

ORIGINAL

IN THE SUPREME COURT OF OHIO

KELLY BLAIR, : CASE NO. ~~2011-0864~~ 11-0960  
 Appellant, : [Appeal from the Second District  
 vs. : Court of Appeals, for Greene  
 : County, Ohio Case Nos. 2010-CA-0003]  
 BOARD OF TRUSTEES OF :  
 SUGARCREEK TOWNSHIP, :  
 Appellee. :

MERIT BRIEF OF APPELLEE  
 THE BOARD OF TRUSTEES OF SUGARCREEK TOWNSHIP

Dwight D. Brannon (0021657)  
 Matthew C. Schultz (0080142)  
 Brannon & Associates  
 130 W. Second Street, Suite 900  
 Dayton, Ohio 45402  
 (937) 228-2306  
 (937) 228-8475 fax  
[dbrannon@branlaw.com](mailto:dbrannon@branlaw.com)  
[m Schultz@branlaw.com](mailto:m Schultz@branlaw.com)  
*Attorneys for Appellant Kelly Blair*

Edward J. Dowd (0018681)  
 Dawn M. Frick (0069068)  
 Surdyk, Dowd & Turner Co., L.P.A.  
 1 Prestige Place, Suite 700  
 Miamisburg, Ohio 54342  
 (937) 222-2333  
 (937) 222-1970 fax  
[edowd@sdtlawyers.com](mailto:edowd@sdtlawyers.com)  
[dfrick@sdtlawyers.com](mailto:dfrick@sdtlawyers.com)  
*Attorneys for Appellee Board of Trustees of  
 Sugarcreek Township*

Elizabeth Ellis (0074332)  
 Greene County Prosecutor's Office  
 61 Greene Street, 2<sup>nd</sup> Floor  
 Xenia, Ohio 45385-3173  
 (937) 562-5250  
 (937) 562-5107 (fax)  
[Eellis@co.greene.oh.us](mailto:Eellis@co.greene.oh.us)  
*Co-counsel for Appellee Board of Trustees of  
 Sugarcreek Township*

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**TABLE OF CONTENTS**

I. TABLE OF AUTHORITIES..... ii

II. STATEMENT OF CASE..... 1

III. STATEMENT OF FACTS ..... 4

IV. ARGUMENT..... 5

**Proposition of Law:** A certified township police officer who is appointed chief and then is terminated as chief, other than for cause in a township where R.C. 505.49(C) is not applicable, does not have the automatic right to return to the position he held prior to his appointment as chief.. .....5

        A. Pursuant to R.C. 505.49, Appellant served at the pleasure of the Board and is not entitled to reinstatement to a position he held prior to becoming chief.....5

        B. Appellant had no tenured rights to waive.....13

        C. The public policy of Ohio favors the Second District Court of Appeals’ reading of R.C. § 505.49 .....13

V. CONCLUSION..... 16

VI. CERTIFICATE OF SERVICE..... 17

APPENDIX

R.C. § 124.44.....1

## I. TABLE OF AUTHORITIES

### Cases

<i>Barnhart v. Peabody Coal Co.</i> (2003), 537 U.S. 149, 123 S.Ct. 748.....	9
<i>Blair v. Sugarcreek Twp. Bd. of Trustees</i> , Second Dist. App. No. 08CA16, 2008-Ohio-5640.....	2
<i>Blair v. Bd. of Trustees of Sugarcreek Township</i> , Second Dist. App. No. 2010 CA 3, 2011-Ohio-1725.....	3, 5, 12
<i>Cincinnati v. Roettinger</i> (1922), 105 Ohio St. 145, 137 N.E. 6.....	9
<i>Columbus-Suburban Coach Lines, Inc. v. P.U.C.O.</i> (1969), 20 Ohio St. 2d 125, 254 N.E.2d 8 .	12
<i>Gissner v. City of Cincinnati</i> , First Dist App. No. C-040070, 2004-Ohio-6999 .....	13
<i>In re Phoenix Hotel Co. Of Lexington, Ky.</i> (6 <sup>th</sup> Cir.1936), 83 F. 2d 724.....	8, 9
<i>Kiefer v. State</i> (1922), 106 Ohio St. 285, 139 N.E. 852 .....	9
<i>McGuckin v. West Homestead</i> (Pa. 1948), 360 Pa. 311, 62 A.2d 23 .....	15
<i>Metropolitan Securities Co. v. Warren State Bank</i> (1927), 117 Ohio St. 69, 158 N.E. 81 .....	9
<i>Miller v. Union Township</i> (Nov. 30, 1998), Twelfth Dist. App. No. CA98-06-044 .....	14
<i>Muncy v. City of Dallas</i> (5 <sup>th</sup> Cir. 2003), 335 F.3d 394 .....	15
<i>Painter v. Graley</i> (1994), 70 Ohio St.3d 377, 639 N.E.2d 51 .....	13
<i>Scheu v. State</i> (1910), 83 Ohio St. 146, 93 N.E. 969.....	12
<i>Smith v. Fryfogle</i> (1982), 70 Ohio St.2d 58, 434 N.E.2d 1346.....	6, 11, 14, 15
<i>Staley v. St. Clair Twp. Bd. of Trustees</i> (Dec. 18, 1987), Seventh Dist. App. No. 87-C-44.....	11
<i>State ex rel. Cleveland Elec. Illum. Co. v. Euclid</i> (1959), 169 Ohio St. 476, 159 N.E. 2d 756..	8, 9
<i>State ex. rel Warzyniak v. Grenchik</i> (Ind. App. 1978), 177 Ind. App. 393, 379 N.E.2d 997 .....	15
<i>State v. Jordan</i> (2000), 89 Ohio St.3d 488, 733 N.E.2d 601 .....	8
<i>State v. Reichert</i> (Ind. 1948), 226 Ind. 358, 80 N.E.2d 289.....	15

