police officers and constables. Under the Court of Appeals’ ruling, a terminated township police officer or constable has only ten days in which to retain counsel, for that counsel to do sufficient research to determine every possible basis for appeal of the administrative decision, and to file a notice of appeal listing all those possible

bases. This is simply unrealistic, and places a burden on the appellant that is nearly impossible to meet. More importantly, this requirement is not part of the statutes upon which Mr. Blair's appeal is based. It is an extra hurdle added by the Court of Appeals with no statutory basis. Thus this case presents a question of public and great general interest, as well as a substantial constitutional question.

This case also presents the question of exactly what significance a township's designation of its chief of police as a constable has. The Second District Court of Appeals' decision makes it clear that the designation of a township police chief as a township constable pursuant to R.C. 505.49(B) has no significance at all. *Blair II*, 2011-Ohio-1725, ¶11, see also ¶35, Grady, J., Fain, J. Dissenting. The Second District held that the township can terminate such an employee from every other position he holds, and can refuse to pay him, but yet not violate the law by terminating the employee as a constable. Such a conclusion is simply ludicrous.

Kelly Blair was appointed a township police constable by the Sugarcreek Township Board of Trustees in Resolution No. 1998-08-17-18, pursuant to R.C. 505.49(B)(2) and 509.01. The Second District held that, even though Mr. Blair was terminated from every other position he held with the township, through Resolution No. 2006-09-18-12, he was not terminated from his position as a township police constable. Even though Mr. Blair's badge and firearm were taken from him; even though he was told not to enter the township police station; even though the township stopped paying Mr. Blair; even though the Township responded to Requests for Admission by stating that Mr. Blair was not employed with the Township in any capacity; the Court of Appeals held that Mr. Blair was never terminated as a constable. This conclusion is contrary to both the law, as announced by this Supreme Court in *State ex rel. McClaran v. City of Ontario*, 119 Ohio St.3d 105, 2008-Ohio-3867, ¶¶36-37, and the facts of this case.

As Judge Grady pointed out in his dissent, the Court of Appeals' decision "leaves [Mr. Blair] in a state of limbo." *Blair II*, 2011-Ohio-1725, ¶35. Mr. Blair is apparently still a township constable, but with no powers and no pay. Mr. Blair still has his title, because the Township cannot take it from him without cause, but he is prevented from doing his job. This situation is surely not what the legislature had in mind when it granted protections to township constables in R.C. 509.01 and R.C. 505.491 through 505.495. Thus, this case presents a question of public and great general interest, as well as a substantial constitutional question.

Lastly, the Court of Appeals held that "that no compensation attached to the constable position," merely because Mr. Blair was not paid any extra salary in order to perform his duties as constable. *Blair II*, 2011-Ohio-1725, ¶13. The Court of Appeals devoted almost no discussion to this issue, completely ignoring Mr. Blair's citations to the caselaw that allowed such a double appointment, while explicitly forbidding a double salary. See *State v. Layman* (1986), 29 Ohio App.3d 343, 345, 505 N.E.2d 999; *State ex rel. Reeder v. Municipal Civil Service Com.* (Franklin C.P. 1958), 82 Ohio L. Abs. 225, 165 N.E.2d 490, 495. Thus, under the Court of Appeals' decision, a political subdivision may terminate an employee who holds two positions, one with a right of retention, by merely claiming that the position with a right of retention has no compensation attached to it. All the political subdivision needs to do is terminate the employee from the unprotected position and stop paying the employee, leaving the other position to languish in "limbo." For these reasons, this case presents a question of public and great general interest, as well as a substantial constitutional question.

#### **STATEMENT OF THE CASE**

This case is an administrative appeal, pursuant to R.C. 505.49(B)(3) and R.C. 2506.01 et seq., from the action of the Sugarcreek Township Board of Trustees terminating the employment

of Kelly Blair, an eighteen-year career police officer who had risen to the rank of Chief of Police and Constable for the Township. Kelly Blair was first placed on administrative leave by decision of the Board of Trustees, in executive session, on September 8, 2006, with termination to follow if he did not resign within twenty-one days. The decision to terminate Kelly Blair was effected by Township Resolution Number 2006-09-18-12, passed September 18, 2006. There was no record made of any debate or reason for the decision to terminate Mr. Blair, or the earlier decision to place him on leave, other than the votes of the individual trustees. There was no hearing offered to Mr. Blair and no transcript recording the determination to fire him.

Kelly Blair timely appealed the decisions placing him on leave and terminating him by initiating this administrative appeal on September 18, 2006. Mr. Blair filed an amended notice of appeal on September 26, 2006. Because there was no transcript or other sufficiently complete record of either of these decisions, Mr. Blair filed a motion to strike the record that was submitted by the trustees and requested a de novo hearing pursuant to R.C. 2506.03. The trial court Magistrate issued a decision on September 20, 2007, ordering that Kelly Blair be reinstated to his position as constable with back pay and benefits. The Board objected to the Magistrate's decision, and on February 28, 2008, the trial court adopted the Magistrate's decision.

