

ORIGINAL

No. 2013-0280

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# In the Supreme Court of Ohio

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STATE, ex rel. PAUL CALVARUSO, et al.,

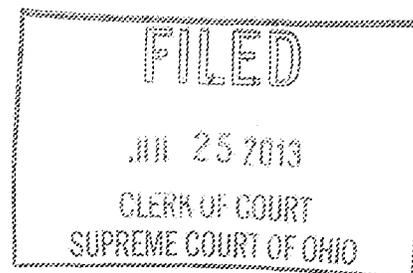
*Relators,*

v.

CHARLES BROWN,

*Respondent.*

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ORIGINAL ACTION FOR A WRIT OF QUO WARRANTO

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## BRIEF OF RESPONDENT CHARLES BROWN AND INTERVENOR CITY OF AKRON

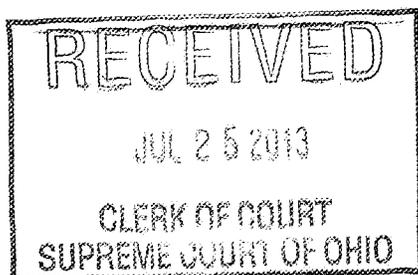
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Susannah Muskovitz (0011457)  
(COUNSEL OF RECORD)  
William E. Froehlich (0087857)  
MUSKOVITZ & LEMMERBROCK, LLC  
The BF Keith Building  
1621 Euclid Avenue, Suite 1750  
Cleveland, OH 44115  
Tel: (216) 621-2020  
Fax: (216) 621-3200  
E-mail: [muskovitz@mllabor.com](mailto:muskovitz@mllabor.com)  
[froehlich@mllabor.com](mailto:froehlich@mllabor.com)

*Attorneys for Relators*

Cheri B. Cunningham (0009433)  
Director of Law  
Patricia Ambrose-Rubright (0009435)  
(COUNSEL OF RECORD)  
Tammy L. Kalail (0072295)  
Assistant Directors of Law  
City of Akron  
161 S. High Street, Suite 202  
Akron, Ohio 44308  
Tel: (330) 375-2030  
Fax: (330) 375-2041  
E-mail: [ccunningham@akronohio.gov](mailto:ccunningham@akronohio.gov)  
[ambropa@ci.akron.oh.us](mailto:ambropa@ci.akron.oh.us)  
[tkalail@akronohio.gov](mailto:tkalail@akronohio.gov)

*Attorneys for Respondent and Intervenor*



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## I. INTRODUCTION

Relators'<sup>1</sup> Brief and the record evidence establish that Respondent Charles Brown ("Brown") lawfully possesses the sole position he actually holds. The parties stipulated that Intervenor City of Akron's ("City") Mayor appointed Brown "Assistant to the Mayor" pursuant to Section 105 of the Akron City Charter. (Jt. Statement of Facts, ¶ 9.) The Akron City Charter gives the Mayor unfettered discretion to make appointments to that unclassified position, and Relators do not argue that Brown's appointment as Assistant to the Mayor was in any way improper under Akron Charter Section 105. That fact should be the beginning and the end of this case.

The evidence shows that Relators' Complaint is not an attempt to challenge Brown's actual position as Assistant to the Mayor, but rather an improper attempt by the local union (Fraternal Order of Police, Akron Lodge No. 7 ["FOP"]) to challenge certain job duties Brown performs. *See, e.g.*, Affidavit of Susannah Muskovitz, counsel for the FOP and the Relators, ¶ 6 and Relators' Ex. P-1, at 2 (letter from Relators' counsel stating that "the *FOP* filed a Writ of Quo Warranto against the City (emphasis added)); and Relators' Br. at 3 (characterizing this action as "an effort to defend the rank structure of the Division of Police and the integrity of the Department"). This Court's precedents, however, squarely foreclose any attempt by a union to seek quo warranto relief. *E.g.*, *State ex rel. E. Cleveland Fire Fighters' Assn., Local 500, Internatl. Assn. of Fire Fighters v. Jenkins*, 96 Ohio St.3d 68, 2002-Ohio-3527, ¶ 10 ("Because the association did not claim title to the office of fire chief and, in fact, could not hold that

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<sup>1</sup> Relators Paul Calvaruso, Elizabeth A. Daugherty, Michael G. Prebonick, Martha L. Sullivan, Sylvia D. Trundle and Daniel D. Zampelli will be referred to collectively as Relators.

office, the association lacked standing to bring the quo warranto action.”). The sort of declaratory relief Relators seek, including an order that Brown “not assume the duties of a sworn police officer in the Chain of Command, falls outside the limited scope and purpose of a quo warranto action.

In an attempt to circumvent the limitations on quo warranto actions, the FOP filed this action through six of the nine Police Captains challenging Brown’s ability to hold a designation (Acting Chief of Police) and position (“de facto” Deputy Chief) he currently does not possess, without ever claiming (as they are required to do in a quo warranto petition) that they themselves were entitled to either post. This is not a mere technical pleading deficiency. According to this Court’s precedents, the reason a private person must claim title to a public office in order to bring a quo warranto action is to assure that the interests of that individual are aligned with those of the State.

The form and substance of Relators’ quo warranto claim amply demonstrates that such an alignment of interests is wholly absent here. Relators challenge Brown’s ability to hold “public offices” that either do not exist (Acting Chief of Police) or he has never held (Deputy Chief) in an effort to coax a ruling out of this Court as to whether certain of Brown’s job duties violate what they characterize as the proper Chain of Command—a subject that has nothing to do with title to any particular position. Such a ruling would be far afield from the established and narrow role of a quo warranto action, which exists solely to settle disputes relating to claims of title to a public office. This Court should reject the invitation to stray from the settled and narrow focus of a quo warranto action and deny the writ.

## II. COUNTERSTATEMENT OF THE CASE

On February 13, 2013, Relators filed a one-count Complaint asserting a claim for quo warranto relief against Brown. The Complaint does not identify Acting Chief of Police as an existing position within the City, and does not claim that Relators are entitled to serve in any such position. (See Compl., ¶ 44.) The Complaint also does not allege that Brown has ever claimed to be Deputy Chief, that he is by reputation a Deputy Chief, or that Relators are entitled to be Deputy Chief. (Compl., ¶ 45.) Relators nevertheless seek to “oust” Brown from the “position of Acting Chief of Police” and “*de facto* Deputy Chief of Police,” and request a variety of improper declarations relating to assumption of duties and the Police Division Chain of Command. (Compl., pp. 8-9.)

On March 12, 2013, Brown filed an answer and motion for judgment on the pleadings; the City filed an answer and motion for leave to intervene. On June 5, 2013 this Court issued an Entry that: 1) denied Brown’s motion for judgment on the pleadings; 2) granted the City’s motion for leave to intervene; and 3) granted an alternative writ and set a schedule for presentation of evidence and the filing of merit briefs. The parties filed evidence pursuant to this Court’s order. On July 1, 2013, the parties filed: 1) a joint motion to clarify the record that addressed certain clerical errors in the parties’ evidentiary submissions; and 2) a joint motion for leave to redact and replace that addressed a failure to remove personal identifying information from one of Relators’ exhibits. On July 15, 2013, this Court issued an Entry: 1) granting the joint motion for leave to clarify the record; and 2) granting the joint motion for leave to redact and replace insofar as it requested redaction of the exhibit.