*Szewczyk v. Bd. of Fire and Police Commissioners of Vill. of Richmond* (Ill App. 2008), 381 Ill. App. 3d 159, 885 N.E.2d 1106 ..... 15

*Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 78 N.E.2d 370..... 12

**Statutes**

Am. H.B. No. 513, 135 Ohio Laws 693-715 ..... 10

Am. H.B. No. 671, 137 Ohio Laws 3209-3215 ..... 10, 11

R.C. § 109.77 ..... 4, 6

R.C. § 124.11 ..... 7, 10, 11

R.C. § 124.44 ..... 7

R.C § 505.49 ..... passim

R.C. § 2506.02 ..... 1

R.C. § 2506.03 ..... 1

**Other Authorities**

Black's Law Dictionary (6 Ed.1990) 581..... 9

1986 Ohio Op. Atty. Gen. No. 86-070..... 6

## **II. STATEMENT OF THE CASE**

This case commenced on September 27, 2006, with the Amended Notice of Appeal under R.C. Chapter 2506 contesting Appellant Kelly Blair's ("Appellant") removal as Chief of Police for the Sugarcreek Township Police Department by the Sugarcreek Township Board of Township Trustees and his alleged removal as a certified police constable. The Amended Notice of Appeal did not contest in any way the failure to retain Appellant in any paid position he had held prior to being promoted to Chief of Police.

A transcript of the Trustees' Meeting Minutes was filed with the trial court pursuant to R.C. § 2506.02. Appellant moved to supplement the record under R.C. § 2506.03 and towards that end hearings were held on March 8, 2007 and March 15, 2007. A briefing schedule followed. The Magistrate issued his Decision on September 20, 2007, finding that Appellant had been properly terminated as Chief of Police but that his "...employment as township constable was improperly terminated..." As a result, the Magistrate reversed the decision terminating Appellant as police constable and ordered Appellant reinstated "...with back pay and benefits consistent with that position."

Sugarcreek Township Board of Trustees ("Appellee" or the "Board") was the only party to object to that decision. Appellee's objections were limited only to that portion of the Magistrate's Decision that ordered Appellant reinstated to the position of police constable. Appellant did not object to the Magistrate's Decision of September 20, 2007, neither did Appellant file any cross-objections upon the filing of Appellee's objections. As a result, the sole issue that went to the trial court was Appellee's objections to the Magistrate's Decision finding that Appellant had been improperly terminated as a police constable and the order to reinstate Appellant to that position. No other issue relative to this case, not Appellant's termination as

Chief of Police, or his retention to some paid position he held prior to being promoted to Chief of Police, was preserved for appeal. On February 28, 2008, the trial court, overruled Appellee's objections and adopted the Magistrate's Decision.

On March 3, 2008, Appellee filed its Notice of Appeal regarding the sole issue of whether or not Appellant was terminated as police constable. No cross-appeal or cross-assignment of error was filed by Appellant objecting to any other decision of the trial court below. As a result, the issue of Appellant's termination as Chief of Police was not before the Second District court of Appeals. Similarly, any obligation to retain Appellant to any paid position he held prior to his promotion to Chief of Police was not before the Second District in that appeal.