The Township appealed to the Second District Court of Appeals. In its decision, the Court of Appeals remanded the case to the trial court for determination of several issues. The appellate court held that Mr. Blair had not been terminated as a police constable by the Trustees' Resolution of September 18, 2006, because the resolution did not specifically state that Mr. Blair was being terminated from his employment as a constable. *Blair v. Bd. of Trustees of Sugarcreek Township*, 2nd Dist. No. 2008 CA 16, 2008-Ohio-5640, ¶17 (*Blair I*). The appellate court directed the trial court to consider Mr. Blair's arguments and evidence regarding "rights of

retention as a certified police constable and/or former certified police officer of which the Trustees' action deprived him." *Blair I*, 2008-Ohio-5646, ¶18.

On remand, the Township argued that the appellate court had actually held that Mr. Blair had not been terminated as a police constable at all, as opposed to the court's holding that Mr. Blair was not terminated as a police constable by the resolution. Mr. Blair pointed out the absurdity of this argument, submitting evidence that the Township not only stopped paying Mr. Blair, but demanded that he return all of the equipment supplied by the Township and barred Mr. Blair from the Township Police Department offices.

The trial court Magistrate adopted the Township's misreading of the appellate court's opinion, stating that "the appellate court held that Kelly Blair was not terminated from his appointment as a certified police constable." The Magistrate went further, and stated "[t]he Court notes from recent testimony that the position of certified police constable did not carry with it any increments of pay and even though Mr. Blair was not fired as certified police constable he would not be entitled to back pay for that position." The Magistrate also mistakenly found that "[n]othing in the notice of appeal addressed the issue of what rights of retention Mr. Blair may have had as a certified police officer." Lastly, the Magistrate's Decision wrongfully held that "[i]f Kelly Blair is to return as a police officer in the position he held prior to becoming chief of police, Sugarcreek Township must meet the criteria set forth in R.C. 505.49(C)." Mr. Blair objected to the Magistrate's Decision, and the issues were briefed. On December 12, 2009, the trial court filed a brief decision adopting the Magistrate's Decision, and Mr. Blair appealed to the Second District Court of Appeals.

The Court of Appeals affirmed the decision of the trial court, specifically holding that "Appellant was a former certified police officer employee with the township and is not

automatically entitled to return to the classified service in the position that he held previous to his appointment as chief.” *Blair v. Bd. of Trustees of Sugarcreek Township*, 2nd Dist. No. 2010 CA 3, 2011-Ohio-1725, ¶16 (*Blair II*). The Court of Appeals confirmed that Mr. Blair had not been terminated as a township constable, but failed to address the consequences of that holding. Mr. Blair filed a Motion to Certify a Conflict between the Court of Appeals’ decision and the decision in *Staley v. St. Clair Township Board of Trustees* (Dec. 15, 1987), 7th Dist. No. 87-C-44, 1987 Ohio App. LEXIS 10087, which is awaiting decision.

### **STATEMENT OF FACTS**

Kelly Blair began his career as a police officer with the Sugarcreek Township police department in 1988. He received a certificate of satisfactory completion of an approved police basic training program, as required by R.C. 109.77, in 1975, and completed a refresher course in 1988. He rose through the ranks over the next decade and was appointed Chief of Police for the township in 1998. Mr. Blair was appointed a Township Constable a few months after being promoted to Chief, as previous Chiefs of Police for the Township had been. As Mr. Blair testified, his appointment as Constable was necessary for him to be able to perform essential duties that he would otherwise have lacked jurisdiction to perform. Prior to September, 2006, Kelly Blair received no discipline during his tenure as Police Chief and Constable.

On September 8, 2006, the Trustees and Mr. Barry Tiffany, the township administrator, met and discussed Kelly Blair’s employment. Mr. Blair was given no notice of this meeting, which occurred in executive session, and was given no opportunity to present evidence or to speak. During this meeting, the Trustees and Mr. Tiffany decided that Kelly Blair would be asked to resign. The Trustees and Mr. Tiffany also decided that if Mr. Blair refused to resign, he would be placed on administrative leave pending termination, which occurred the next day. That

same day, Mr. Tiffany met with Kelly Blair, at which time Mr. Blair was given a Settlement Agreement and Release that had already been signed by the Board of Trustees and Mr. Tiffany. Mr. Blair was asked to sign the Settlement Agreement and Release and to resign from his employment with Sugarcreek Township, but refused to do so.

September 18, 2006, the Board of Trustees held another meeting to discuss Kelly Blair's employment. Mr. Blair was not notified of this meeting, nor that his employment would be discussed, nor was he given any opportunity to attend the meeting or address any concerns held by the Trustees. He was never given any pre-termination or post-termination administrative hearing. The decision to terminate Mr. Blair was effected by a resolution passed by the Board of Trustees, Resolution Number 2006-09-18-12, at the September 18, 2006 meeting. There was no record made of any debate or reason for the decision to terminate Mr. Blair or the earlier decision to place him on leave, other than the votes of the individual trustees. Mr. Blair was not given a hearing and no transcript recorded the determination to fire him.