### **III. COUNTERSTATEMENT OF THE FACTS**

Much of the “Statement of the Facts” in Relators’ Brief addresses irrelevant topics totally unrelated to the issues presented here concerning whether Brown holds title to the alleged “public offices” they claim Brown holds, or whether any of the Relators claim title to those alleged positions. (*See generally* Relators’ Br. at 4-23.) While the City and Brown dispute the accuracy of these irrelevant facts, a detailed response would confuse rather than clarify the narrow issues before the Court. This case is not about Brown’s Reserve Officer status, identification badge number, gun range training, or a public event at which he represented the City. Rather, this quo warranto action involves only the following issues: 1) whether “Acting Police Chief” is a public office; 2) whether Brown is a Deputy Chief of Police; and 3) whether any Relator claims title to and is entitled to hold either of those claimed “public offices.” The City and Brown therefore confine the Counterstatement below to those facts germane to the issues before the Court.

#### **A. The Akron City Charter.**

##### **1. The Charter makes clear that the Division of Police is under the supervision and control of the Mayor.**

The Charter vests the Mayor with broad powers to hire employees and supervise the Division of Police. Akron City Charter Section 54 grants the Mayor power to “appoint and remove *all employees* in both the classified and unclassified service, except elected officials,” and “exercise control over *all departments and divisions* created by the Charter[.]” Jt. Ex. A, Akron City Charter 54(4)-(5) (emphasis added). One such department is the Department of Public Safety, which includes the Division of Police. *Id.*, Akron City Charter 59, 67.

Just as a civilian is in charge of the United States Armed Forces (the President of the United States), a civilian is in charge of Akron's Police Division (the Mayor): the Division of Police is "under the immediate supervision of the Mayor, who shall make all rules necessary for the regulation and discipline of the same."<sup>2</sup> Jt. Ex. A, Akron City Charter 60. The Mayor appoints the Chief of Police. *Id.*, Akron City Charter 68. While the Chief of Police has broad "control over the Police Station and any substation which may be hereafter established," he exercises that control "under such rules and regulations as the Mayor may prescribe." *Id.* Some of the rules and regulations are contained in the Akron Police Manual of Rules and Regulations. (Jt. Ex. C.) In all circumstances, the Mayor retains ultimate authority: the Charter vests the Mayor with "the right to suspend, reduce in rank or dismiss any officer or employee in the Division of Police \* \* \*." *Id.*, Akron City Charter 72.

2. **The Charter grants the Mayor plenary authority to hire Assistants.**

In addition to his authority over the Division of Police, the Mayor also possesses broad authority to hire Assistants to the Mayor. Jt. Ex. A, Akron City Charter 105(1)(g). Assistants to the Mayor are unclassified employees not subject to the civil service rules. *Id.* Importantly, no section of the Charter limits the persons who may be hired as an Assistant or restricts in any way the duties the Mayor may assign to such an Assistant. *Id.*, Akron City Charter 105.

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<sup>2</sup> Because the Division of Police is at all times under the immediate supervision of the Mayor, the Division does not "lack[] an 'executive head'" (Relators' Br. at 10) when Chief Nice is absent — regardless of whom (if anyone) is appointed Acting Chief of Police.

The absence of any such restrictions is reflected by the wide range of duties Assistants to the Mayor perform, some of which involve managerial responsibilities. For instance, an Assistant to the Mayor has managed the City's Safety Communications Center, which "consists of sworn Fire and Police personnel, including supervisors, as well as civilian employees" and "provides dispatch service to both the Police and Fire Departments." (Affidavit of Diane L. Miller-Dawson ["Miller-Dawson Aff."], ¶ 4(g).) Indeed, Relators' claim that the Safety Communications Center "now falls into the Chain of Command under the Communications Sub-Division" (Relators' Br. at 5, fn. 2) merely illustrates that there is nothing unprecedented about an unclassified employee supervising classified employees who fall under Relators' definition of the Chain of Command. Historically, Assistants to the Mayor have also served, or currently serve, as the City's Director of Communications, Chief Information Officer, Chief Technology Officer and Assistant for Community Relations. (Miller-Dawson Aff., ¶ 4(b)-(f).)

Relators' narrow reliance on the APD Manual of Rules and Regulations and a City ordinance does not diminish the Mayor's Charter authority. Relators rely upon the Rules and Regulations to cloud the issues before the Court and to deflect away from the fact that Akron's Charter permits the Mayor to appoint unclassified assistants to whom he can assign duties. Relators also attempt to rely upon the City's Job Omnibus Ordinance, No. 409-2012, to support their allegations, but the Job Omnibus Ordinance lists only the classified positions of the City of Akron. Because Assistant to the Mayor is an unclassified position, Assistants to the Mayor are not (and need not be) listed in the Omnibus Job Ordinance, No. 409-2012, which "creat[es], establish[es], and recognize[es] departments, offices, bureaus, divisions and positions *in the classified service of the City of Akron.*" (Jt. Ex. B, at 1.)

**B. Brown Was Appointed as Assistant to the Mayor and Assigned to Chief Nice.**

On January 12, 2013, Brown resigned from his classified position as an Akron City Police Lieutenant. (Affidavit of Charles Brown [“Brown Aff.”], ¶ 1; Jt. Ex. J.) The Mayor then appointed him to the unclassified position of Assistant to the Mayor, assigning Brown to assist Chief of Police James Nice. (*Id.*, ¶ 2; Affidavit of James Nice [“Nice Aff.”], ¶ 2.; *see also* Affidavit of Paul Calvaruso [“Calvaruso Aff.”], ¶ 8 (acknowledging Brown’s appointment as Assistant to the Mayor under Charter Section 105); Affidavit of Elizabeth A. Daugherty [“Daugherty Aff.”], ¶ 8 (same); Affidavit of Michael G. Prebonick [“Prebonick Aff.”], ¶ 8 (same); Affidavit of Martha L. Sullivan [“Sullivan Aff.”], ¶ 8 (same); Affidavit of Sylvia D. Trundle [“Trundle Aff.”], ¶ 8 (same); Affidavit of Daniel D. Zampelli [“Zampelli Aff.”], ¶ 8 (same).)

In that role, Brown has been referred to as “Assistant Chief” or “Assistant Chief of Police,” but never “Deputy Chief of Police.” (Brown Aff., ¶ 2; Nice Aff., ¶ 2; Miller-Dawson Aff., ¶ 4(a).) The City does not consider Brown to be a “Deputy Chief,” Brown does not consider himself to be a “Deputy Chief,” and no one recognizes Brown as “Deputy Chief” or claims to have dealt with him as “Deputy Chief.” (*Id.*; *see also* Calvaruso Aff., ¶ 9 (the “City began to identify Mr. Brown with the working title ‘Assistant Chief of Police’”); Daugherty Aff., ¶ 9 (same); Prebonick Aff., ¶ 9 (same); Sullivan Aff., ¶ 9 (same); Trundle Aff., ¶ 9 (same); Zampelli Aff., ¶ 9 (same).) While the Akron Police Division did briefly include Brown on an “S-List” containing the names of classified employees within the Police Division (Nice Aff., ¶ 11), even that list referred to Brown as “Assistant Chief” — not “Deputy Chief” — and accurately listed the number of Deputy Chiefs within the Division as “0.” (Jt. Ex. F.)