On October 31, 2008, the Second District Court of Appeals issued its Opinion reversing the trial court's determination that Appellant had been terminated as police constable. See *Blair v. Sugarcreek Twp. Bd. of Trustees*, Second Dist. App. No. 08CA16, 2008-Ohio-5640 ("*Blair I*"). (Appellant's Appx. 1.) However, in remanding the case back to the trial court, the Court admittedly included language which caused some confusion on remand. Specifically, the decision in *Blair I*, stated:

Blair argues that he enjoys certain rights of retention 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 further proceedings.

Id. at ¶ 18.

Pursuant to the remand order the trial court held additional evidentiary hearings on April 30, and May 1, 2009. Thereafter on August 13, 2009, the Magistrate issued his Decision dismissing this administrative appeal finding that Appellant was not entitled to retention to any paid position he held prior to being promoted to Chief of Police since Sugarcreek Township did

not meet the criteria for such action under R.C. § 505.49(C)(1), and further that since no order had terminated Appellant as police constable, this issue was not proper for an administrative appeal under Chapter 2506 of the Revised Code.

Appellant filed objections to the Magistrate's Decision with the trial court on August 27, 2009. After briefing, on December 11, 2009, the trial court overruled Appellant's objections and adopted the Magistrate's Decision dismissing the appeal. Appellant then filed his Notice of Appeal to the Second District Court of Appeals on January 8, 2010. On April 8, 2011, the Second District Court of Appeals issued a decision holding that:

(1) the statute governing removal of police appointees by board of township trustees, not statutory chapter governing civil service employees, governed termination of former police chief's employment, and

(2) former police chief was not automatically entitled to return to classified service in position of police officer.

*Blair v. Bd. of Trustees of Sugarcreek Township*, Second Dist. App. No. 2010 CA 3, 2011-Ohio-1725 ("*Blair II*"). (Appellant's Appx. 17.) The decision in *Blair II*, went further in addressing whether the matter was even properly before the court stating:

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 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>FNI</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.\* \* \*

Notwithstanding whether the issue of whether Appellant's contention that he should have been returned to the position he held prior to his appointment as Chief was even properly before the court, the Second District Court of Appeals addressed the issue and upheld the trial court's decision below. Thereafter, Appellant filed a Motion for Certification of a Conflict, which the Second District Court of Appeals granted. (Appellants Appx. 37, 42.) This Court agreed and directed the issue to be briefed.

### **III. STATEMENT OF FACTS**

Appellant was hired as a part-time patrol officer by the Sugarcreek Township Police Department in 1988. (Tr., 04/30/09, p. 24). Appellant completed basic certification through the Ohio Peace Officers Training Academy (OPOTA) pursuant to R.C. § 109.77. (Tr. March 2007, p. 5; Tr., 04/30/09, p. 28.) Over the years Appellant was promoted several times ultimately being promoted to Chief of Police in May 1998. (Id.) Appellant testified that as Chief of Police he knew he was an unclassified employee and "...worked at the leasure [sic] of the Trustees." (Tr. March 2007, p. 21, 35.)

On September 18, 2006, the Board voted to terminate Appellant from the position of Chief of Police by Resolution Number 2006-09-18-12. No agreement was entered into between Appellant and Appellee that would have permitted Appellant to remain employed in any other paid position, including any position he held prior to being promoted to Chief of Police. (Tr., 05/01/09, pp. 153-154, 172-173.) By Stipulation filed by the parties on August 4, 2009, the parties agree that Sugarcreek Township does not meet the criteria specified in R.C. § 505.49(C)(1).

#### IV. ARGUMENT

**PROPOSITION OF LAW:** A certified township police officer who is appointed chief and then is terminated as chief, other than for cause in a township where R.C. § 505.49(C) is not applicable, does not have the automatic right to return to the position he held prior to his appointment as chief.

**A. Pursuant to R.C. § 505.49, Appellant served at the pleasure of the Board and is not entitled to reinstatement to a position he held prior to becoming chief.**

The Second District Court of Appeals properly held that Appellant “is not automatically entitled to return to the classified service in the position that he held previous to his appointment as chief.” *Blair v. Sugarcreek Twp. Bd. of Trustees*, Second Dist. App. No. 2010 CA 3, 2011 - Ohio- 1725 at ¶24. The foregoing holding was based upon a logical reading of R.C. § 505.49. Ohio Revised Code Chapter 505 deals with the powers and authority of a board of township trustees. Revised Code section 505.49 provides, in relevant part that:

(B)(1) The township trustees by a two-thirds vote of the board may adopt rules necessary for the operation of the township police district, including a determination of the qualifications of the chief of police, patrol officers, and others to serve as members of the district police force.