The Township has stated that there "has not been any grounds upon which to believe" that Kelly Blair was guilty of "malfeasance, misfeasance, neglect of duty, [or] violation of a criminal statute." As a consequence of the Trustee's decision to terminate Kelly Blair's employment, he has been deprived of income, benefits, and other emoluments of being a township police officer and constable, without any hearing or determination that there was just cause for his termination.

### **ARGUMENT**

**Proposition of Law No. 1: Under R.C. 505.49(B), a township chief of police, who moved from a position as a certified township police officer to the position as township chief of police, has the right to keep his employment as a certified township police officer after being removed as township chief of police other than for cause by the township commission, even if R.C. 505.49(C) does not apply to the township.**

The Court of appeals held that “Appellant was a former certified police officer employee with the township and is not automatically entitled to return to the classified service in the position that he held previous to his appointment as chief.” *Blair v. Bd. of Trustees of Sugarcreek Township*, 2nd Dist. No. 2010 CA 3, 2011-Ohio-1725, ¶16. In *Staley v. St. Clair Township Board of Trustees* (Dec. 15, 1987), 7th Dist. No. 87-C-44, 1987 Ohio App. LEXIS 10087, \*5-6, the Seventh District Court of Appeals held:

Appellee admits that the Board may remove him as chief of police, but argues that because he was a certified peace officer, the Board could not properly terminate his employment with the township without complying with R.C. 505.49.1 505.49.5. *Smith [v. Fryfogle* (1982), 70 Ohio St.2d 58], supra did not settle this issue because the trustees in that case allowed the former chief to continue his employment as a peace officer.

R.C. 505.49(A), however, supports appellee’s argument. The statute provides, in part:

“A patrolman, other police district employee, or police constable, who has been awarded a certificate attesting to satisfactory completion of an approved state, county, or municipal police basic training program, as required by section 109.77 of the Revised Code, *may be removed or suspended only under the conditions and by the procedures in sections 505.491[505.49.1] to 505.495[505.49.5] of the Revised Code.*” (Emphasis added)

R.C. 505.49(A) also provides that the chief of police serves at the Board’s pleasure. The Board must only follow the procedure set forth in R.C. 505.491 to 505.495 either to remove the police chief where misconduct is alleged, or to remove or suspend a certificated police district employee. Here, appellee is not accused of misconduct. Mr. Staley is a certificated peace officer. The Board may terminate appellee’s employment as a township police officer only under the conditions set forth in R.C. 505.491-505.495.

This holding from the Seventh District Court of Appeals interpreting what is now R.C. 505.49(B)(2) is in clear conflict with the Court of Appeals’ holding in the appeal at bar.

The fact that the Court of Appeals relied upon R.C. 505.49(C) does not distinguish the *Staley* opinion from the case at bar. The provisions of R.C. 505.49(C), former R.C. 505.49(B), for police chiefs in civil-service-commission townships, were added by amendment in 1978. See

*Smith v. Fryfogle*, 70 Ohio St.2d at 60. The 1978 amendment that added this provision did not alter in any way the statutory protections for constables and police officers that already existed under former R.C. 505.49(A), now 505.49(B). The provisions at issue in this decision were fully in effect at the time of the *Staley* decision. There has been no substantive amendment that could distinguish the *Staley* holding. There is a clear conflict regarding the interpretation of R.C. 505.49 between the Court of Appeals' decision in this case and the decision in *Staley*. This conflict requires resolution by this Supreme Court.

As discussed above, decades of township police personnel, including Kelly Blair, have built their careers in reliance upon the *Staley* holding. Allowing the Second District Court of Appeals' decision in this case to stand would not only create a conflict between the two districts, but would create uncertainty as to the state of the law. As discussed above, this uncertainty would deter any experienced township police officer from accepting a position as chief of police, leading to the appointment of less qualified candidates, and a corresponding reduction in the quality of law enforcement in these communities. For this reason, Appellant urges this Supreme Court to grant jurisdiction to hear this appeal.

**Proposition of Law No. 2: In order for a terminated township police chief, officer or constable to perfect an appeal from his or her termination under R.C. 505.49(B)(3), R.C. 2505.05, and R.C. 2506.01, all that the terminated township employee must include in his or her notice of appeal is the name of the body which made the determination being appealed, the nature of the determination being appealed, and the body to which the appeal is being made.**

The Second District Court of Appeals, in its decision in this case, has set an impossibly high standard for notices of appeal filed pursuant to R.C. 505.49(B)(3). Mr. Blair pointed out to the Court of Appeals that all that is required of a notice of appeal pursuant to R.C. 2505.05 is that the notice designate "the final order appealed from and whether the appeal is on questions of law or questions of law and fact." R.C. 2505.05. The caselaw on the issue states that "if the notice

of appeal substantially informs all parties of the order and tribunal (or court) from which the appeal is taken and to what court the appeal is taken, so that no parties are prejudiced, then it is sufficient notice for R.C. 2505.05.” *Woods v. Civil Serv. Commission* (1982), 7 Ohio App.3d 304, 306. The Court of Appeals chose to ignore both the statute and the caselaw, and to impose its own requirement that a terminated township police chief, officer or constable must identify each and every basis for his appeal in his notice of appeal.

