ORIGINAL

IN THE SUPREME COURT OF OHIO

RICHARD O. PIETRICK,	)	Case No. 2013-0052
	)	
Appellee	)	*On Appeal from the Eighth District Court of Appeals, Cuyahoga County, Ohio*
	)	
v.	)	
	)	
CITY OF WESTLAKE, CIVIL SERVICE COMMISSION, et al.	)	*Court of Appeals Case No. 98258*
	)	
Appellants	)	

MERIT BRIEF OF APPELLEE RICHARD PIETRICK

JOSEPH W. DIEMERT, JR. (0011573)
(Counsel of Record)
receptionist@diemertlaw.com
THOMAS M. HANCULAK (0006985)
tmhanculak@aol.com
DANIEL A. POWELL (0080241)
dapowell@diemertlaw.com
Diemert & Associates Co., L.P.A.
1360 S.O.M. Center Road
Cleveland, Ohio 44124
(440) 442-6800 (telephone)
(440) 442-0825 (facsimile)

Counsel for Appellee Richard O. Pietrick

JOHN D. WHEELER (0004852)
(Counsel of Record)
Director of Law
jwheeler@cityofwestlake.org
ROBIN R. LEASURE (0061951)
Assistant Director of Law
rleasure@cityofwestlake.org
2700 Hilliard Boulevard
Westlake OH 44145
(440) 617-5222 (telephone)
(440) 617-4249 (facsimile)

Counsel for Appellants City of Westlake Civil Service Commission, et al.

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SUPREME COURT OF OHIO

PHILLIP K. HARTMANN (0059413)
(Counsel of Record)
phartmann@fbtlaw.com
STEPHEN J. SMITH (0001344)
ssmith@fbtlaw.com
YAZAN S. ASHRAWI (0089565)
yashrawi@fbtlaw.com
Frost Brown Todd L.L.C.
10 West Broad Street, Suite 2300
Columbus, Ohio 43215
(614) 464-1211 (telephone)
(614) 464 1737 (facsimile)

JOHN GOTHERMAN (0000504)
jgotherman@columbus.rr.com
Ohio Municipal League
175 South Third Street, Suite 510
Columbus, Ohio 43215
(614) 221-4349 (telephone)
(614) 221-4390 (facsimile)

Counsel for Amicus Curiae
The Ohio Municipal League

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STATEMENT OF THE CASE

This proceeding stems from the adverse employment action taken by Appellees City of Westlake and its civil service commission (collectively "the City" or "Westlake") against Appellant Richard O. Pietrick ("Pietrick"), a member of the City's classified civil service and a long-tenured employee of its fire department. Specifically, on November 2, 2007, the appointing authority, Westlake Mayor Dennis Clough ("Mayor Clough"), ordered Pietrick demoted from his position as Fire Chief down to the lowest rank in the department, First-Class Firefighter. Mayor Clough also imposed a 30-day suspension which included the removal of Pietrick's health care benefits for the duration of the suspension. (A.r.6; Supp.381-82).[1]

Pietrick timely appealed the Mayor's decision to the civil service commission. (A.r.8; Supp.385-86). Prior to the civil service commission taking any action on the appeal, Mayor Clough called for what he termed a "pre-deprivation hearing" with his designee, municipal attorney Gary Ebert, presiding. (A.r. 9; Supp.387). The Mayor's designee upheld the discipline. (A.r.11; Supp.388-90). The civil service commission held a hearing on November 30, 2007 and denied Pietrick's appeal. (A.r.16, Supp.1-175, SuppII.4).

Pietrick thereafter exercised his right to a trial de novo on questions of law and fact pursuant to R.C. 124.34 in the Cuyahoga County Court of Common Pleas. (SuppII.1-4). The common pleas court issued its final decision on March 26, 2012,

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[1] "A.r." shall refer to the administrative record filed with the common pleas court by the City of Westlake. "Supp." shall refer to the supplement filed by Appellants. "SuppII." Shall refer to the supplement submitted by Appellee.

upholding the 30 day suspension and removal as Fire Chief, but modifying the demotion to his prior rank of Captain.

The City appealed that decision to the Eighth Appellate District. The court of appeals found no abuse of discretion in the common pleas court's decision and affirmed. Upon review of the jurisdiction memoranda filed by the City and Amicus Curiae (in support of the City) Ohio Municipal League ("OML"), this Court initially declined jurisdiction but subsequently agreed to review the appeal after the City requested reconsideration of that initial ruling.