(2) Except as otherwise provided in division (E) of this section and subject to division (D) of this section, the township trustees by a two-thirds vote of the board shall appoint a chief of police for the district, determine the number of patrol officers and other personnel required by the district, and establish salary schedules and other conditions of employment for the employees of the township police district. The chief of police of the district shall serve at the pleasure of the township trustees and shall appoint patrol officers and other personnel that the district may require, subject to division (D) of this section and to the rules and limits as to qualifications, salary ranges, and numbers of personnel established by the board of township trustees. The township trustees may include in the township police district and under the direction and control of the chief of police any constable appointed pursuant to section 509.01 of the Revised Code, or may designate the chief of police or any patrol officer appointed by the chief of police as a constable, as provided for in section 509.01 of the Revised Code, for the township police district.

Section 505.49 sets forth the scope of authority for the Trustees generally with regard to the

Township police district. Specifically, R.C. § 505.49(B)(2) deals exclusively with the chief of police position. The statute is “clear and unequivocal. It gives the appointing body unilateral authority to terminate the chief of police without considerations of cause or reason.” *Smith v. Fryfogle* (1982), 70 Ohio St.2d 58, 59, 434 N.E.2d 1346.

In contrast, R.C. § 505.49(B)(3) addresses everyone else in a Township police district—the patrol officers, other police district employees or police constables. Section 505.49(B)(3) is not applicable to the chief of police. To conclude otherwise would make the two sections of the same statute in conflict with one another. This section distinguishes between the removal and suspension of those patrol officers, other police district employees or constables that are certified and those who are not certified. Specifically, R.C. § 505.49(B)(3) provides:

(3) 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 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.

At the time of his removal, Appellant was not a patrol officer or other police district employee—he was the Chief. Simply because he held a certificate attesting to the satisfactory completion of an approved basic training program under R.C. § 109.77 does not, in and of itself, confer additional rights on him. The receipt of a certificate under R.C. § 109.77 for completion of a satisfactory training program indicates that an individual has the qualifications needed to serve as a police officer. It does not, however, bestow upon him the authority to so serve. See 1986 Ohio Op. Atty. Gen. No. 86-070.

This is further supported by viewing the legislature's use of the term "patrol officer" rather than "peace officer" or "police officer." This is a significant distinction when interpreting R.C. § 505.49(B). In R.C. § 124.44, the legislature very specifically defines "patrol officer" as a police rank.<sup>1</sup> Thus, while a patrol officer may be a certified peace officer and a police officer, not all certified peace officers or police officers are patrol officers. The legislature was quite specific in the language it used and as such, R.C. § 505.49(B)(3) is applicable only to "patrol officers, other police district employees, or police constables."

Finally, R.C. § 505.49(C) applies only to a township that has a population of ten thousand or more residing within the township and outside of any municipal corporation, that has its own police department employing ten or more full-time paid employees, and that has a civil service commission. There is no dispute that Sugarcreek Township does not fit within those parameters.

This section of the statute provides:

(C)(1) Division (B) of this section does not apply to a township that has a population of ten thousand or more persons residing within the township and outside of any municipal corporation, that has its own police department employing ten or more full-time paid employees, and that has a civil service commission established under division (B) of section 124.40 of the Revised Code. The township shall comply with the procedures for the employment, promotion, and discharge of police personnel provided by Chapter 124 of the Revised Code, except as otherwise provided in divisions (C)(2) and (3) of this section.

(2) The board of township trustees of the township may appoint the chief of police, and a person so appointed shall be in the unclassified service under section 124.11 of the Revised Code and shall serve at the pleasure of the board. A person appointed chief of police under these conditions who is removed by the board or who resigns from the position shall be entitled to return to the classified service in the township police department, in the position that person held previous to the

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<sup>1</sup> R.C. 124.44 provides in relevant part:

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.

person's appointment as chief of police.

It is only in R.C. § 505.49(C), that there is any mention by the legislature that a person appointed chief of police and who is removed by the board shall be entitled to return to the position that individual held prior to his appointment as chief.

