

ORIGINAL

IN THE SUPREME COURT OF OHIO

KELLY BLAIR,

Appellant,

vs.

BOARD OF TRUSTEES OF  
SUGARCREEK TOWNSHIP,

Appellee.

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CASE NO. 2011-0960

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

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REPLY BRIEF OF APPELLANT KELLY BLAIR

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FILED  
DEC 06 2011  
CLERK OF COURT  
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## ARGUMENT

Pursuant to R.C. 505.49(B)(3), Kelly Blair, as a certified township police officer, possesses the right to continued employment absent allegations of wrongdoing. The Seventh District Court of Appeals, in *Staley v. St. Clair Township Board of Trustees*, 7th Dist. No. 87-C-44, 1987 Ohio App. LEXIS 10087 (Dec. 15, 1987), held that this right of continued employment means that when a township police chief, who was a certified township police officer prior to being appointed chief, is removed as chief with no allegation of wrongdoing, that individual has the right to resume his duties as a township police officer in the position he last held before becoming chief. The Second District Court of Appeals disagreed with this interpretation of the statute, holding that Mr. Blair, who was a certified Sugarcreek Township police officer before becoming Chief of the Sugarcreek Township Police Department, did not have the right to resume the position he held before becoming chief. *Blair v. Bd. of Trustees of Sugarcreek Township*, 2nd Dist. No. 2010 CA 3, 2011-Ohio-1725, ¶ 24. As explained below and in Mr. Blair's Brief, the Second District Court of Appeals' decision conflicts not only with the Seventh District's decision in *Staley*, but with the body of law in Ohio and other states interpreting statutes such as R.C. 505.49. For all the reasons discussed above and in Mr. Blair's main Brief, Mr. Blair urges this Supreme Court to reverse the decision of the Second District Court of Appeals, and adopt the following 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, has the automatic right to return to the position he held prior to his appointment as chief.

**I. The canon of statutory interpretation *expressio unius est exclusio alterius* does not apply to R.C. 505.49.**

The Township argues that the fact that R.C. 505.49(C) expressly grants township police chiefs in civil service townships the right to resume their duties as township police officers upon their removal as chief means that police chiefs in non-civil service townships do not have the same right under R.C. 505.49(B). The Township claims that “this Court should apply the maxim of *expressio unius est exclusion* (sic) *alterius* in interpreting R.C. § 505.49.” (Appellee’s Brief, p.9.) However, this canon of statutory construction does not apply to R.C. 505.49.

“[T]his court has long recognized that the canon ‘*expressio unius est exclusio alterius*’ is not an interpretive singularity but merely an aid to statutory construction, which must yield whenever a contrary legislative intent is apparent.” *Balt. Ravens v. Self-Insuring Empls. Evaluation Bd.*, 94 Ohio St.3d 449, 455, 2002-Ohio-1362, 764 N.E.2d 418; citing *State ex rel. Jackman v. Court of Common Pleas of Cuyahoga Cty.*, 9 Ohio St.2d 159, 164, 224 N.E.2d 906, 910 (1967); *Smilack v. Bowers*, 167 Ohio St. 216, 218-219, 147 N.E.2d 499, 501 (1958); *State ex rel. Curtis v. DeCorps*, 134 Ohio St. 295, 16 N.E.2d 459 (1938); *State v. Cleveland*, 83 Ohio St. 61, 67, 93 N.E. 467, 468 (1910).

This Court quoted the U.S. Supreme Court in *Sec. & Exchange Comm. v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-351, 64 S. Ct. 120, 123, 88 L. Ed. 88, 93 (1943), in explaining the correct use of this canon of construction:

“Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.”

*Balt. Ravens*, 94 Ohio St.3d at 455.

This Court has recently addressed the improper use of this canon of statutory construction:

“[T]he canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an ‘associated group or series,’ justifying 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, 154 L.Ed.2d 653, citing *United States v. Vonn* (2002), 535 U.S. 55, 65, 122 S.Ct. 1043, 152 L.Ed.2d 90. The United States Supreme Court explained in *Chevron U.S.A. Inc. v. Echazabal* (2002), 536 U.S. 73, 81, 122 S. Ct. 2045, 153 L. Ed. 2d 82:

“Just as statutory language suggesting exclusiveness is missing, so is that essential extrastatutory ingredient of an expression-exclusion demonstration, the series of terms from which an omission bespeaks a negative implication. The canon depends on identifying *a series of two or more terms or things* that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded.”

*Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 229, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 35-36 (emphasis added). The Court then went on to hold that the canon could not be applied where the statute at issue included a single exception, so as to “preclude all other exceptions.” *Summerville*, 2010-Ohio-6280, ¶ 37. The Court stated that the statute “does not contain a series of exceptions that illustrates the General Assembly’s intent that terms left out must have been intentionally excluded.” *Id.* Because there was no list of items from which the item at issue could be excluded, the canon could not be applied.