Moreover, while there is a superficial similarity between some of the duties for Brown's position as outlined in a summary forwarded to the Ohio Police & Fire Pension Fund ("OP&F") by the City and certain of the duties specified in the Civil Service job description for Deputy Chief (*see* Brown Aff., Ex. 2; Jt. Ex. D), the record is clear that Brown does not perform numerous duties required of a Deputy Chief. Significantly, while Relators claim Brown "serves within the Chain of Command with the authority of a Deputy Chief" (Relators' Br. at 2), the evidence shows that Brown "is *not* assigned to manage or supervise employees" and does *not* supervise Police Captains — the classified service rank immediately below Deputy Chief. (Nice Aff., ¶¶ 4-5 (emphasis added); *cf.* Calvaruso Aff., ¶ 5 (listing Police Deputy Chief as a classified rank between Police Chief and Police Captain).) Brown also does not "plan and direct all activities of one or more subdivisions of the Akron Police Division," participate in the development of the Division's budget, prepare analytical reports on behalf of the Division or administer the Division's Rules, Regulations and Procedures. (*Id.*, ¶ 5.)

The duties Brown performs involve communicating with the media and making public television appearances; administering the Ohio Attorney General's Safe Neighborhood Initiative; and community outreach efforts (such as meeting with faith-based organizations and the Akron Urban League). (Nice Aff., ¶ 3; Brown Aff., ¶ 3.) Brown has also attended morning meetings with Chief Nice, Police Captains and other supervisors (Daugherty Aff., ¶ 18); approved training requests (Zampelli Aff., ¶¶ 26-27); overseen background investigations for hiring (*id.* at ¶ 25); approved overtime requests related to physical ability testing conducted for police hiring (Daugherty Aff., ¶ 21; Relators' Ex. T); participated in the Firearms Review Board (Prebonick Aff., ¶ 22; Ex. R); and served as Acting Chief of Police (Nice Aff., ¶ 10).

Relators cite no authority that requires any of these duties to be performed by a Deputy Chief. For instance, while Relators assert that only Captains have been assigned to the Firearms Review Board in the absence of a Deputy Chief (Relators' Br. at 12), they point to no rule that *requires* Captains or Deputy Chiefs to serve on that Board. (*Id.*) Moreover, the Board Findings and Recommendations signed by Brown accurately reflect his position as Assistant to the Mayor/Assistant Chief; he does not sign as "Deputy Chief," or even as commander of a sub-division. (*See* Relators' Ex. R.) Additionally, while Relators complain about Brown's approval of overtime requests as part of his oversight of police hiring, they acknowledge that Police Lieutenants have approved overtime in the past. (Relators' Br. at 12.) Relators do not (and cannot) explain how performing a duty that has been delegated to Police Lieutenants is somehow indicative of service as a Deputy Chief.

In short, Relators have no evidence and cite no authority showing that Brown has at any time performed — or currently is performing — any duties exclusively performed by a Deputy Chief.

**C. Chief Nice Designates Brown Acting Chief of Police for One Week in February 2013.**

From time to time, Chief Nice temporarily assigns the duties of his position to various individuals when he is briefly absent. (Nice Aff., ¶ 7.) Throughout his tenure, Chief Nice has designated Relators Daugherty, Calvaruso, Prebonick, Trundle and Zampelli — as well as Captains Caprez, Shearer and Ball (who have not joined this action) — as "Acting Chief of Police" during these absences. (*Id.*) On February 5, 2013, Chief Nice issued Chief's Directive 2013-CD-11. (Nice Aff., ¶ 10 and Ex. 14.) This directive specified that, during his brief absence "from 5:00 p.m. Monday, February 11,

2013 through 5:00 p.m. Friday, February 15, 2013, Assistant Chief Charles Brown will be Acting Chief of Police.” (*Id.*) Brown has not been designated Acting Chief at any time since that directive. (Nice Aff., ¶ 10.)

It is not disputed that Chief Nice holds and has held the position of Chief of Police at all times relevant to this action. When Chief Nice is briefly absent, such as on vacation, ill, at a seminar, etc., he does not abdicate the Chief of Police position. Nice remains the Chief of Police. There is no vacancy to fill.

#### IV. LAW AND ARGUMENT

##### Proposition of Law No. 1

**A person who claims only to possess the necessary qualifications for a public office does not have standing to bring a quo warranto action under R.C. Chapter 2733.**

The first fatal flaw in Relators’ quo warranto claim is that *none* of them personally claim title to *either* position they claim Brown holds. The absence of any such claim of title means Relators lack standing to bring a quo warranto action.

##### **A. Only Persons Who Claim to be Entitled to Hold a Public Office May Bring a Quo Warranto Action.**

An individual could not invoke the writ of quo warranto at common law. This “high prerogative writ of an extraordinary nature,” *State ex rel. Cain v. Kay*, 38 Ohio St.2d 15, 16 (1974), “could only be employed by the crown at the instance of its own officers, usually the Attorney General.” *State ex rel. Lindley v. The Maccabees*, 109 Ohio St. 454, 456 (1924). The writ’s function “was to safeguard the public interests by protecting the right of the crown against the unlawful usurpation of governmental prerogatives.” *State ex rel. Cain*, 38 Ohio St.2d at 16. Even today, the writ of quo

warranto remains “essentially a means to be employed principally by the crown to question unlawful intrusion into governmental interests.” *Id.*

The statutory basis for a private citizen to bring a quo warranto action under Ohio law resides in R.C. 2733.06, which makes clear that only “[a] *person claiming to be entitled to a public office* unlawfully held and exercised by another may bring an action therefor \* \* \*.” (Emphasis added.) R.C. 2733.08 reiterates this threshold requirement, specifying that a petition for a writ of quo warranto “*shall set forth the name of the person claiming to be entitled to the office, with an averment of this right thereto.*” (Emphasis added.) The limitation is critical. It reflects the General Assembly’s conclusion that the interests of private citizens are “commensurate” with the State’s interests in the challenged position if, and only if, the private citizen is claiming to be entitled to that position. *State ex rel. Cain*, 38 Ohio St.3d at 16.

Thus, this Court has repeatedly held that a private citizen has standing to bring a quo warranto action “only when he *personally* is claiming title to a public office.” *State ex rel. Annable v. Stokes*, 24 Ohio St.2d 32, 32 (1970); *see also State ex rel. E. Cleveland Fire Fighters’ Assn., Local 500, Internatl. Assn. of Fire Fighters v. Jenkins*, 96 Ohio St.3d 68, 2002-Ohio-3527, ¶ 10 (“[a]s we have consistently held, for persons other than the attorney general or a prosecuting attorney, ‘an action in quo warranto may be brought by an individual as a private citizen only when he personally is claiming title to a public office.’”).

**B. Relators Do Not Claim They Are Entitled to Either Position They Claim Brown Holds.**

Relators’ Brief and the record evidence confirm that Relators cannot meet this threshold requirement, and they therefore lack standing to seek quo warranto relief.

While Relators argue that their “pleadings make a good faith and reasonable claim of entitlement to office” (Relators’ Br. at 25), no allegations in their Complaint actually make such a claim — with respect to either the designation of Acting Chief of Police or Brown’s purported role as “de facto” Deputy Chief. The Complaint alleges only that Relators “are entitled to be *considered* for the position of Acting Chief,” and “are *able to fulfill* the duties of the Police Deputy Chief \* \* \* for the City of Akron.” (Compl., ¶¶ 44, 45.) (Emphasis added.)