R.C. 505.49(B)(3) states, in relevant part, as follows:

In case of removal or suspension of an appointee by the board of township trustees, that appointee may appeal the decision of the board to the court of common pleas of the county in which the district is situated to determine the sufficiency of the cause of removal or suspension. *The appointee shall take the appeal within ten days* of written notice to the appointee of the decision of the board.

(emphasis added.) It is this ten-day requirement that makes it nearly impossible for a township police chief, officer or constable to meet the Court of Appeals’ specificity requirement. Under the Second District’s holding, a township employee that wishes to file a notice of appeal would be required to retain counsel, then counsel would be required to do sufficient research to determine each and every possible ground for appealing the decision, and then the employee and counsel would have to file a notice of appeal specifying all of those grounds, all within ten days of the employee’s receipt of the decision. Such a requirement places a nearly insurmountable burden on the employee and his or her counsel. It also adds additional hurdles to the administrative appeal process, with no statutory basis for doing so. For these reasons, Appellant urges this Supreme Court to grant jurisdiction to hear this appeal.

**Proposition of Law No. 3: A township chief of police who is also appointed a township police constable, and who is removed from his position as chief of police, forced to return his badge, firearm and other equipment, barred from the township police department, and no longer paid, has been discharged, either explicitly or constructively, as a township police constable.**

As discussed above, the conclusion that Mr. Blair has not been terminated from his position as a township police constable is absolutely contrary to the facts. Mr. Blair was asked to return his badge, his firearm, and his vehicle. Mr. Blair was told not to return to the Sugarcreek Township Police Department. The Township ceased to pay Mr. Blair. The Township admitted in response to Requests for Admissions that Mr. Blair was not employed by the Township in any capacity. This Supreme Court has held that where a police officer has not accepted an offer of retirement, but has been told not to report to work and is barred from public buildings, that officer has been terminated. *State ex rel. McClaran v. City of Ontario*, 119 Ohio St.3d 105, 2008-Ohio-3867, ¶¶36-37.

Nevertheless, in complete contradiction of these established facts, the trial court and appellate court held that Mr. Blair was not terminated from his position as a township police constable. Such a holding has absolutely no basis in fact, and “there is no sound reasoning process that would support” such a decision, which this Supreme Court has held amounts to an abuse of discretion. *AAAA Enters., Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597. For this reason, Appellant urges this Supreme Court to grant jurisdiction to hear this appeal.

**Proposition of Law No. 4: A township employee who holds two positions within the township, one of which has a statutory right of retention, and who receives one salary for performance of both positions, is entitled to reinstatement and back wages if unlawfully removed from the position which provides him with a statutory right of retention.**

Ohio law has long recognized that if an employee serves in two roles, one classified and one unclassified, that employee may not be terminated without cause, as employment as an unclassified employee does not deprive him of the protections of his classified position. In *State ex rel. Reeder v. Municipal Civil Service Com.* (Franklin C.P. 1958), 82 Ohio L. Abs. 225, 165

N.E.2d 490, the court held that a classified employee should be reinstated to his job and salary where he performed the duties of two positions, one classified and the other unclassified. As an initial matter, the court found no “impropriety [in] holding two such jobs, one classified and the other unclassified, especially when but one rate of pay is made.” *Id.* at 495. The court noted that it is the “known purpose of the merit system to reward long, skilled and faithful public service,” and found it “utterly incredible [that the municipality] should peremptorily kick out its most experienced officer, its key man in office and in court, without even lip service to the rudiments of fair play \*\*\* It shocks the conscience.” *Id.* at 502.

As Mr. Blair pointed out to the trial and appellate courts, this is precisely the manner in which such government employees must be paid under the law. It is perfectly legal for a municipal employee to hold more than one position in the municipality, so long as the employee only receives one salary. See *State ex rel. Reeder*, 165 N.E.2d at 495. See also 1998 Ohio Op. Atty. Gen. No. 20 (holding that a Veteran’s Services employee may hold both classified and unclassified positions at the same time.) In fact, the Second District Court of Appeals has held that it is lawful for a township police officer to also hold the position of township constable. *State v. Layman* (1986), 29 Ohio App.3d 343, 345 (“a person can be both a township police constable and a township police officer.”) Kelly Blair did not receive a separate salary for his position as a police constable in addition to his salary as chief of police because, like the officer in *Layman*, it was necessary for Kelly Blair to hold several appointments in order to fulfill his job responsibilities. The jobs are indistinguishable, and the salary for one is the salary for both. Mr. Blair testified to this fact. Thus, Kelly Blair is entitled to be reinstated as a constable at the salary he received at the time of his unlawful termination.