The same situation exists in this case. R.C. 505.49(C)(2) sets out one situation where a removed township police chief must be permitted to return to the position he held before becoming chief. It does not list every situation where a removed township police chief has this right. For this reason, the canon *expressio unius est exclusio alterius* does not apply to R.C.

505.49, or to the facts of this case, the decision of the Second District Court of Appeals must be reversed, and Mr. Blair's proposition of law must be adopted.

**II. While Mr. Blair's employment is not governed by Ohio Revised Code Chapter 124, the tenure rights at issue are analogous.**

The Township dismisses much of the caselaw cited by Mr. Blair in his brief by stating that "each of the cases cited by Appellant involves civil service positions." (Appellee's Brief, p.13.) While the right to continued employment conferred on certified township police officers by R.C. 505.49(B) is not precisely the same as the right to continued employment conferred on classified civil servants under Ohio Revised Code Chapter 124, it is analogous. See *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 409 (6th Cir.1992) (holding that under R.C. 505.49, a certified police officer has "a property right in continued employment."); *Seltzer v. Cuyahoga County Dep't of Human Services*, 38 Ohio App.3d 121, 528 N.E.2d 573 (1987), syllabus paragraph 1 ("A classified civil servant has a property right in continued employment.")

It is the property right in continued employment that invokes the employee's due process rights with regard to dismissal. *Guarino*, supra; *Seltzer*, supra. This Supreme Court has held that even tenure rights derived from a contract, rather than a statute, are property rights with constitutional protections. *Chan v. Miami Univ.*, 73 Ohio St.3d 52, 59, 1995-Ohio-226, 652 N.E.2d 644; citing *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 538-541, 105 S. Ct. 1487, 1491-1493, 84 L. Ed. 2d 494, 501-503 (1984). Thus the same constitutional protections apply to tenure rights of state employees, regardless of where those rights are derived from, and the rights are analogous. For this reason, the cases cited by Mr. Blair in his Brief are applicable to this case, and give guidance on how courts should deal with issues like waiver, which the Township raised when it claimed that Mr. Blair gave up his rights under R.C. 505.49(B)(3) when he became chief. (See Appellee's Brief, p.15.)

As Mr. Blair pointed out in his Brief, the caselaw on the subject of waiver of a tenure right by a public employee requires that the employee not only take some positive action to relinquish the right, but also that the employee *intend* to relinquish the right. *State ex rel. Reeder*, 82 Ohio Law Abs. 225, 165 N.E.2d 490 (C.P.1958). See also *Gissiner v. City of Cincinnati*, 1st Dist No. C-040070, 2004-Ohio-6999, ¶ 6 (holding that because the public employee did not sign a written waiver of his tenure rights, he retained those rights.); *Hooper v. Brown*, 4th Dist. No. CA 931, 1979 Ohio App. LEXIS 12443, \*3 (Mar. 20, 1979). The evidence in this case shows that Mr. Blair had no intention of giving up his right to continued employment as a Sugarcreek Township Police Officer when he accepted the position as chief. (2nd Tr., 32:14-33:1, 35:2-14, 126:16-24.) Because Mr. Blair did not intend to waive his right to continued employment, there was no waiver, and he is entitled to return to his position as a Sugarcreek Township Police Officer. For this reason, the decision of the Second District Court of Appeals must be reversed, and Mr. Blair's proposition of law must be adopted.

**III. The public policy contained in the relevant statutes militates in favor of township chiefs of police retaining their tenure rights as township police officers.**

The Township claims that the way R.C. 505.49 is arranged indicates that the public policy contained in the statute "favors the Second District Court of Appeals' reading of R.C. § 505.49." However, as Mr. Blair discussed in his Brief, the way in which the statute is arranged is a product of the way it has been amended, and has little meaning besides representing the legislative history of the statute.

As Mr. Blair has already discussed in his Brief, R.C. 505.49(B), formerly simply 505.49, originally applied to all townships, and allowed townships to create and maintain police departments. See Am. H.B. No. 513, 135 Ohio Laws 693-715 (Appx.52). The statute was amended in 1974, dividing the statute into subsection (A), which consisted of the previously

existing statute, and subsection (B), which exempted townships of a certain size, which also had civil service commissions, from the operation of the original portion of the statute, and instead subjected them to the restrictions contained in Chapter 124 of the Revised Code. *Id.* The stated purpose for this amendment was “to allow certain townships to establish civil service commissions for the employment, promotion, and discharge of township policemen and firemen.” *Id.* The amendment was not intended to limit the employment rights of police officers in other townships in any way.