Relators’ sworn affidavits do not even go that far. Relators say only that they “believe [they] possess the necessary qualifications for the positions of Acting Police Chief and Deputy Chief[.]” (See Paul Calvaruso Aff., ¶ 4; Elizabeth A. Daugherty Aff., ¶ 4; Michael G. Prebonick Aff., ¶ 4; Martha L. Sullivan Aff., ¶ 4; Sylvia D. Trundle Aff., ¶ 4; Daniel D. Zampelli Aff., ¶ 4.) Of course, Deputy Chief is a classified civil service position filled by appointment following a competitive testing process. (See Jt. Ex. A, Akron City Charter 106(1).) Relators therefore would not be entitled to be Deputy Chief, even if they met the minimum qualifications for Deputy Chief and claimed they were entitled to hold that position. But they do not make such a claim. As a result, even if Acting Chief of Police was a public office (it is not), and even if Brown were a Deputy Chief (he is not), Relators lack standing to pursue a quo warranto claim relating to either position because they do not allege they are entitled to hold it. *State ex rel. Coyne v. Todia*, 45 Ohio St.3d 232, 238 (1989) (“Since they do not claim title to the offices, respondents lack standing to bring an action in quo warranto.”).

Relators’ citations to *State ex rel. Delph v. Barr*, 44 Ohio St.3d 77 (1989), and *State ex rel. Newell v. Jackson*, 118 Ohio St.3d 138, 2008-Ohio-1965, merely highlight the inadequacy of their allegations. (Relators’ Br. at 25.) *Newell* underscores the critical

distinction between *alleging* entitlement to a public office (necessary to assert a quo warranto claim) and *demonstrating* entitlement to that office (unnecessary for the remedy of ouster). *Newell* involved a quo warranto action by a private citizen who claimed she was entitled to hold the challenged position. 2008-Ohio-1965, at ¶¶ 6-7. Before reaching the merits, this Court explained that “[a] person \* \* \* can bring a quo warranto action, as a private citizen, *only when the person is personally claiming title to a public office.*” *Id.* at ¶ 6 (Emphasis supplied). This Court passed upon the merits only *after* concluding that the relator made such claim. *Id.* at ¶ 7 (“*Although Newell does claim that she should be appointed fire chief, she did not establish her entitlement to be fire chief.*”) (Emphasis added). Accordingly, *Newell* makes clear that while this Court’s ability to issue a judgment on a disputed office does not depend on the relator *establishing* she is entitled to the post, it does depend on the relator adequately *alleging* she is entitled to that post.

*Delph* likewise addressed a claimant who alleged he was entitled to the disputed office. *Delph* arose out of a challenge to the validity of a provisional appointment to police chief. Unlike the Relators in this case, the relator in *Delph* had been certified for appointment to the challenged position and claimed “*he was entitled to be police chief and that [the incumbent] was holding the office unlawfully.*” 44 Ohio St.3d at 78-79 (Emphasis added). These Relators have not been certified for appointment to the challenged position, and do not claim they are entitled to hold it.

Finally, the fact that several Relators, and other Captains who are not Relators,<sup>3</sup> have temporarily served as Acting Chief during brief absences by Chief Nice in the past cannot save Relators' quo warranto claim. (Relators' Br. at 29.) Even if Acting Chief were a public office (and it is not), the threshold requirement for asserting a claim for quo warranto relief is that they *are entitled to serve* in that capacity — now and in the future. Such an allegation is crucial to establishing that Relators' interests are sufficiently aligned with those of the State, and it is wholly absent here. *See State ex rel. Cain*, 38 Ohio St.3d at 16. Because Relators do not and cannot make that critical allegation, they lack standing to seek a writ of quo warranto.

**Proposition of Law No. 2**

**A prior, temporary assignment of the duties of a “public office” during a brief absence may not be challenged in a quo warranto proceeding under R.C. Chapter 2733.**

Relators' quo warranto claim concerning the designation Acting Chief of Police also fails because that title merely reflects a temporary assignment of the duties of Chief of Police, which Chief Nice continues to hold. (Nice Aff., ¶ 7.) It is not a separate public office subject to a quo warranto action, and Brown cannot be “ousted” from such a temporary designation because he no longer holds it.

**A. Acting Chief of Police is Not a “Public Office.”**

The quo warranto claim created by R.C. 2733.06 applies only to “a *public office* unlawfully held and exercised by another \* \* \*.” This Court's precedents contemplate that a “public office” is a permanent position, not a temporary assignment of the duties

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<sup>3</sup> The Chief of Police has assigned Captains Daugherty, Calvaruso, Prebonick, Trundle, Zampelli, Caprez, Shearer and Ball to temporarily serve as Acting Chief of Police. Captain Sullivan has not been assigned to be Acting Chief. (*See* Nice Aff. ¶ 7.)

of a public office presently held by another person. This Court explained in *State ex rel. Milburn v. Pethtel* that “[t]he usual criteria in determining whether a position is a public office are *durability of tenure, oath, bond, emoluments*, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him.” 153 Ohio St. 1, 5 (1950) (emphasis supplied), quoting *State ex rel. Landis v. Bd. of Commrs. of Butler Cty.*, 95 Ohio St. 157, 159 (1917). These criteria necessarily contemplate something more than a short-lived assignment of the duties of a position that belongs to someone else; such criteria are clearly absent here.

For one thing, the tenure of an “Acting Police Chief” is not at all durable. Relators’ own chart at page 9 of their Brief shows that such a designation is fleeting: it can be as short as one day and has lasted no longer than one week. (See Relators’ Br. at 9; see also Nice Aff., Exs. 1-14.) In keeping with this short duration, no oath or bond is required for the designation and the duties temporarily performed by an Acting Chief of Police are not conferred by statute: Chief Nice merely issues a directive naming someone to serve in his stead during his brief absence. (Nice Aff., Exs. 1-14.) Indeed, Relators’ argument that their claims are not moot because Brown served as Acting Chief of Police for such a short period of time (Relators’ Br. at 29-30) serves only to confirm that Acting Chief of Police is not the kind of permanent post that this Court’s precedents recognize as a “public office.”

Other evidence confirms “Acting Police Chief” is not a separate public office. The City’s Director of Finance determines which positions are budgeted and funded by the City, and she states unequivocally in her Affidavit that “Acting Police Chief” is not an “existing position[.]” (Miller-Dawson Aff., ¶ 3.) Relators’ Complaint does not identify Acting Chief of Police as a separate job classification (Compl., ¶ 13), and their sworn

affidavits do not list Acting Chief of Police as a separate position. (See Paul Calvaruso Aff., ¶ 5 (listing positions as including “Police Chief, Police Deputy Chief, Police Captain, Police Lieutenant, Police Sergeant, Police Office”); see also Elizabeth A. Daugherty Aff., ¶ 5 (same); Michael G. Prebonick Aff., ¶ 5 (same); Martha L. Sullivan Aff., ¶ 5 (same); Sylvia D. Trundle Aff., ¶ 5 (same); Daniel D. Zampelli Aff., ¶ 5 (same).)

In short, the designation Acting Chief of Police is merely a temporary assignment of the duties of Chief Nice, who continues to hold the public office of Police Chief. (Nice Aff., 7.) Relators cite no authority suggesting that such a temporary assignment of the duties of a public office during an abbreviated absence somehow creates a separate position that may be challenged in a quo warranto proceeding, and the City and Brown are aware of none. Brown cannot be ousted from the designation Acting Chief of Police, because no such public office exists.

**B. Brown Is Not Acting Chief of Police**

Brown cannot be “ousted” from the position of Acting Chief of Police for another reason as well: he does not currently hold that designation. Key to establishing a quo warranto claim is showing “that another is actually holding office.” *City of Parma v. City of Cleveland*, 9 Ohio St.3d 109, 112 (1984).

Relators concede Brown’s designation as Acting Chief of Police “took place several months ago” and that he served as Acting Chief of Police “for a short period of time.” (Relators’ Br. at 29.) They nevertheless argue that he can be “ousted” from a designation he no longer holds under this Court’s decision in *State ex rel. Ziegler v. Zumbar*, 129 Ohio St.3d 240, 2011-Ohio-2939.