In addition, Mr. Blair is entitled to receive back wages for the time period from when he was unlawfully discharged to the time he is reinstated. “It is axiomatic that ‘[a] wrongfully excluded public employee may obtain back pay and related benefits.’” *State ex rel. Stacy v. Batavia Local Sch. Dist. Bd. of Educ.*, 105 Ohio St.3d 476, 480, 2005-Ohio-2974, ¶24; quoting *State ex rel. Stacy v. Batavia Local Sch. Dist. Bd. of Educ.*, 97 Ohio St.3d 269, 2002-Ohio-6322, ¶19; quoting *State ex rel. Boggs v. Springfield Local Sch. Dist. Bd. of Educ.*, 93 Ohio St.3d 558, 565, 2001-Ohio-1608. For these reasons, Appellant urges this Supreme Court to grant jurisdiction to hear this appeal.

### CONCLUSION

For all the above reasons, Appellant Kelly Blair urges this Supreme Court to grant jurisdiction to hear this appeal.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the following this 19th day of May, 2011, by regular U.S. Mail.

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**KELLY BLAIR, Plaintiff-Appellant v. BOARD OF TRUSTEES OF SUGARCREEK TOWNSHIP, et al., Defendant-Appellee**

**C.A. CASE NO. 2010 CA 3**

**COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, GREENE COUNTY**

**2011 Ohio 1725; 2011 Ohio App. LEXIS 1507**

**April 8, 2011, Rendered**

**PRIOR HISTORY:** [\*\*1]

(Civil appeal from Common Pleas Court). T.C. NO. 06CV811.

Blair v. Bd. of Trs. of Sugarcreek Twp., 2008 Ohio 5640, 2008 Ohio App. LEXIS 4737 (Ohio Ct. App., Greene County, Oct. 31, 2008)

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THOMAS C. MILLER, Civil Division Chief, Greene County Prosecutor's Office, Xenia, Ohio and EDWARD J. DOWD, and DAWN M. FRICK, Miamisburg, Ohio, Attorneys for Defendant-Appellee.

**JUDGES:** FROELICH, J. FAIN, J., GRADY, P.J., dissenting.

**OPINION BY:** FROELICH

**OPINION**

FROELICH, J.

[\*P1] The essential facts of this case were set out in our opinion in a prior appeal. *Blair v. Board of Trustees of Sugarcreek Township*, Greene App. No. 08CA16, 2008 Ohio 5640. (*Blair I*) In that appeal by the Board, we reversed a judgment of the trial court in which the court had found that the township trustees were prevented from terminating Blair from his appointment as police constable without prior notice and hearing. We found that Blair was not terminated as a police constable and remanded "the case for further proceedings."

[\*P2] On remand, a magistrate found that Blair was not terminated from his constable's position, "but even if he was terminated, he would not be entitled to back pay for that designation, because no compensation was attached to that position." The magistrate also stated that the "Township [\*\*2] was not required to offer him a position in the police department that he held prior to his appointment as chief." Blair filed objections to the magistrate's decision. The trial court overruled his objections and dismissed Blair's R.C. Chapter 2506 appeal.

**FIRST ASSIGNMENT OF ERROR**

[\*P3] "THE TRIAL COURT ERRED BY HOLDING THAT KELLY BLAIR HAD NO RIGHT OF RETENTION AS A CERTIFIED POLICE OFFICER."

[\*P4] "I. MR. BLAIR'S AMENDED NOTICE OF APPEAL WAS SUFFICIENT TO RAISE HIS STATUS AS A CERTIFIED POLICE OFFICER AS A BASIS FOR HIS APPEAL."

[\*P5] "II. MR. BLAIR'S STATUS AS A CERTIFIED POLICE OFFICER ENTITLES HIM TO REINSTATEMENT TO HIS LAST POSITION BEFORE BECOMING TOWNSHIP POLICE CHIEF UPON HIS REMOVAL AS CHIEF."

**SECOND ASSIGNMENT OF ERROR**

[\*P6] "THE TRIAL COURT ERRED BY HOLDING THAT THIS COURT OF APPEALS HAD HELD THAT KELLY BLAIR WAS NOT TERMINATED FROM HIS POSITION AS POLICE CONSTABLE WITH THE SUGARCREEK TOWNSHIP POLICE DEPARTMENT."

## THIRD ASSIGNMENT OF ERROR

[\*P7] "THE TRIAL COURT ERRED BY HOLDING THAT THE POSITION OF POLICE CONSTABLE WITH THE SUGARCREEK TOWNSHIP POLICE DEPARTMENT WAS AN UNPAID POSITION."