If this Court were to interpret the above statutes differently, it would essentially give no effect to the specific language of R.C. § 505.49(B)(2) that explicitly states that the chief of police “serves at the pleasure of the board.” Such an interpretation would violate a basic tenant of statutory construction, that the legislature is not presumed to do a vain or useless thing, and that when language is inserted in a statute or charter, it is inserted to accomplish some definite purpose. *State ex rel. Cleveland Elec. Illum. Co. v. Euclid* (1959), 169 Ohio St. 476, 479, 159 N.E. 2d 756, 759; *In re Phoenix Hotel Co. Of Lexington, Ky.*, (6<sup>th</sup> Cir.1936) 83 F. 2d 724. The rules of statutory interpretation need only be employed if the statutory language is ambiguous. “Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.” *Sears v. Weimer* (1944), 143 Ohio St. 312, 55 N.E.2d 413, paragraph five of the syllabus. Here, there is no ambiguity.

It is only in R.C. § 505.49(C), that there is any mention by the legislature that a person appointed chief of police and who is removed by the board shall be entitled to return to the position that individual held prior to his appointment as chief. Appellant argues, notwithstanding that although he could be terminated as chief of police, that the Township should have returned him to a position he held prior to becoming chief. Appellant is reading something into the statute that just is not there. In construing a statute, a court must give effect to the words used in the statute, not insert words not used. *State v. Jordan* (2000), 89 Ohio St.3d 488, 492, 733 N.E.2d

601, 605.

Clearly, if the legislature had intended that provision to apply to smaller non-civil service townships, it could have stated so specifically under section (B). The legislature could have so provided by inserting the appropriate language. Having omitted such language in R.C. § 505.49(B), this Court cannot, under the guise of construction or interpretation, include it. It is well settled that where the legislature uses certain language in one instance and different language in another instance, different results were intended. See *Metropolitan Securities Co. v. Warren State Bank* (1927), 117 Ohio St. 69, 158 N.E. 81; *Kiefer v. State* (1922), 106 Ohio St. 285, 139 N.E. 852. As such, this Court should apply the maxim of *expressio unius est exclusion alterius* in interpreting R.C. § 505.49. *Expressio unius est exclusion alterius* means “the expression of one thing is the exclusion of the other.” Under this maxim, “if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.” Black's Law Dictionary (6 Ed.1990) 581. See *Cincinnati v. Roettinger* (1922), 105 Ohio St. 145, 152, 137 N.E. 6. Because the legislature did not include a retention provision in R.C. § 505.49(B) but did in 505.49(C), it “justif[ies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” *Barnhart v. Peabody Coal Co.* (2003), 537 U.S. 149, 168, 123 S.Ct. 748.

As noted previously, when language is inserted in a statute, it is inserted to accomplish some definite purpose. *State ex rel. Cleveland Elec. Illum. Co. v. Euclid* (1959), 169 Ohio St. 476, 479, 159 N.E. 2d 756, 759; *In re Phoenix Hotel Co. Of Lexington, Ky.* (6<sup>th</sup> Cir. 1936), 83 F. 2d 724. If R.C. § 505.49(B) already provided for an automatic right of retention for the Chief of Police, there would have been no purpose in the legislature adding the specific language set forth above in section R.C. § 505.49(C)(2) as it relates to larger civil service townships. This

also begs the question under this flawed construction as to how that construed statute would treat a township police chief who was hired as Chief of Police from the outside, and had never before held a position with the township police department other than Chief of Police.

In an attempt to discount the foregoing, Appellant makes certain presumptions regarding amendments made to the statute in 1974 and 1977. However, Appellant is reading more into Amended House Bill Nos. 513 and 671 than what is specifically stated therein. The 1974 Amendment's stated purpose was to "allow certain townships to establish civil service commissions for the employment, promotion and discharge of township policemen and firemen." See Appellant's Appx. 052. The 1974 Amendment, Am. H.B. No. 513, specifically provided that a chief of police of a civil service township was at that time not exempt from the classified service and was designated within the competitive class. See Appellant's Appx. 056, Am. H.B. 513, R.C. § 124.11(A)(3) and (B)(1). Therefore pursuant to the changes to R.C. § 505.49 by Am. H.B. 513, the procedures for the employment, promotion and discharge of police personnel of a civil service township were governed by Revised Code Chapter 124.