But even if Acting Chief of Police were a public office, Relators’ reliance on *Ziegler* is misplaced. *Ziegler* addressed an action brought by a county treasurer who

claimed he had been unlawfully removed from his post and was entitled to reinstatement. *Id.* at ¶ 9. The respondent argued that his claim was moot because three successors had held the office of county treasurer since relator's removal. *Id.* at ¶ 12. This Court rejected that argument, reasoning that otherwise "an appointing authority could insulate its improper removal of a public officer by appointing multiple persons to the office in quick succession." *Id.* at ¶ 13. Because "the term of office from which Ziegler claims improper removal ha[d] not expired," *id.* at ¶ 14, this Court ruled that Relator's claim was timely and "neither moot nor barred by laches," *id.* at ¶ 16.

Here, Relators do not and cannot claim that they were improperly removed from the designation of Acting Chief of Police, or that there is a "term" for that designation which has not yet expired. The simple fact is that Brown's designation as Acting Chief of Police ended after a brief temporary five-day period in February 2013 and there is no unexpired term associated with that designation for *anyone* to fill. (Nice Aff., ¶ 10 and Ex. 14.) This Court cannot "oust" Brown from a designation that ended several months ago, and cannot "reinstate" Relators to an Acting Chief of Police designation that has long since ended. While Relators' quo warranto claim fails for other reasons as explained above, it is also moot.

### **Proposition of Law No. 3**

**An employee may not be ousted under R.C. Chapter 2733 from a public office he does not claim to hold and is not regarded as holding.**

Relators argue that Brown should be "ousted" from the "office of de facto" Deputy Chief of Police. (Relator's Br. at 30-44.) However, there is no public office of "de facto" Deputy Chief of Police. (Miller-Dawson Aff., ¶ 3.) Relators' argument therefore ultimately boils down to the assertion that the duties Brown performs are sufficiently

similar to those of a Deputy Chief that Brown is “de facto” a Deputy Chief, and he may be ousted from the position of Deputy Chief even though he does not claim to hold it and is not regarded as such. (Relators’ Br. at 32-40.) That argument misunderstands what a “de facto” public officer is, and erroneously seeks to work an unprecedented expansion of the writ of quo warranto that would result in this Court assuming the role of a referee in disputes over duties assigned to particular positions. This Court’s precedents teach that the “de facto” public office doctrine plays no role in determining the rights of claimants to a particular office, and even if it did, the evidence establishes that Brown does not fit the definition of a “de facto” Deputy Chief. Relators cannot oust Brown from a position he does not hold — “de facto” or otherwise.

A. **The Writ of Quo Warranto Cannot be Utilized to Remove a Person from an Office He Does Not Claim to Hold and Is Not Regarded as Holding.**

The “de facto” public officer doctrine does not permit courts to pierce the job title of a public employee to analyze whether his or her job duties somehow encroach upon the duties of a separate public office. It has a very different and limited purpose: to validate certain actions performed by persons who believed they occupied a particular office “de jure” — *i.e.*, pursuant to “a proper and legal election or appointment” — when in fact they did not. *State ex rel. Witten v. Ferguson*, 148 Ohio St. 702, 707-08 (1947). The definition of a “de facto” officer closely aligns with this narrow purpose: a “de facto” officer “is one who enters upon and performs the duties of his office with the acquiescence of the people and public authorities and has the reputation of being the officer he assumes to be and is dealt with as such.” *State ex rel. Huron Cty. Prosecutor v. Westerhold*, 72 Ohio St.3d 392, 396 (1995).

The common sense notion behind the doctrine is that innocent third parties (and the public as a whole) should not suffer because the person they believed to hold a particular office in fact did not have title to that office. This Court has explained that the “de facto” public officer doctrine “rests on the principle of protection to the interests of the public and third parties, *not to protect or vindicate* the acts or rights of the particular de facto officer or *the claims or rights of rival claimants to the particular office.*” *State ex rel. Purola v. Cable*, 48 Ohio St.2d 239, 242-43 (1976) (Emphasis added), quoting *State ex rel. Paul v. Russell*, 162 Ohio St. 254, 257 (1954).

Thus, this Court has held that the actions of a judge duly elected to the court of common pleas will be deemed valid insofar as they affect the interests of parties appearing before him, even though the judge technically forfeited his office by accepting a commission in the United States armed forces. *State ex rel. Witten*, 148 Ohio St. at 708-10. Likewise, the vote of a de facto member of a township board of trustees could be counted to determine whether another member of the board was properly appointed. *State ex rel. Purola v. Cable*, 48 Ohio St.2d 239, 241-43 (1976); *see also State ex rel. Paul*, 162 Ohio St. at 257-58 (vote of de facto member of board of education counts in action challenging appointment of superintendent of schools).

Because the “de facto” public officer doctrine does not exist to vindicate either the rights of the office holder or the rights of rival claimants, it is unsurprising that Relators cite no case in which this Court has applied that doctrine to oust a public employee from a position they did not claim to hold. In short, Relators’ reliance on the “de facto” public officer doctrine is misplaced and inapplicable because the settled scope of that doctrine does not encompass resolving disputes over title to a particular public office.

**B. Brown Is Not a Deputy Chief.**

Even if the “de facto” public officer doctrine applied to Relators’ quo warranto claim, the evidence establishes that Brown is not a “de facto” public officer within the meaning of that doctrine.

First, Brown has never “assumed to be” a Deputy Chief: he does not and has not claimed that he is a Deputy Chief. (See Brown Aff., ¶¶ 1-2, 7.) Second, while Relators claim Brown is “regularly identified” as a Deputy Chief (Relators’ Br. at 31-32), their own evidence confirms Brown does not have the reputation of being a Deputy Chief. Relators’ evidence establishes at most that Brown and others have referred to him as Assistant Chief of Police, Assistant Police Chief, or Assistant Chief. (See, e.g., Relators’ Ex. X (referring to Brown as “Assistant Police Chief”); Relators’ Ex. N-1 (referring to Brown as “Assistant Chief of Police” and “Assistant Chief”); Jt. Ex. F (listing Brown as “Assistant Chief” and noting total number of Deputy Chiefs as “0”); see also Brown Aff., ¶ 2 (“Mayor Plusquellic told me that my duties would be to serve as an Assistant to the Chief of Police or ‘Assistant Chief of Police.’”); Nice Aff., ¶ 2 (“I refer to Mr. Brown as Assistant Chief Brown since he is assigned to assist me and is an Assistant to the Mayor.”); Miller-Dawson Aff., ¶ 4(a) (Brown “currently serves as Assistant to the Mayor in the capacity of Assistant Chief of Police”). Relators cite no evidence that anyone at any time ever referred to Brown as a Deputy Chief — much less “dealt with [him] as such.” *State ex rel. Huron Cty. Prosecutor*, 72 Ohio St.3d at 396.

It is not a matter of semantics that Brown is regarded as Assistant Chief, not Deputy Chief. (Relators Br. at 32.) Aside from the inapplicability of the “de facto” public officer doctrine, this Court’s precedents instruct that in a quo warranto action “the only thing that can be tried is the title to the office[.]” *State ex rel. Flask v. Collins*,

148 Ohio St. 45, 49 (1947). (Emphasis added.) Such proceedings do not exist to referee disputes concerning job duties assigned to a public employee. *Cf. State ex rel. Coyne*, 45 Ohio St.3d at 238 (quo warranto claim failed where relators “claim only a right to preempt some of the duties of those offices”). Since no one considers Brown to be a Deputy Chief, and he has not claimed to be a Deputy Chief, he is not a Deputy Chief — “de facto” or otherwise. *State ex rel. Huron Cty. Prosecutor*, 72 Ohio St.3d at 396.