[\*P8] We previously held:

[\*P9] "It is undisputed that Blair served as chief of police at the pleasure of the Trustees, R.C. 505.49(B), [\*\*3] and therefore the Trustees could remove Blair from that position as they did, without prior notice or hearing. Courts have held that, in that event, any separate status the employee enjoys as a certified police officer is nevertheless subject to a relevant notice and hearing requirement. *Staley v. St. Clair Twp. Bd. Of Trustees*, (Dec. 18, 1987), Columbiana App. No. 87-C-44, 1987 Ohio App. LEXIS 10087. Absent a satisfaction of such requirements, the employee must be retained in that other position. *Smith v. Fryfogle* (1982), 70 Ohio St.2d 58, 434 N.E.2d 1346" *Blair*, supra, at ¶16.

[\*P10] The notice and hearing requirements to which we referred are codified in R.C. 509.01(B), which provides for designation as police constable persons who are certified as having completed an approved basic training program, and that such constables may be removed or suspended only under the conditions and by the procedures in R.C. 505.491 to 505.495. Those sections set out basic due process requirements of notice and opportunity to be heard and require findings that support the action taken. The parties agreed with the magistrate at the March 2007 hearing that its purpose was to take "evidence relating to whether or not Kelly Blair is a constable or police [\*\*4] chief." (Tr. pg. 3). The trustees, pursuant to R.C. 505.49(B)(2), chose to appoint Blair chief and, later, to designate him as a constable (he had not previously been designated as constable). His position as a constable does not exist necessarily because he was appointed chief, like some sort of emolument. Regardless, since R.C. 509.01(B) and R.C. 505.49(B)(3) are identically worded, it does not matter whether his designation as a police constable was pursuant to R.C. 509.01(B) or R.C. 505.49(B)(2). He still is entitled to the procedures set forth in R.C. 505.491 and 505.495 before he can be terminated as a constable. It is not disputed that Blair was not provided with such statutory due process.

[\*P11] This, however, is not the issue before us since we found in *Blair I*, at ¶17, that Blair was never terminated as a constable. Thus we reversed the magistrate and court's decisions that he was terminated, but that it had been done improperly for failure to comply with R.C. 509.01.

[\*P12] On remand, the magistrate, probably out of an abundance of caution, allowed evidence whether Blair was constructively discharged as a constable, even if he had not been discharged as a constable as a result of a formal [\*\*5] Resolution by the trustees. The arcane intricacies of bar, res judicata, collateral estoppel, claim or issue preclusion, or law of the case aside, the question of whether Blair had been terminated - by any means - has been argued and decided. To the extent Appellant then or now argues that he had been constructively terminated, as opposed to a termination by a Township Resolution, the question was resolved by *Blair I*. Appellant's Second Assignment of Error is overruled.

[\*P13] Further, based on the record of the hearings, we cannot say that the magistrate and judge's finding that no compensation attached to the constable position was an abuse of discretion. Appellant's Third Assignment of Error is overruled.

[\*P14] The First Assignment of Error asserts that the court after remand erred by not finding that Blair was entitled to reinstatement as a certified police officer with the township when he was terminated as chief of police. The Appellant argues that any automatic surrender, upon being appointed chief, of the tenure and due process protections that a certified police officer enjoys creates a "destructive disincentive for experienced police officers ever to accept such a promotion." (Appellant's [\*\*6] Brief, p. 14). He cites *Staley v. St. Clair Township Board of Trustees* (December 15, 1987), Columbiana County No. 87-C-44, 1987 Ohio App. LEXIS 10087 for the principle that "a patrolman, other police district employee, or police constable. . . may be removed or suspended only under the conditions and by the procedures. . . set forth in the Revised Code" which, it is agreed, were not followed in Blair's case.

[\*P15] The first part of the First Assignment states that Blair's "Amended Notice of [Administrative] Appeal was sufficient to raise his status as a certified police officer." His brief, pg. 7, argues that "paragraph 8, references both Mr. Blair's status as a constable and a certified officer. . ." and that he was "removed from office in violation of the law." This, according to the brief, "is, in a nutshell, the entire purpose of Kelly Blair's appeal after remand."

[\*P16] Blair's Amended Notice of Administrative Appeal appeals "from the decision of the Trustees enforced on September 18, 2006, terminating Appellant's employment." As we stated in *Blair I*, Resolution 2006-09-18-12, adopted on September 18, 2006, refers to Blair's service "as an unclassified employee of Sugarcreek Township in the capacity of Chief of Police [\*\*7] since April 25, 1998. . . [and determines] to remove Kelly E. Blair as Chief of Police." Id. ¶15. The only de-

cision on September 18, that Blair could administratively appeal, therefore, was his termination as chief. Believing the Township had also terminated him as a constable, Blair appealed that action (and we subsequently held that he was not terminated as a constable).