In order to subject these civil service townships to the operation of Chapter 124, it was necessary to remove them from the operation of what had become R.C. 505.49(A) (now R.C. 505.49(B)). A side effect of this change was that police and fire chiefs in civil service townships lost the right to return to their positions as township police officers and fire fighters upon their removal as chief, a right that they held under the former R.C. 505.49. Realizing this, the legislature acted to rectify this error in 1977, passing Am. H.B. No. 671, 137 Ohio Laws 3209-3215 (Appx.75), which had the express purpose of restoring that right to police and fire chiefs.<sup>1</sup>

The statute has been amended several times since then in ways that do not affect this case or Mr. Blair’s rights. However, the way in which the statute is arranged is not indicative of anything other than the method by which it was amended. The purpose of these amendments, on the other hand, as stated in the titles to the 1974 and 1977 amendments, indicates that the 1974 amendment was made to allow for civil service commissions in larger townships, and the 1977 amendment was made to correct a problem caused by the 1974 amendment.

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<sup>1</sup> In his Brief, Mr. Blair mistakenly stated that Am. H.B. No. 671 was passed in 1978. (Appellant’s Brief, p.8-9.) Am. H.B. 671 was passed by the Legislature and approved by the Governor in 1977, but took effect January 13, 1978. Am. H.B. No. 671, 137 Ohio Laws 3209-3215 (Appx.81.)

The public policy advanced by the Township is inherently illogical. As Mr. Blair pointed out in his Brief, there is simply no reason to give police chiefs in civil service townships protections that police chiefs in other townships do not have. Forcing township police officers to give up their right to continued employment by becoming township police chief, as the Township advocates, creates a destructive disincentive for township police officers to apply for or accept the position of township police chief. On the other hand, allowing township chiefs of police in general to retain these employment protections provides an incentive for township police officers to serve as township police chiefs, bringing not only their professional expertise, but their knowledge of the township itself, to the position of chief.

Allowing township police officers who become chief to retain their right to continued employment as a police officer encourages those officers to bring their local knowledge and experience to the position of chief, and fits well with the public policy exemplified in R.C. 505.49 and in similar statutes from other states. See e.g. 62 Corpus Juris Secundum, Municipal Corporations, Section 602 (2011); *McGuckin v. West Homestead*, 360 Pa. 311, 314, 62 A.2d 23, 24 (1948); *State v. Reichert*, 226 Ind. 358, 363, 80 N.E.2d 289, 291 (1948); *State ex rel. Warzyniak v. Grenchik*, 177 Ind. App. 393, 402, 379 N.E.2d 997, 1003 (1978); *Howard v. Kokomo*, 429 N.E.2d 659 (Ind. App. 1982); *Szewczyk v. Bd. of Fire and Police Commissioners of the Vill. of Richmond*, 381 Ill.App.3d 159, 885 N.E.2d 1106 (2008); *People ex rel. Bubash v. Bd. of Fire and Police Commissioners of the Vill. of Thornton*, 14 Ill.App.3d 1042, 303 N.E.2d 776 (1973); *Bd. of County Commissioners of Howard County v. Moxley*, 222 Md. 113, 158 A.2d 895 (1960); *Muncy v. City of Dallas*, 335 F.3d 394, 399 (5th Cir.2003).

The Township argues that these cases from other states involve situations where “there is a specific statute or statutory scheme providing for the Chief to be returned to his prior rank.”

(Appellee's Brief, p.15.) However, that is exactly the case in the circumstances at bar. There is a specific statute, R.C. 505.49(B)(3), which grants Mr. Blair the right to resume his duties as a township police officer upon his removal as township police chief.

The Township claims that the construction of the statute adopted in *Staley v. St. Clair Township Board of Trustees, supra*, "begs the question ... 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." (Appellee's Brief, p.10.) In reality, there is no question how the statute would treat such an individual. R.C. 505.49(B)(3) provides a right of retention to individuals serving as certified township police officers. If an individual has never served as a township police officer, that person does not have the right to continued employment under R.C. 505.49(B)(3).

This is the interpretation of R.C. 505.49 espoused in *Staley*, which was the only Ohio caselaw on this issue for twenty-three years. This is the interpretation of R.C. 505.49 relied upon by Mr. Blair and decades of other township police officers who became township police chiefs. (2nd Tr., 32:14-33:1, 35:2-14, 126:16-24.) The Second District Court of Appeals has determined to change this longstanding rule based on nothing but its own nonsensical reading of the statute. For this reason, the decision of the Second District Court of Appeals must be reversed, and Mr. Blair's proposition of law must be adopted.