**C. Relators’ Misplaced Arguments Concerning Brown’s Job Duties.**

The bulk of Relators’ argument is aimed at establishing that Brown performs some (but not all) of the duties of a Deputy Chief. (Relators Br. at 32-40.) That effort is misguided and irrelevant. Since the “de facto” public officer doctrine plays no role in resolving disputes between rival claimants to a particular office, and Brown does not meet the settled definition of a “de facto” public officer, the duties Brown performs are irrelevant to these quo warranto proceedings. But it is simply wrong to claim, as Relators do, that Brown’s duties show he serves as a Deputy Chief.

Brown does not, for example, supervise the Police Captains. (Nice Aff., ¶ 4; Brown Aff., ¶ 5.) Standing alone, the absence of such supervisory authority belies Relators’ claim that Brown serves in the rank of Deputy Chief between Police Chief and Police Captain in the “Chain of Command.” (*E.g.*, Relators’ Br. at 2.) The record also establishes that Brown does not perform many of the other tasks assigned to Deputy Chiefs, such as: manage employees; plan and direct all the activities of a subdivision of the Police Division; participate in developing and administering the division budget; prepare analytical reports on behalf of the Police Division; or administer the City’s Police Division Rules, Regulations and Procedures. (Nice Aff., ¶ 5; Brown Aff., ¶ 6.)

The specific job-related complaints identified by Relators do not relate to duties reserved to a Deputy Chief. (Relators' Br. at 32-40.) For instance, Relators complain that Brown is not excused from morning meetings the Captains and other supervisors attend with Chief of Police Nice. (Relators' Br. at 34, citing Daugherty Aff., ¶ 18.) But Relators cite no section of the Akron City Charter or any evidence that says only Deputy Chiefs may participate in the Chief's morning meetings. Brown is entitled to attend such meetings. Indeed, since Captains and other police supervisors attend these meetings, it is plain that such attendance is not a function exclusively reserved for a Deputy Chief. Relators also mention that Brown attends confidential briefings with the Office of Professional Standards and Accountability (Internal Affairs). The Mayor and Chief of Police have the authority under Akron's Charter to discipline employees and the Mayor has the authority to discharge Police Division employees. There is no prohibition in the Akron City Charter or in any other evidence that precludes Brown, or any other unclassified employees from attending briefings with Internal Affairs to assist the Mayor in carrying out his discipline and discharge duties under the Charter or the Chief of Police in carrying out his discipline duties. See Jt. Ex. A, Akron City Charter Section 72.

Likewise, Relators complain that Brown asked a Police Sergeant to send out an email flyer concerning pizza delivery safety and place stickers on police cruisers. (Relators' Br. at 36, citing Relators' Ex. Y.) Yet Relators acknowledge Brown could have made those requests prior to resigning his position as a Police Lieutenant. (*Id.*) Their complaints that Brown made the same request as an Assistant to the Mayor therefore cannot establish that he is serving in the role of Deputy Chief.

Relators also complain about Brown approving training requests (Zampelli Aff., ¶¶ 26-27), overseeing background investigations for hiring (*Id.* at ¶ 25), approving

overtime requests associated with physical ability testing conducted for police hiring (Daugherty Aff., ¶ 21; Relators' Ex. T), participating on the Firearms Review Board (Prebonick Aff., ¶ 22; Ex. R), and serving as Acting Chief of Police. (Relators' Br. at 36-39.) Once again, however, Relators cite no section of the Akron City Charter or any other evidence that reserves these duties to a Deputy Chief. Brown's participation on the Firearms Review Board is limited to making recommendations to Chief Nice, and he serves on that Board as Assistant to the Mayor/Assistant Chief — not as "Deputy Chief," or commander of a particular sub-division. (See Relators' Ex. R.) Moreover, as Relators acknowledge, overtime requests have been approved by Lieutenants in the past. (See Daugherty Aff., ¶ 21.) Accordingly, Brown's approval of overtime requests associated with testing related to the police hiring process he oversees in no way establishes that he was functioning as a Deputy Chief. Furthermore, Relators perform many of these same duties while serving as Police Captains. (E.g., Daugherty Aff., ¶¶ 7, 18, 20-21 (noting that Police Captains attend the morning meetings with Chief Nice, have been assigned to the Firearms Review Board, have been designated Acting Chief of Police, and, along with Lieutenants, have approved overtime requests); see also Nice Aff., ¶ 7 (listing Police Captains who have served as Acting Chief of Police.)

Relators cite as evidence in this case a self serving letter that the Union sent to the Ohio Police and Fire Pension Fund ("OP&F"). It is readily apparent that the Union's motive behind the letter to OP&F was to merely state their position in another forum and now try to use this letter as factual evidence in this case.

In the end, Relators fall back on a generic claim that Brown's job duties "illegally circumvent the City's Charter and related Civil Service Rules." (Relators' Br. at 43.) That claim is irrelevant. Relators' citations to *Local 330, Akron Firefighters Assn., AFL-*

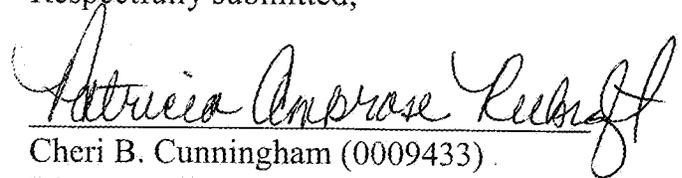
*CIO v. Romanoski*, 68 Ohio St.3d 596 (1994), and *Jonovich v. East Cleveland*, 8th Dist. No. 88272, 2007-Ohio-1984, illustrate the flaw in Relators' argument. *Romanoski* was an appeal from a trial court judgment on a complaint for declaratory and injunctive relief, not an original action for a writ of quo warranto. *Jonovich* similarly originated in the court of common pleas as an action for declaratory and injunctive relief. The declaratory and injunctive relief sought in those cases is unavailable in an original action in quo warranto, which (as explained above) exists solely to settle title to a public office. *See also State ex rel. Cain v. Kay*, 38 Ohio St.2d 15, 16 (1974). Therefore, even if the duties assigned to Brown as Assistant to the Mayor were a violation of the Akron City Charter (they are not), *Romanoski* and *Jonovich* show that Relators bring that claim before the wrong Court.

Relators' claim ultimately rests on rhetoric. They cite absolutely no provision of the Akron City Charter that purports to restrict the duties that may be assigned to an unclassified employee appointed Assistant to the Mayor under Section 105(1)(g). Jt. Ex. A., Akron City Charter 105(1)(g). While Section 68 of the Charter specifies that the classified police force consists of "such officers and employees as may be provided for by the Council," nothing in that Section or any other Section of the Charter is limited to full time police officers or purports to restrict the duties that may be assigned to a duly appointed Assistant to the Mayor. *Id.*, Akron City Charter 68. Relators' claim that Brown must "serve as a full-time police officer" is simply irrelevant to this action. (Relators' Br. at 41.) Since Section 68 of the Akron City Charter has no limitation on the duties that may be assigned to an Assistant to the Mayor, it is not limited to "full-time" police officers. The appointment of Brown as Assistant to the Mayor did not violate any provision of the Akron City Charter or Civil Service Rules.