Approximately three years later in Am. H.B. 671, the Ohio Legislature amended R.C. §§ 124.11 and 505.49 with the stated purpose a board of trustees in a civil service township may appoint a police chief to serve at the pleasure of the board, and to entitle police chiefs so appointed who are subsequently removed from that position to return, upon removal, to their previous positions in the classified service. See Appellant's Appx. 075 Am. H.B. 671. However, it is important to note that the amendment specifically included that civil service townships shall comply with the procedures for the employment, promotion and discharge of police personnel as provided by Chapter 124 \* \* \* "except that the board of township trustees of the township may appoint the chief of police, and any person so appointed shall be in the unclassified service under

section 124.11 of the Revised Code\* \* \*.” The amendment provided further that:

A person appointed chief of police, under these conditions who is removed by the board or who resigns from the position shall be entitled to return to the classified service in the township police department, in the position he held previous to his appointment as chief of police.

Appx. 080-081, Am. H.B. 671, 505.49(B). (Emphasis added.) The legislature was very specific in adding in that the provision entitling a chief of police to return to the classified service applied to only those chiefs appointed under Chapter 124. Further, as this Court noted in *Smith v. Fryfogle* (1981), 70 Ohio St.2d 58, 60, 434 N.E.2d 1346, in the 1978 amendment “[t]he General Assembly elected to restate that the chief of police of such larger township district serves “at the pleasure of the board.” Id. The distinction therefore, is that in a civil service township, although a chief still serves at the pleasure of the board, he may return from the unclassified status to the classified status. There is absolutely nothing in plain language of R.C. § 505.49 that states that a chief of a non-civil service township is entitled to return to a position he held previous to his appointment as chief of police.

Appellant relies on *Staley v. St. Clair Twp. Bd. of Trustees* (Dec. 18, 1987), Seventh Dist. App. No. 87-C-44 in support of his quest for reinstatement to a position he held prior to Chief. However, the *Staley* case is distinguishable. First, at the time that the *Staley* case was decided, R.C. § 505.49 was not divided among the three sections set forth above. By dividing the subject matter of R.C. § 505.49 into separate divisions of the statute, *i.e.*, 505.49(B)(2) and 505.49(B)(3), the General Assembly has further emphasized the distinction between treatment of the police chief and that of a patrol officer, other police district employee, or police constable.

The *Staley* decision, decided in 1987, never once mentions or recognizes then division (B) of R.C. § 505.49 which was enacted in 1978. It never discusses or mentions the requirement that only certain township police chiefs are required to be retained in a position they held prior to

becoming chief of police. Second, the *Staley* court never discusses whether or not St. Clair Township met or did not meet the specifications listed in then R.C. § 505.49(B) and now R.C. § 505.49(C)(1) and (C)(2). Third, if the decision in *Staley* is the correct view, the Court does not address why the Ohio General Assembly would have included limitations for a township to terminate its chief of police and retain him/her in some other position, only for certain larger townships with civil service commissions.

In contrast, the Second District Court of Appeals in this case disagreed with the holding in *Staley* stating that:

[i]f the certified police officer employed by a township as such who is appointed chief 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.

*Blair II* at ¶23. Based upon the foregoing, the Second District properly chose not to follow the holding in *Staley*, and instead recognized the clear language of the statute.

It is a fundamental principle that exceptions to the application or operation of the terms of a statute shall be recognized only when such exceptions are set forth clearly and unambiguously either in the statute itself or in another statute. See generally *Columbus-Suburban Coach Lines, Inc. v. P.U.C.O.* (1969), 20 Ohio St. 2d 125, 127, 254 N.E.2d 8. In those instances in which the General Assembly has not enacted an exception to the terms of a particular statute, there is a presumption that it has intended that there shall be no exceptions thereto. *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 78 N.E.2d 370, syllabus, paragraph five; *Scheu v. State* (1910), 83 Ohio St. 146, 157-58, 93 N.E. 969. Here, the General Assembly enacted an exception to a chief of police serving at the pleasure of the board, only in Section 505.49(C). Thus, since there is not

an exception in R.C. § 505.49(B)(2), the presumption is that there are no exceptions thereto.

**B. Appellant had no tenured rights to waive.**

Appellant argues that he is entitled to return to the position he held prior to being appointed chief of police because he did not “waive” what he contends were his tenured rights. Appellant’s argument is misplaced. First, each of the cases cited by Appellant involves civil service positions. There is no dispute in this case that Sugarcreek Township is not a civil service township and Appellant’s position as chief of police was not a civil service position.

In *Gissner v. City of Cincinnati*, 1<sup>st</sup> Dist No. C-040070, 2004-Ohio-6999, not only was the position at issue a civil service position, the City’s own rules and regulations stated that employees can only relinquish classified civil-service status when they do so in writing. Such is not the case in this instance. Appellant himself confuses the fact that although he was a civil servant, that does not mean that he possesses the same rights as those that are in civil service positions. As Chief of Police, Appellant served at the pleasure of the Board of Trustees. Therefore, he had no tenure rights to waive.