[\*P17] Further, in his Amended Notice of Administrative Appeal, paragraph 7, he states he "is a police constable who was awarded a certificate attesting to his satisfactory completion of an approved basic training program. . . [and thus] he was named constable by Sugarcreek Township Trustees in 1998. . . [and that he] has been removed from office. . . without following the procedures set forth in the Ohio Revised Code for constables." Paragraph 8 is identical with the exception of the last sentence which alleges that he "has been terminated. . ." whereas paragraph 7 says he "has been suspended and will be terminated. . ."

[\*P18] There is no reference in the Notice to "certified police officer" or "police officer." It does mention that he completed a basic training program, but such completion does not ipso facto make one a "certified [\*\*8] police officer," or even a "police officer," let alone one that was employed and terminated as such by the township, and is just as consistent with his appealed termination as a constable. Similarly, the allegation that he was wrongfully "removed from office" can only be read as referencing his position as a "police constable." A further indication of grounds of the original administrative appeal is that at the 2007 hearings, Blair testified as to his belief that when he became chief he gave up any position in the classified service as a certified police officer employee of the township. He stated that he believed "that becoming a constable gave [him] job security with the township" (Tr. pg. 34) and that "every chief I worked for told me to make sure that if you become chief you become a constable. That is the only protection you have." (Tr. pg. 34).<sup>1</sup> Thus, if we stopped here, we would hold that Blair did not administratively appeal anything regarding his status as a former certified police officer with Sugarcreek Township.

1 This testimony was "clarified" in the 2009 hearings when Appellant testified that his belief that he had the right to return to his old job figured into his decision [\*\*9] to take the job as chief (April 30, 2009, transcript pg. 35).

[\*P19] The confusion arises from dicta in *Blair I*: "Blair argues that he enjoys certain rights as a certified police constable and/or former certified police officer of which the Trustees' action deprived him. That contention involves issues the trial court did not reach. Blair may present evidence on those matters in the course of future proceedings." *Id.* ¶18. Construing this broadly, the parties, on remand, presented evidence and briefs regarding

whether Blair had any rights as a "former certified police officer."

[\*P20] Removal or suspension of a "certified police officer" is governed by R.C. 505.49(B)(3):

[\*P21] "Except as provided in division (D) of this section, a patrol officer, other police district employee, or police constable, who has been awarded a certificate attesting to the satisfactory completion of an approved state, county, or municipal police basic training program, as required by section 109.77 of the Revised Code, may be removed or suspended only under the conditions and by the procedures in sections 505.491 to 505.495 of the Revised Code. Any other patrol officer, police district employee, or police constable shall serve [\*\*10] at the pleasure of the township trustees. In case of removal or suspension of an appointee by the board of township trustees, that appointee may appeal the decision of the board to the court of common pleas of the county in which the district is situated to determine the sufficiency of the cause of removal or suspension. The appointee shall take the appeal within ten days of written notice to the appointee of the decision of the board."

[\*P22] R.C. 505.49(C)(1) provides that division (B) does not apply to larger townships that have a civil service commission; instead such townships are required to comply with the procedures in Chapter 124 of the Revised Code. R.C. 505.49(C)(2) then provides that, in such a township, a person appointed as chief who is removed or who resigns "shall be entitled to return to the classified service on the township police department, in the position that person held previous to the person's appointment as chief of police." Both parties agree that Sugarcreek is not such a township; therefore, R.C. 505.49(B)(3) governs the return of a certified police officer to Sugarcreek Township.

[\*P23] If the certified police officer employed by a township as such who is appointed chief [\*\*11] is always still a certified police officer employed by a township as such even when employed as chief of police, there is no need for R.C. 505.49(C), regardless of the size of the township. The statute gives a right to a chief in larger townships to return to his or her position "held previous" which implies that as chief he or she does not hold the position. Further, even this right is not imposed by the legislation on smaller townships without a civil service commission.

[\*P24] To the extent the Assignments of Error raise issues concerning Blair's alleged current status as a "certified police officer," Appellant was a former certified police officer employee with the township and is not automatically entitled to return to the classified service in the position that he held previous to his appointment as chief.

[\*P25] The judgment of the trial court will be affirmed.

**DISSENT BY: FAIN; GRADY**

**DISSENT**

FAIN, J.,

GRADY, P.J., dissenting:

[\*P26] In the prior appeal, *Blair v. Board of Trustees of Sugarcreek Township*, Greene App. No. 08CA16, 2008 Ohio 5640 ("Blair I"), we found that, Plaintiff-Appellant Blair had not been removed or suspended from his position as a police constable. That finding reflected the fact that the resolution [\*\*12] of Defendant-Appellee Board of Trustees of Sugarcreek Township (the "Board") removing Blair from his position as chief of police made no reference to Blair's position as a constable.

[\*P27] On remand, the trial court found that Blair, even if he was not terminated from his constable's position, has no right that can be vindicated by proceedings pursuant to R.C. 505.491 to 505.495, to which Blair insists he is entitled pursuant to R.C. 509.01(B), because Blair benefitted from no compensation or other emolument of office from his constable's position. In the present appeal, the Board agrees with that finding, and points out that Blair's designation as a constable was done by the Board pursuant to R.C. 505.49(B)(2), adjunct to his appointment as chief of the township police district. The Board argues that Blair's removal as chief therefore encompassed his removal from his constable's position.