V. CONCLUSION

Respondent Charles Brown lawfully possesses the position of Assistant to the Mayor pursuant to Section 105 of the Akron City Charter. Relators cannot “oust” Brown from other positions that do not exist or that he does not occupy. Furthermore, no Relator claims any right to hold the purported position of “Acting Chief of Police” or the position of Deputy Chief. For all of the above reasons, the writ of quo warranto should be denied.

Respectfully submitted,



Cheri B. Cunningham (0009433)

Director of Law

Patricia Ambrose-Rubright (0009435)

(COUNSEL OF RECORD)

Tammy L. Kalail (0072295)

Assistant Directors of Law

City of Akron

161 S. High Street, Suite 202

Akron, Ohio 44308

Tel: (330) 375-2030

Fax: (330) 375-2041

E-mail: [ccunningham@akronohio.gov](mailto:ccunningham@akronohio.gov)

[pambrose@akronohio.gov](mailto:pambrose@akronohio.gov)

[tkalail@akronohio.gov](mailto:tkalail@akronohio.gov)

*Attorneys for Respondent and Intervenor*

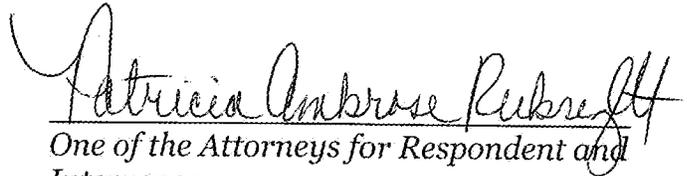
**PROOF OF SERVICE**

A copy of the foregoing was served on July 24, 2013 pursuant to Civ.R. 5(B)(2)(c)

by mailing it by United States mail to:

Susannah Muskovitz  
William E. Froehlich  
MUSKOVITZ & LEMMERBROCK, LLC  
The BF Keith Building  
1621 Euclid Avenue, Suite 1750  
Cleveland, OH 44115

*Attorneys for Relators*

  
*One of the Attorneys for Respondent and  
Intervenor*

APPENDIX

Ohio Revised Code §2733.06.....Appendix 2

Ohio Revised Code §2733.08.....Appendix 3

Excerpts\* of Akron City Charter:

§54.....Appendix 4

§59.....Appendix 5

§60.....Appendix 6

§67.....Appendix 7

§68.....Appendix 8

§72.....Appendix 9

§105.....Appendix 10

§106.....Appendix 11

\* A complete copy of the Akron City Charter was filed on June 25, 2013, as Joint Exhibit A.

APPENDIX

Ohio Revised Code §2733.06.....Appendix 2

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### **2733.06 Usurpation of office.**

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

Effective Date: 10-01-1953

\*

### **2733.08 Petition against person for usurpation of office.**

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

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

Effective Date: 10-01-1953

**SECTION 54. - POWERS AND DUTIES.**

The Mayor shall be recognized as the official head of the City by the courts, for the purpose of serving civil processes, by the Governor for military purposes and for all ceremonial purposes. The Mayor, by and with the consent of Council, shall appoint and remove all members of boards or commissions except as otherwise provided in this Charter.

In addition to the foregoing, and except as otherwise provided in this Charter, his powers and duties shall be:

1. To see that the laws and ordinances are enforced.
2. To prepare and submit to the Council the annual budget.
3. To keep the Council fully advised as to the financial condition and needs of the City.
4. To appoint and remove all employees in both the classified and unclassified service, except elected officials.
5. To exercise control over all departments and divisions created by the Charter or that may be hereafter created by the Council.
6. To see that all terms and conditions imposed in favor of the City or its inhabitants in any franchise or contract to which the City is a party are faithfully kept and performed.
7. He shall have the right to introduce ordinances and take part in the discussion of all matters coming before Council.

*(V 95 p 89; Approved by voters Nov. 8, 1966) (Amendment adopted by electorate 11-4-80)*

**SECTION 59. - DEPARTMENTS AND DIVISIONS.**

The following administrative departments are hereby established:

1. Department of Law;
2. Department of Public Service;
3. Department of Public Safety;
4. Department of Health;
5. Department of Finance.

*(Amendment adopted by electorate 11-4-80)*

**SECTION 60. - DIRECTORS.**

At the head of each department there shall be a director. Each director shall be appointed by the Mayor, except the Director of Health who shall be appointed by the Health Commission. Each director shall serve until removed by the appointing authority, or until his successor has been appointed and has qualified. He shall conduct the affairs of his department in accordance with the rules and regulations made by the Mayor, or in the case of the Director of Health, by the Health Commission, and shall be responsible for the conduct of the officers and employees of his department, for the performance of its business, and for the custody and preservation of the books, records, papers and property under its control. Subject to the supervision and control of the Mayor in all matters, except the Director of Health, who shall be subject to the supervision and control of the Health Commission, the director of each department shall manage his department.

*(Amendment adopted by electorate 11-4-80)*

**SECTION 67. - GENERAL POWERS AND DUTIES.**

The Department of Public Safety shall consist of the following divisions: Police, Fire, Building Inspection and Regulation, Weights and Measures, and such others as Council may from time to time prescribe, which said divisions shall be under the immediate supervision of the Mayor, who shall make all rules necessary for the regulation and discipline of the same. With the approval of Council, the Mayor shall make such rules and regulations as he shall deem expedient to govern the movement of all vehicles and pedestrians upon the public thoroughfares. He shall have exclusive authority, unless otherwise provided by ordinance, to issue all permits and licenses directly or indirectly concerned with the control of traffic upon the streets and sidewalks, but in the event the office of the Mayor may be closed for business, the Chief of Police shall have the authority to issue such temporary or emergency permits as may be necessary to prevent destruction of life or property. Such temporary or emergency permits in all cases shall be surrendered to the Mayor not later than two hours from and after the time the office of said Mayor shall have been reopened for business.

*(V 44 p 311; Approved by voters Nov. 5, 1935)*

APPENDIX 7

**SECTION 68. - DIVISION OF POLICE.**

The police force shall consist of a Chief of Police and such officers and employees as may be provided for by the Council. For any vacancy in the position of Chief of Police which exists after November 7, 2000, the Mayor shall appoint the Chief of the Division of Police who shall serve in the classified service for an initial term of four (4) years. A Chief so appointed may be reappointed in the classified service for an additional term of four (4) years, with no limit on the number of re-appointments. The Chief of the Division of Police shall be in immediate charge of said Division, shall have jurisdiction over the Police Station and any substation which may be hereafter established, and shall have control over the stationing and transfer of all patrolmen and other employees constituting the Division of Police, under such rules and regulations as the Mayor may prescribe. No special detectives or other special officers shall be employed except upon written authority from the Mayor, and such authority shall be exercised only under the direction and control of the Chief of Police, and for a stipulated time. The Mayor shall have the right, whenever authorized by Council, to appoint substitute or special patrolmen who shall not be considered to be in any sense regular members of the Police Division and who need not be in the classified service. In case of riot or other serious emergency, or at time of elections or for other similar occasions, the Mayor or in his absence, the Chief of Police, may appoint, for the period of the emergency only, additional patrolmen and officers, who need not be in the classified service.