**C. The public policy of Ohio favors the Second District Court of Appeals’ reading of R.C. § 505.49.**

The public policy of the state of Ohio, as set forth by the legislature and this Court, favors the interpretation of R.C. § 505.49 by the Second District Court of Appeals in this case. Public policy may be ascertained from the Ohio and United States Constitutions, statutes, administrative rules and regulations, and the common law. *Painter v. Graley* (1994), 70 Ohio St.3d 377, 639 N.E.2d 51, paragraph three of the syllabus.

In specifically separating R.C. § 505.49 into distinct sections, the legislature expressed the public policy that the chief serves at the pleasure of the board of trustees—those who appointed him. That is, Appellant’s at-will status as a public employee was prescribed by

statute. See generally, *Miller v. Union Township* (Nov. 30, 1998), Twelfth Dist. App. No. CA98-06-044 at \*3 (holding that the General Assembly has expressed a “clear public policy” in R.C. § 505.49(A) that a chief of police is an at-will employee). Moreover, the legislature clearly and unambiguously divided R.C. § 505.49 into sections consistent with their applicability to different individuals. Specifically, R.C. § 505.49 covers the following topics:

- (B)(1) relates to the power of the trustees to adopt rules;
- (B)(2) relates to the Chief of Police; and
- (B)(3) relates to patrol officers, other police district employees, or police constables.
- (C) relates to larger and specifically, civil service townships.

Similarly this court has recognized the public policy expressed in R.C. § 505.49 in *Smith v. Fryfogle*, supra.

In *Smith v. Fryfogle*, this Court stated:

\*\*\* R.C. 505.491 et. seq. is \*\*\* clear and unequivocal. ***In those limited circumstances*** where the trustees believe the chief of police, \*\*\* has been guilty of one of the named offenses the trustees must act in a quasi-judicial manner, conducting a due process hearing.” (Emphasis added.)

*Smith v. Fryfogle*, supra at 60 (emphasis added). However, this Court also recognized that another path for removal is set forth in R.C. § 505.49(A). This Court noted that R.C. § 505.49(A) states, in pertinent part that “[t]he chief of police of the district shall serve at the pleasure of the township trustees \*\*\*.” This Court then added:

“This \*\*\* path is clear and unequivocal. It gives the appointing body unilateral authority to terminate the chief of police without considerations of cause or reason. The function thus exercised is executive, not judicial or quasi-judicial. [Citation omitted.]”

*Smith v. Fryfogle*, supra at 59. Had this Court, or the legislature, intended to provide the Chief separate protections because he was formally a patrol officer, or even because he was still a certified peace officer, this Court, or the legislature, could have specifically so stated. Rather, this Court noted:

Absent a reason to believe that a township police chief is guilty of one or more of the named offenses in R.C. 505.491, he may be removed from office at the pleasure of the township trustees, pursuant to R.C. 505.49(A).

*Smith v. Fryfogle*, supra at the syllabus. Thus, in *Smith v. Fryfogle*, just as in this case, the Court found under the circumstances presented therein that the chief of police was not entitled to the protection of due process because there was no evidence that the trustees believed the chief was guilty of any misconduct. Therefore, just as in *Smith v. Fryfogle*, Appellant is not entitled to the due process protections provided to patrol officers, other police district employees, or police constables.

Appellant argues that his removal from the position of police chief does not deprive him of his status as a police officer. However, as noted above, while Appellant may still be a certified peace officer, he had long since given up his position as a patrol officer as he moved up the ranks of the Sugarcreek Township Police Department.

Appellant further cites to various cases from other courts for the proposition that public policy requires Appellant to be returned to the position he held prior to becoming chief. However, in each of the cases cited by Appellant, there is a specific statute or statutory scheme providing for the Chief to be returned to his prior rank. See *McGuckin v. West Homestead* (Pa. 1948), 360 Pa. 311, 62 A.2d 23 (position at issue was civil service position); *State v. Reichert* (Ind. 1948), 226 Ind. 358, 80 N.E.2d 289 (The Cities and Towns Act of 1905 specifically provides chief can only be demoted and removed after charges filed and served and a hearing held.); *State ex. rel Warzyniak v. Grenchik* (Ind. App. 1978), 177 Ind. App. 393, 379 N.E.2d 997 (specific statute); *Szewczyk v. Bd. of Fire and Police Commissioners of Vill. of Richmond* (Ill App. 2008), 381 Ill. App. 3d 159, 885 N.E.2d 1106 (court of appeals granted hearing pursuant to specific statutory scheme applicable to chiefs); *Muncy v. City of Dallas* (5<sup>th</sup> Cir. 2003), 335 F.3d