[\*P28] R.C. 509.01(B) provides that persons designated police constables who also hold a training certificate, as Blair does, "may be removed or suspended only under the conditions and by the procedures in sections 505.491 to 505.495 of the Revised Code." The adjunct designation of police chiefs as constables [\*\*13] authorized by R.C. 505.49(B)(2) incorporates the protections of that section by reference with respect to removal or suspension of constables designated pursuant to R.C. 505.49(B)(2). Those same protections with respect to suspension or removal also appear in R.C. 505.49(B)(3).

[\*P29] R.C. 505.491 states:

[\*P30] "Trustees to prefer charges against delinquent police personnel

[\*P31] "Except as provided in division (D) of section 505.49 or in division (C) of section 509.01 of the Revised Code, if the board of trustees of a township has reason to believe that a chief of police, patrol officer, or other township police district employee appointed under

division (B) of section 505.49 of the Revised Code or a police constable appointed under division (B) of section 509.01 of the Revised Code has been guilty, in the performance of the official duty of that chief of police, patrol officer, other township police district employee, or police constable, of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, neglect of duty, gross immorality, habitual drunkenness, incompetence, or failure to obey orders given that person by the proper authority, the board immediately shall file written charges against [\*\*14] that person, setting forth in detail a statement of the alleged guilt and, at the same time, or as soon thereafter as possible, serve a true copy of those charges upon the person against whom they are made. The service may be made on the person or by leaving a copy of the charges at the office or residence of that person. Return of the service shall be made to the board in the same manner that is provided for the return of the service of summons in a civil action."

[\*P32] In *Smith v. Fryfogle* (1982), 70 Ohio St.2d 58, 434 N.E.2d 1346, the Supreme Court considered the predecessor version of R.C. 505.49(C)(2), which contained the same reference to the protections afforded by R.C. 505.491 to 505.495. *Smith* distinguished the "quasi-judicial" action of a board of trustees in removing or suspending a police chief for the causes in R.C. 505.491 from the board's exercise of its "executive function" when removing a chief who serves at the pleasure of the board, without cause. *Smith* states: "R.C. 505.491 applies to the chief, among others, but only when the trustees have reason to believe the officer is guilty of neglect of duty or other named offense." *Id.*, at 60. (Emphasis supplied.)

[\*P33] The statutory provision that [\*\*15] township chiefs of police serve at the pleasure of the board of trustees in R.C. 505.49(B)(2) does not, by its terms, extend to constables. However, the holding in *Smith* is not limited to removal or suspension of chiefs. With respect to the applicability of R.C. 505.491 to 505.495, *Smith* applies to chiefs, "among others." Those others reasonably include any other employee of the police district, including police constables. As a result, the quasi-judicial causes and procedures in R.C. 505.491 to 505.495 apply to the removal or suspension of such persons only when done for cause, specifically the causes in R.C. 505.491. Any other removal or suspension of an officer by the board is an executive function, to which those sections have no application.

[\*P34] Blair's contention that his removal from his position as police constable, whether actual or constructive, may only be done pursuant to R.C. 505.491 to 505.495, is inconsistent with and contrary to the holding in *Smith*. Furthermore, it could lead to absurd results the General Assembly never intended. R.C. 505.49(B)(2)

directs a township board of trustees to "appoint a chief of police for the district, determine the number of patrol officers [\*\*16] and other personnel required by the district, and establish salary schedules and other conditions of employment for the employees of the police district." That mandate would authorize a board to order a reduction in force for fiscal reasons, terminating some of its employees. To limit the board's power to do that by requiring the board to then comply with the quasi-judicial procedures in R.C. 505.491 to 505.495 governing removal or suspension for cause would unreasonably hamstring the board in its exercise of the executive authority conferred by R.C. 505.49(B)(2).

[\*P35] Having said all of that, we remain confronted by the Board's failure to terminate Blair from his constable's position. Notwithstanding the fact that Blair was so designated pursuant to R.C. 505.49(B)(2), adjunct

to his appointment as chief, Blair's termination as chief did not likewise terminate his constable's position. Each position is recognized by statute, and each therefore reasonably requires a termination from that position to be effective. The Board's failure to terminate Blair from his constable's position not only leaves him in a state of limbo in that regard. It also presents a risk of liability for the Board should [\*\*17] Blair exercise the remaining authority the Board conferred on him in some improper way. It could conceivably also work to the Board's detriment by extending the basis for calculating Blair's retirement benefits and the Board's contribution to his public retirement account.

[\*P36] For the foregoing reasons, I would remand the case to the Board for the purpose of considering whether the Board should adopt a resolution terminating Blair from his designated position as a police constable.