STATEMENT OF FACTS

a. The Relevant Background Information of the Parties

Westlake is a political subdivision operating pursuant to the general laws of the State of Ohio and its own charter. The City's charter contains a general reservation of home-rule authority for the operation of its civil service system. The City's fire department consists of one Chief, one Assistant Chief, three Captains, seven Lieutenants, and approximately 33 Firefighter-Paramedics. All employees within the fire department, including the Fire Chief, are members of the competitive classified civil service.

Pietrick was initially hired by the City as a First-Class Firefighter/Paramedic on July 28, 1980. Through competitive examination, he was promoted to Lieutenant in March 1989 and then again to the rank of Captain in April 1993. His meritorious ascension through the department's various ranks pinnacled in November 1994 when, based on his exemplary record and his performance on the civil service examination, he was appointed to the position of Fire Chief. (Tr.135, Supp.135).[2]

[2] "Tr." shall refer to the transcript of proceedings found at A.r.16 and Supp.1-175.

In less than 15 years, Pietrick had risen from the entry level rank to the head of the entire fire department. Pietrick remained as Fire Chief up until the adverse employment action taken in 2007 which gave rise to the administrative proceedings culminating in this appeal.

When the subject discipline was imposed by the City, Pietrick had tallied over 25 years on the job with a spotless disciplinary record. (Tr.138, Supp.138). Indeed, Pietrick's civil service file was devoid of *any* formal disciplinary action(s). Despite having the burden of proof at all stages of these proceedings, the City failed to produce so much as a single prior disciplinary notice.

On the other hand, among his numerous accolades, Pietrick is a two time recipient of the Community Leadership and Legacy Awards, most recently in 2005. In addition to his on-the-job training, he is a member and graduate of the Ohio Fire Executive program and the Ohio State Leadership Academy. (Tr.138, Supp.138).

b. The Stated Basis for Discipline

To appropriately narrow the issues relevant to this appeal, absolutely vital is a clear understanding of the specifically stated basis for discipline (as provided to Pietrick by the appointing authority and as explicitly required by R.C. 124.34(C)). In early July 2007, at Mayor Clough's insistence, the City retained the services of municipal attorney Jonathan Greenberg ("Greenberg") to conduct an investigation into concerns the City's firefighters' union had raised via a letter to Pietrick about certain firefighter-mechanics[3] assisting him with repairs on his personal vehicles. An investigative report was subsequently issued – "the Greenberg Report." (A.r.5, Supp.365-80).

[3] A 'firefighter-mechanic' is a firefighter who, in addition to regular on-shift duties, also performs routine maintenance on the department's vehicles and equipment.

Citing the findings of the Greenberg Report as the purported basis, Mayor Clough issued the subject discipline demoting Pietrick from Fire Chief to the entry level position of First-Class Firefighter (the rank at which Pietrick remained for more than five years until this Court rightfully denied the City's motion to stay the decision under review). As further discipline, Mayor Clough suspended Pietrick for 30 days without pay or benefits. (A.r.6, Supp.381-82).

According to the November 2, 2007 notice of disciplinary action, Mayor Clough deemed Pietrick guilty of "misfeasance, malfeasance, nonfeasance, neglect of duty and failure of good behavior." (A.r.6, Supp.381-82). The stated basis for the discipline referenced *only* the investigation conducted by Greenberg and the facts which gave rise to that investigation. Although it now attempts to suggest something to the contrary, the City acknowledged this simple truth right at the outset of its opening statement at the evidentiary hearing held in 2007:

> This is, frankly, a pretty straightforward matter. It came to the city's knowledge via a letter sent by the union president...

(Tr.13, Supp.13).

Despite the limited stated basis for the discipline, the City has spent considerable effort at the various levels of this administrative appeal harping on the audits performed on the fire department ("the McGrath Reports") leading up to the subject discipline. However, given the strict statutory and constitutional (due process) requirements[4] that the

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[4] See, e.g., *Sandusky v. Neusse*, 2011-Ohio-6497 (App. 6 Dist.) – "By adopting the City's view, we would be sanctioning a scenario in which a city police chief could be notified of the grounds for her termination, contest the termination on those grounds, and then have the termination upheld on entirely different grounds of which she was unaware and had no opportunity to contest. This result contravenes the concept of procedural due process, which requires, at a minimum, an opportunity to be heard at a meaningful time and in a

employee be provided with written notice of the basis for the charges and the lack of any reference in the Mayor's notice to Pietrick of the McGrath Reports, any issues raised in those reports is not relevant to the question of whether the evidence in the record supports the discipline imposed. The only relevance those reports may offer is to provide proper context and support to the obvious truth that the Mayor's 'concerns' about the issues with the mechanics was merely a subterfuge for imposing discipline he desired but could not justify imposing in response to the audits. (Tr.27, Supp.27). In fact, the City readily admits that the rationale for hiring Greenberg was that Mayor Clough, after consulting with his law department, acknowledged that he shouldn't be involved with the investigation "due to the fact he had been having some ongoing disputes with the fire chief on other matters" (i.e. the McGrath Reports). (Tr.14, Supp.14).

c. The Facts Relevant to the Greenberg Report.