*(V 44 p 311; Approved by voters Nov. 5, 1935) (Amendment adopted by electorate 11-4-80; Amendment adopted by electorate 11-7-00)*

**SECTION 72. - REMOVAL OF OFFICERS AND EMPLOYEES.**

The Mayor shall have the right to suspend, reduce in rank or dismiss any officer or employee in the Division of Police and Fire and the Chiefs of the Divisions of Police and Fire shall have the right to suspend and/or recommend the reduction in rank or dismissal of any officers or employees in the said division for incompetence, inefficiency, abuse of chemical substances, disorderly or immoral conduct, discourteous treatment of any citizen or of the public at large, insubordination, neglect of duty, for violation of the rules and regulations of the Police Division or Fire Division or Civil Service, or for any other just and reasonable cause. In the event that such suspension and/or recommendation is made by the Police or Fire Chief, the said Chief shall forthwith, in writing, certify the fact, together with the cause therefor to the Mayor, who, within five (5) days from the receipt of such certification, or a later time if agreed to by the officer or employee, shall conduct a hearing on said cause and render judgment thereon within ten (10) days after the hearing, which judgment, if the charge be sustained, may be suspension, reduction in rank, or dismissal; provided, however, that an appeal may be had to the Civil Service Commission from the decision of the Mayor. In the event of such appeal, which shall be filed not later than ten (10) days from the date of the Mayor's judgment, the Mayor shall, upon notice thereof forthwith transmit to the Commission a copy of the charges and proceedings appertaining thereto. Within thirty (30) days, or a later time if agreed to by the officer or employee, after the receipt of said copy, the said Civil Service Commission shall hear such appeal and may affirm, disaffirm or modify the judgment of the Mayor. In the event that such suspension, reduction in rank or dismissal is made by the Mayor, the Mayor shall forthwith, in writing, certify the fact, together with the cause therefor, to the Civil Service Commission, and said Commission shall, not later than thirty days after the receipt of such certification, proceed to hear such cause and render judgment thereon. The employee or appointing authority may appeal the decision of the Civil Service Commission to the Court of Common Pleas pursuant to Ohio Revised Code Chapter 2506. In any investigation of charges against any employee in the Division of Police or Fire, the Mayor shall have the same power to administer oaths and secure the attendance of witnesses and the production of books and papers as is conferred upon the Council.

*(V 44 p 311; Approved by voters Nov. 5. 1935) (Amendment adopted by electorate 11-4-80; Amendment adopted by electorate 11-4-80)*

**SECTION 105. - CLASSIFICATION.**

The civil service of the City is hereby divided into the unclassified and the classified service.

- (1) The unclassified service shall include:
  - (a) All officers elected by the people.
  - (b) The Director and Deputy Directors of the Department of Public Service.
  - (c) The Director and Deputy Directors of Finance.
  - (d) The Director of Law, the Deputy Directors of Law and the Assistant Directors of Law.
  - (e) The Director and Deputy Directors of Planning and Urban Development appointed after November 15, 1990.
  - (f) The members of all appointed boards or commissions, and advisory boards.
  - (g) The Secretaries and assistants to the Mayor.
  - (h) The Deputies to the Mayor.
- (2) The classified service shall comprise all positions not specifically included by this Charter in the unclassified service.

*(V 46 p 444; Approved by voters Nov. 2, 1937) (Amendment adopted by electorate 11-4-80; Amendment adopted by electorate 11-6-90)*

APPENDIX 10

**SECTION 106. - PERSONNEL DIRECTOR—RULES AND REGULATIONS.**

The Personnel Director, under the direction of the Commission, shall direct and supervise the administrative work of the Personnel Department; shall prepare and recommend rules and regulations for the administration of the civil service provisions of the Charter, which shall become effective after approval by the Commission; shall administer such rules and regulations and shall propose amendments thereto; shall prepare an annual report to the Mayor for the Civil Service Commission and Council; shall keep minutes of the proceedings of the Commission; shall make investigation concerning the enforcement and regulations thereunder; shall perform such other functions as may be required by the Civil Service Commission.

It is hereby provided and the rules and regulations shall provide:

- (1) For the classification and standardization of all positions in the classified service. The classification into groups and subdivisions shall be based upon and graded according to their duties and responsibilities, and so arranged as to permit the filling of the higher grades, so far as practicable through promotion. All salaries shall be uniform for like service in each grade, as the same shall be standardized and classified by the Civil Service Commission. The Commission shall have the sole power to create new classification.
- (2) For open competitive examinations to be given under the direction of the Personnel Director to test the relative fitness of applicants for such positions. Employees of any public utility or agency taken over by the City who have been in the service of said utility or agency for three (3) years prior to the time of such acquisition shall come under the provisions of the merit system without examination; but vacancies thereafter occurring in such service shall be filled from eligible lists in the manner herein provided.
- (3) For public notice of the time and place of all competitive examinations.
- (4) For the creation by the Personnel Director of eligible lists upon which shall be entered the names of successful candidates in the order of their standing in such examination or test.
- (5) For the rejection by the Personnel Director, by authority of the Commission, of candidates or eligibles who failed to meet reasonable qualification requirements, or who have attempted deception or fraud in connection with any application or examination.
- (5a) (Repealed; Amendment adopted by electors 11-4-80)
- (5b) For declaring that no person shall hold an appointed or promoted position in the classified service of the City of Akron unless he shall become a resident citizen of the City of Akron within twelve (12) months of his appointment or promotion, and remain a resident citizen of the City of Akron during the term of his employment, except that such provisions shall not be applicable to:
  1. Full-time permanent employees of the City of Akron whose continuous employment began prior to and continued through November 7, 1978; or
  2. Appointment or promotion to a position entailing work performed primarily outside of the corporate limits of Akron; or
  - 3.

Employees of agencies which serve areas outside of the City of Akron and which receive most of their funding from other than City of Akron Funds.

However, these employees must live within the region their agency serves.

- (5c) For declaring methods of granting preference points to the passing grades of those persons taking non-promotional examinations who are resident citizens of the City of Akron continuously for one year immediately prior to examination and who remain resident citizens of the City of Akron throughout the remainder of the selection process.
- (5d) For declaring methods of granting preference points to the passing grades of those persons taking non-promotional examinations who are veterans of the Armed Forces of the United States irrespective of date of honorable discharge from active duty.
- (6) For the certification to the appointing authority by the Personnel Director from the appropriate eligible list to fill vacancies in the classified service of the persons with the three highest scores on such list, or of the person or persons on such list when the same contains less than three scores.
- (7) For promotion based on competitive examinations and records of efficiency and seniority. Lists shall be created and promotions made in the same manner as in original appointments. Any advancement from one job classification to another for which the maximum rate of pay is higher shall constitute promotion. Whenever practicable, vacancies shall be filled by promotion.
- (8) For transfer from a position to a similar position in the same class and grade and for reinstatement on the eligible list within one year of persons who, without fault or delinquency on their part, are separated from the service or reduced in rank.
- (9) (Repealed; V 107 p 582; approved by voters Nov. 2, 1971)
- (10) (Repealed; V 107 p 582; Approved by voters Nov. 2, 1971)
- (11) For investigating and keeping a record of the efficiency of officers and employees in the classified service, and for requiring performance evaluations and records relative thereto from appointing officers. Each employee's own record shall be available for his/her inspection at all times.
- (12) For a period of probation not exceeding six (6) months before an appointment or employment is made permanent, during which period a probationer may be discharged or reduced by the appointing authority without the right of appeal to the Commission; provided, however, that said probationary period shall be extended for each class of employee, for that period of time which is equivalent to the period of time during which employees entering service in that classification are required to participate in formal, full-time training programs. In no case shall the combined probationary and training period exceed nine (9) months.

*(Approved by voters Nov. 4, 1975)*

- (13) Such other rules shall be adopted which are not inconsistent with the foregoing provisions of this section as may be necessary and appropriate for the enforcement of the merit system.

*(Amendment adopted by electorate 11-4-80; Amendment adopted by electorate 11-7-00)*