**IV. Mr. Blair's status as a certified township police officer is properly before this Supreme Court.**

The Township spends much of the first portion of its Brief arguing that Mr. Blair's status as a certified township police officer is not a proper issue for appeal. (See, e.g., Appellee's Brief, p.1-2.) This issue was definitively addressed in the Second District Court of Appeals'

Decision and Entry certifying the conflict to this Supreme Court. (Decision and Entry, Appx.39.) The Court of Appeals addressed the issue as follows:

The appellee in its memorandum in opposition to the motion to certify, suggests that our previous decision did not specifically rule regarding appellant's status as a former certified police officer, but that this was simply "discussed" in our opinion. Specifically, the appellee states "this court determined that 'Blair did not administratively appeal anything regarding his status as a former certified police officer with Sugarcreek Township' *Blair II* at ¶18." This excerpt is misleading. What we said, in the clause immediately preceding that portion of the sentence quoted by the appellee, is that "[t]hus, if we stopped here, ..." The fact is we did not stop there, but went on to hold that appellant was a former certified police officer 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. *Id.* ¶24.

(Decision and Entry, Appx.39.)

The Court of Appeals went on to conclude that there was a conflict between its holding and the Seventh District Court of Appeals' holding in *Staley*. This Supreme Court agreed that a conflict did exist, and directed the parties to brief the issue. The Township did not attempt to appeal the Court of Appeals' holding that the issue of Mr. Blair's status as a certified township police officer was properly before the Court of Appeals. Thus the question of whether Mr. Blair's status as a certified township police officer is properly before the Court has already been resolved, is not an issue in this appeal, and has no bearing on the certified conflict which is before the Court.

**V. The *Staley* decision is consistent with this Court's decision in *Smith v. Fryfogle*; the Second District Court of Appeals' decision below is not.**

The Township also raises an argument based on this Court's decision in in *Smith v. Fryfogle*, 70 Ohio St.2d 58, 434 N.E.2d 1346 (1982). (Appellee's Brief, p.14-15.) As Mr. Blair has explained many times, most recently in his Brief to this Court, in *Smith v. Fryfogle*, although the appellant was removed from his position as Chief of Police for Knox Township, he still

retained his position as a patrolman. *Smith*, 70 Ohio St.2d at 61. The Knox Township Board of Trustees did not attempt to terminate Chief Smith's employment with the township, "[t]hey simply voted to remove appellant as chief and retain him as a patrolman." *Id.* Thus, the issue of Chief Smith's right of retention as a certified township police officer was never before this Court, because the Knox Township Board of Trustees never attempted to violate that right, as the Sugarcreek Township Board of Trustees has done to Mr. Blair. Thus, this Court's decision in *Fryfogle* has more in common with the Seventh District Court of Appeals' decision in *Staley* than it does with the Second District Court of Appeals' decision in this case. See *Staley*, *supra*.

For this reason, the Township's argument is baseless, the decision of the Second District Court of Appeals must be reversed, and Mr. Blair's proposition of law must be adopted.

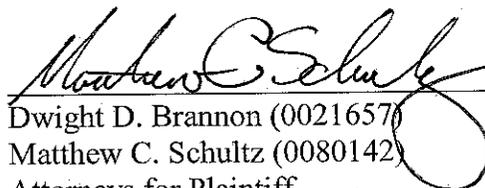
## **VI. Conclusion.**

Pursuant to R.C. 505.49(B)(3), Kelly Blair, as a certified township police officer, possesses the right to continued employment absent allegations of wrongdoing. The Seventh District Court of Appeals, in *Staley v. St. Clair Township Board of Trustees*, 7th Dist. No. 87-C-44, 1987 Ohio App. LEXIS 10087 (Dec. 15, 1987), held that this right of continued employment means that when a township police chief, who was a certified township police officer prior to being appointed chief, is removed as chief with no allegation of wrongdoing, that individual has the right to resume his duties as a township police officer in the position he last held before becoming chief. The Second District Court of Appeals disagreed with this interpretation of the statute, holding that Mr. Blair, who was a certified Sugarcreek Township police officer before becoming Chief of the Sugarcreek Township Police Department, did not have the right to resume the position he held before becoming chief. As explained above, the Second District Court of Appeals' decision conflicts not only with the Seventh District's decision in *Staley*, but with the

body of law in Ohio and other states interpreting statutes such as R.C. 505.49. For all the reasons discussed above and in Mr. Blair's main Brief, Mr. Blair urges this Supreme Court to reverse the decision of the Second District Court of Appeals, and adopt the following 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, has the automatic right to return to the position he held prior to his appointment as chief.

Respectfully submitted,



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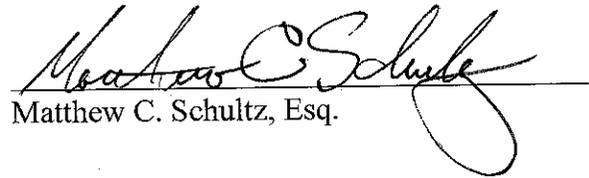
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the forgoing was served on the following by regular U.S. Mail, this 14th day of October, 2011.

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