Mayor Clough maintains that he received a "complaint" regarding Pietrick from Patrick Grealis ("Grealis"), the union president. However, the Grealis letter was not a formal "complaint" to the Mayor, but was sent directly to Pietrick himself and merely copied to the Mayor. The letter simply requested that Pietrick alter certain practices within the department and was issued during a time of, and motivated by, "various items" of contention between the union and Pietrick. (A.r.3, Supp.362; Tr.124, Supp.124).

The Grealis letter was intended to bring to Pietrick's attention certain concerns the union had with firefighter-mechanics assisting Pietrick with repairs to his vehicles. Notably, the mechanic who assisted in nearly every repair was not even aware of the

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meaningful manner 'when the state seeks to infringe a protected liberty or property right.'" *State v. Cowan,* 103 Ohio St.3d 144, 814 N.E.2d 846, 2004–Ohio–4777, ¶ 8 (citing *Boddie v. Connecticut* (1971), 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 and *Mathews v. Eldridge* (1976), 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18).

letter until questioned about it by the Law Director. (A.r.15, pg.3, SuppII.7). Pietrick issued a response letter to Grealis advising that he had never previously been made aware of any such concerns or objections. Pietrick's response assured Grealis that "now that I have your objection, there will never be another incident where a firefighter is asked to assist or advise me on any personal matter or project of this nature." (A.r.4, Supp.363-64). The City did not introduce any evidence to even suggest that Grealis and the union felt the matter was anything but resolved following receipt of Pietrick's response. However, upon reviewing the Grealis letter and Pietrick's response, Mayor Clough placed Pietrick on paid administrative leave and initiated an investigation which the union certainly never requested.

A careful examination of the repairs at issue and the circumstances surrounding those repairs sheds light on the sound reasoning of the common pleas court. The 'fire house' (where the Chief's office was located at all times relevant) presents a rather unique working environment in which fellow employees cook each other meals, do each other's laundry, and offer other courtesies which are more commonly extended between family members than what is customarily observed at places of employment.

Firefighter-mechanic Christopher Gut ("Gut"), a 10 year veteran of the department who has been assigned as a mechanic since approximately 2000, described the "family relationship" that is naturally developed among members of the department who work rotating shifts of 24 hours on and 48 hours off. He further acknowledged that, as a result of this relationship, members routinely do each other favors. (Tr.103, Supp.103).

Gut testified that there is a general tradition of allowing employees to work on their vehicles while on shift when not performing other duties. Gut further testified that he is asked, from time to time, to assist in any repairs being performed and frequently advises his fellow firefighters during the course of their maintenance work. (Tr.99-100, Supp.99-100).

Firefighter-mechanic Todd Spriesterbach ("Spriesterbach"), a 20 year veteran of the department who has been assigned as a mechanic since approximately 1997, confirmed Gut's testimony that there is a general tradition of allowing employees to work on their vehicles while on shift when not performing other duties. Also mirroring Gut's testimony, Spriesterbach acknowledged that he is asked, from time to time, to assist in any repairs being performed and frequently advises other firefighters during their own repairs. (Tr.106-108, Supp.107-108). As Pietrick explained and the common sense of anyone remotely familiar with the politics of the 'fire house' would dictate, "firefighters help firefighters." (Tr.172, Supp.172).