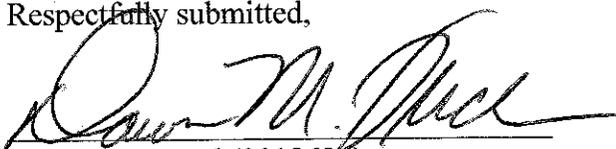
394 (specific language in Charter provided for chief to be restored to rank and grade held prior to appointment to the position).

In each of the foregoing, the applicable statutory provisions were very different than those of Ohio. Moreover, the statute or charter provision at issue expressly provided for the chief to be returned to a prior position. In contrast, in Ohio, the only statute, or portion thereof, which provides for the chief to be returned to a prior position, is section 505.49(C)—dealing with only civil service townships. Thus, the public policy as expressed purposely by the legislature is that only those chiefs which are part of civil service are provided those protections. The legislature clearly made a conscious choice to not delineate such a procedure for all chiefs of township police departments. Accordingly, Appellees respectfully request that this Court uphold the decision of the Second District Court of Appeals below.

**V. CONCLUSION**

The Second District Court of Appeals' decision in this matter is a more sound reading of R.C. § 505.49 than that of the Seventh District Court of Appeals' decision fourteen years ago in *Staley v. St. Clair Township Board of Trustees* (Dec. 15, 1987), 7<sup>th</sup> Dist. App. No. 87-C-44. Appellant was employed as the Chief of Police of Sugarcreek Township and served at the pleasure of the Board of Trustees and as such, upon termination from his position as Chief, he was not entitled to return to the position that he held prior to becoming Chief. Accordingly, Appellee herein respectfully requests that this Court uphold the decision by the Second District Court of Appeals below.

Respectfully submitted,



Edward J. Dowd (0018681)

Dawn M. Frick (0069068)

Surdyk, Dowd & Turner Co., L.P.A.

One Prestige Place, Suite 700

Miamisburg, Ohio 45342

(937) 222-2333

(937) 222-1970 facsimile

[edowd@sdtlawyers.com](mailto:edowd@sdtlawyers.com)

[dfrick@sdtlawyers.com](mailto:dfrick@sdtlawyers.com)

*Attorneys for Appellee Board of Trustees of  
Sugar Creek Township*

Elizabeth Ellis (0074332)

Greene County Prosecutor's Office

61 Greene Street, 2<sup>nd</sup> Floor

Xenia, Ohio 45385-3173

(937) 562-5250

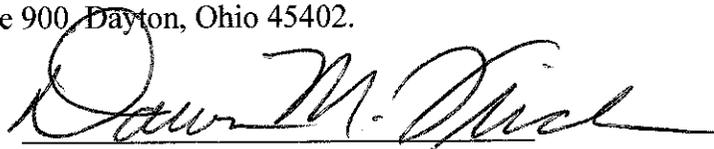
(937) 562-5107 (fax)

[Eellis@co.greene.oh.us](mailto:Eellis@co.greene.oh.us)

*Co-counsel for Appellee Board of Trustees of  
Sugar Creek Township*

## **VI. CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been sent by regular U.S. Mail this 15<sup>th</sup> day of November, 2011, to Dwight D. Brannon, Esq. and Matthew C. Schultz, Esq., BRANNON & ASSOCIATES, 130 West Second Street, Suite 900, Dayton, Ohio 45402.



Dawn M. Frick (0069068)

**C**Baldwin's Ohio Revised Code Annotated Currentness

## Title I. State Government

▣ Chapter 124. Department of Administrative Services--Personnel (Refs & Annos)

## ▣ Municipal and Township Civil Service Commissions; Police and Firefighters

→ → **124.44 Promotion of patrol officers**

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 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.

## CREDIT(S)

(2006 H 187, eff. 7-1-07; 1978 H 412, eff. 5-23-78; 1975 H 1; 1974 H 513; 1973 S 174)

## UNCODIFIED LAW

2006 H 187, § 5: See Uncodified Law under RC 124.01.

HISTORICAL AND STATUTORY NOTES

**Ed. Note:** 124.44 is former 143.34 amended and recodified by 1973 S 174, eff. 12-4-73; 1973 H 276; 126 v 835; 1953 H 1; GC 486-15a.