The record shows a mere five or six instances, at most, over the course of six years in which any firefighter-mechanic was *asked*, but never ordered or coerced in any way, to assist Pietrick to varying degrees with his personal vehicles.[5] The specific instances of repairs purportedly providing the basis for the subject discipline are reflected in the record as follows:

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[5] Contrary to the City's purely speculative suggestion that Pietrick was somehow using a power of appointment to coerce the mechanics, Gut confirmed that the only mechanic who has ever been "replaced" by Pietrick was due to the retirement of that mechanic, not any discord with the Fire Chief. (Tr.104, Supp.104).

i. The Lawn Tractor

In either 2003 or 2004, Pietrick asked Gut to help him evaluate why his lawn tractor would not start. Gut easily diagnosed the tractor as having a broken rod through the simple use of a screwdriver. Gut further agreed, at Pietrick's request, to take apart the tractor so that he could show him where the problem originated and the specific part which needed replacing. Gut informed Pietrick where he could purchase the part needed for the repair and one week later Pietrick had removed the tractor from the bay[6] at the fire station, presumably to have the repairs performed elsewhere.

When Pietrick did ask Gut for this single favor, Gut in no way suggested that it made him feel 'uncomfortable.' Nor did he ever complain to his other superiors or the union. Gut and Pietrick never discussed the issue again and Pietrick did not request any further favors from Gut. Gut testified that there was no change in his relationship with Pietrick thereafter. (Tr.101-104, Supp.101-104).

ii. 1987 Nissan

Spriesterbach testified "to the best of his recollection" that he performed a repair on a 1987 Nissan which he *believed* belonged to Pietrick's mother. (Tr.111, Supp.111). Pietrick later clarified that the car belonged to him. (Tr.162, Supp.162). The repair involved replacing a front shaft. (Tr.111, Supp.111). Spriesterbach testified that Pietrick never threatened him with any adverse employment action or threatened him in any way whatsoever if he did not agree to do him this favor. He never expressed any complaint to any of the command staff or filed a contract grievance. (Tr.123-124, Supp.123-124).

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[6] To be clear, the "bay" refers to a "small mechanic's bay" at Station 2. Thus, any temporary use of the bay in no way hindered any traffic on the apparatus floor where the fire engines and ladder trucks would be parked and where the maintenance on those trucks was performed when necessary. (A.r.15, SuppII.6).

iii. 1992 Cadillac

In another instance, Spriesterbach recalled being asked to try and figure out why Pietrick's Cadillac – which was regularly driven (but not owned) by his minor son – was not steering properly. Pietrick asked Spriesterbach if he could do a diagnosis. Spriesterbach testified that "it was a quick diagnosis." (Tr.113, Supp.113).

Pietrick purchased the parts needed and recalled that Spriesterbach told him he would "be glad to help you put it on." Pietrick parked the car at the station but had to leave to make a fire safety presentation to the local Kiwanis meeting. He intended to assist in the repair and was "a little apprehensive" for Spriesterbach to do the repair by himself, but Spriesterbach told him not to worry and just drop it off, acknowledging that he had extended the same friendly courtesy to others within the department. (Tr.171, Supp.171).

Notably, this was the only occasion of any repair Pietrick requested in which he was not present to assist and "get dirty" because, by the time Pietrick returned from his meeting, the repair was done. (Tr.170-171, Supp.170-171). Spriesterbach filed no complaints and in no way indicated to Pietrick that the request made him feel uncomfortable.

iv. The Van

On another occasion, Spriesterbach offered his assistance in the repair of Pietrick's private van. The van had a problem with overheating, or at least the temperature gauge was "showing hot." Pietrick had already taken it to his regular mechanic who had performed a repair to the water pump which did not resolve the issue of overheating. He requested and Spriesterbach agreed to diagnose why the gauge was

running hot. Spriesterbach described the process as "a very simple diagnosis." He determined that the radiator was plugged. Pietrick purchased a new radiator and Spriesterbach agreed to install it for him. (Tr.114-115, Supp.114-115).

The City seemingly implies that this repair involved some improper use of public property by Pietrick when he used some antifreeze at the Station. However, Spriesterbach explained that when he took the radiator out, all of the antifreeze in the van was lost. He confirmed that Pietrick merely borrowed some of the antifreeze and promised that he would replace it. (Tr.116, Supp.116).

As in all other repairs Spriesterbach performed volitionally at the request of Pietrick or any other member of the department, he did not file a complaint or report the situation in any way to his superiors until pressured to do so by the union several years after the fact.

v. The Black Chrysler

The testimony of Spriesterbach about work performed on Pietrick's Chrysler was simply not accurate. He 'recalled' (i.e. to the best of his recollection from events which occurred 5 or 6 years in the past prior to the hearing) that he performed a brake job on the Chrysler. (Tr.116-117, Supp.116-117). However, Pietrick clearly recalled that all he requested and all Spriesterbach did was to diagnose whether a brake job was needed prior to Pietrick taking the car on vacation to Florida. Spriesterbach never performed any repairs on the brakes. Pietrick very specifically remembered, with proof of receipt, that the repair job was performed by a private mechanic in Westlake at an auto repair shop formerly owned by the Mayor's father. (Tr.162, Supp.162).

vi. Parts Pricing

Another issue constructed by the City involved some vague accusations that Pietrick may have used his public employment to improperly obtain discounts on certain parts needed. Of course, these accusations did not apply to the parts needed for any of the repairs discussed above. The City attempted to lead Spriesterbach into the testimony that Pietrick would ask him "to buy things or order things through the fire department[.]" But Spriesterbach correctly noted that Pietrick simply requested, on occasion, that he "bid out" prices on certain parts. Spriesterbach explained that he knew the people in most of the stores and that is why someone might ask him to call around. (Tr.117-118, Supp.117-118). Pietrick's testimony confirmed that he "got no discounts from anybody that anybody else wouldn't get that was a city worker." Spriesterbach simply knows "the best place to purchase" and NAPA, for instance, has a discount for all service workers, including but hardly limited to members of the fire department. (Tr.163, Supp.163).

Just as with any of the repairs, Pietrick was simply asking for a favor not uncommon among members of a fire department which Spriesterbach was free to refuse, just as Gut had refused without any form of repercussions. Quite often were the occasions when Pietrick would extend courtesies of his own, including donating his personal clothes washing machine to the department when Mayor Clough refused to provide the funds requested so that the firefighters would not have to wash their greasy rags in the same machine used to clean their uniforms. Pietrick's reciprocal courtesies also extended to allowing Gut to use (for over two years and free of charge) his ATV and outright gifting Gut his old mini-bike for his son to use. (Tr.161-162, Supp.161-162).

These types of relationships are hardly uncommon in smaller community fire departments like Westlake's. Pietrick had no reason to know that anything he requested would be objectionable. Not one of the mechanics ever raised any concerns to Pietrick until the Spring of 2007 when Todd Spriesterbach brought to Pietrick's attention that the union was pressuring him to make a complaint. (Tr.152, 123, 130, 103, 49; Supp.152, 123, 130, 103, 49). No complaint, grievance, and/or unfair labor practice charge was ever filed with the appropriate official(s). Similarly, any concerns over the repairs were never voiced during the regular Executive Board meetings and/or other Labor and Management meetings that Pietrick periodically held and attended (even though that would be the appropriate forum to discuss any such concerns with the fire chief). (Tr.155, Supp.155).

The City implies, without support, that Pietrick changed the appointment process for mechanics to gain some level of improper influence. However, while Spriesterbach acknowledged (when the City's counsel persisted) that there perhaps was somewhat of an 'uneasy feeling' with Pietrick being a superior officer, the issue of any conflict due to the appointment process was a point first raised by the union, not Spriesterbach, at the time it was pressuring him to make a complaint. But Spriesterbach never filed any complaint. In fact, he told the City that he liked Pietrick and would help him out if and when possible. (A.r.15, pg.6, SuppII.10).

There is simply no written policy or procedure that prohibits a member of the fire department from working on a vehicle if not currently assigned to other duties. Nor is there any written policy that precludes a mechanic from assisting that firefighter in doing the work or voluntarily performing the work for him/her. (Tr.126, 102, 88; Supp.126,

102, 88). As such, Pietrick was never charged by the Mayor as having violated any specific rules, regulations or policies of the fire department. (Tr.88, Supp.88). Prior to the instant matter and through the current time, not one other individual had been disciplined or investigated even though many members of the fire department willingly participate in this practice of the department's mechanics working, as a courtesy, on the cars of their fellow firefighters and superior officers when assistance is requested.

Contrary to the City's suggestions, there is absolutely no credible evidence that Pietrick coerced any mechanic to make the repairs. In his November 2, 2007 letter, the Mayor indicated that "your request caused the mechanic to feel uncomfortable and created the perception that if the request was not fulfilled he might not be reappointed." (A.r.6; Supp.381-82). However, contrary to the Mayor's unsupported allegation, the Greenberg Report summarized the investigative findings on these issues as follows:

> For the reasons below, we conclude that, although Chief Pietrick did, in fact, have such repairs performed, *he did not employ any coercion, duress, or other undue influence to obtain these repairs*. Therefore, we conclude that no criminal violation occurred.
>
> * * * * *
>
> There is no credible evidence that Chief Pietrick used his power of appointment/reappointment to the Mechanic position to influence or force Spriesterbach or Gut to make any repairs.
>
> * * * * *
>
> We do not, however, conclude that an ethics violation actually occurred.
>
> * * * * *
>
> [T]here is very little evidence to suggest that Chief Pietrick in fact used the authority of his office to force Spriesterbach and Gut to make the personal repairs at issue.

(A.r.5, Supp.365, 377, 378) (emphasis added). Consequently, the Mayor's sole basis for demotion and suspension was contradicted by the City's retained investigator, is unsubstantiated in the record, and should not have been upheld by the civil service commission.

d. The McGrath Reports

As stated previously, any findings in the McGrath Reports which issued following two audits requested by Pietrick himself can not be relied upon as providing any basis for the subject discipline. Nonetheless, because the City discusses those findings at length, this Court may find useful a clarification of the circumstances surrounding the issuance of the reports and the contents thereof. Furthermore, the disputes which arose between the Mayor and Pietrick, as well as between the union and Pietrick, following these reports strongly suggests that the issue with the mechanics was merely a subterfuge for imposing discipline Mayor Clough subjectively desired but the McGrath Reports did not warrant.

For several years, Pietrick and the union had been lobbying the Mayor to have an external and independent audit performed on the fire department. For whatever reason, Mayor Clough had resisted these efforts until finally agreeing in 2005 to hire McGrath & Associates to perform the audit. (Tr.27, Supp.27).

Following the issuance of the first McGrath Report, the relationship between the Mayor and Pietrick began to decline rapidly. Pietrick wanted to institute a three to seven year plan to address what was in the assessment. The Mayor insisted that corrective measures be taken more expeditiously but refused to support Pietrick's request for the necessary additional funding. At this time, Pietrick's evaluations from the Mayor suddenly and dramatically dropped. He was denied a pay raise for the first time in 2006,

in addition to being denied personal time, holiday time, and vacation requests. The Mayor went so far as to deny Pietrick the ability to attend funeral services of a retired Captain who had acted as his mentor in the department. Pietrick interpreted all of this as "pay back" for requesting the report. (Tr.139-42; Supp.139-42).

Pietrick was already not in good standing with the rank and file due to the presumably unpopular (i.e. stricter) measures he was forced to institute to account for any deficiencies identified in the first report and meet the Mayor's unreasonable demands for unrealistic expediency. On top of those difficulties, the Mayor requested Pietrick's resignation, which he refused to tender. (Tr.35; Supp.35). Unable to coerce a resignation, the Mayor needed 'cause' to remove Pietrick and the McGrath Reports obviously failed to provide that cause. The Mayor became frustrated and that is why he so strongly latched onto the relatively minor issue with the mechanics in an attempt to destroy Pietrick's exemplary civil service record and finally accomplish what he had been seeking – Pietrick's removal as Fire Chief.

LAW AND ARGUMENT

Introductory Discussion of Law

All four propositions of law submitted for review are (as written) premised on either a fundamental misunderstanding or gross overexpansion of the Eighth District's rationale and ultimate decision. Nothing in that decision suggests that a finding of criminal or unethical conduct is required to discipline a public employee under R.C. 124.34. Nor does the rationale of the decision rely upon any analysis or application of the concept of 'progressive discipline.'

The relevant inquiry for the court of appeals was limited to an analysis of the common pleas court's exercise and scope of discretion in administrative appeals brought pursuant to R.C. 124.34 on questions of law and fact. That remains the relevant inquiry in this case. Because the City and OML largely (or perhaps even completely) ignore the applicable precedent relative to administrative appeals on questions of law and fact brought pursuant to R.C. 124.34, and the effect thereof on the scope of judicial review, a detailed discussion of the precedential authority is provided in advance of responding more specifically to each of the misplaced propositions of law.

a. The effect of Pietrick being a member of the classified civil service.

More and more commonly throughout the State of Ohio, department heads in home-rule municipalities, including police chiefs and fire chiefs, are political appointees who serve at the pleasure of the Mayor or other executive head of the City, Village, or Township. The people of the City of Westlake, however, have elected to maintain the department heads of the City's police and fire forces in the classified civil service and have, thereby, afforded all the protections that accompany that classification.

Article IV, Sec. 2 ("Department Heads"), subsection (a) of the Westlake City charter provides in relevant part:

> All department heads except the Chiefs of Police and Fire, whose appointments shall be governed by applicable civil service laws, rules, and regulations...
>
> * * * * *
>
> The appointment or dismissal of the Police or Fire Chief shall be governed by applicable civil service laws, rules, and regulations.

(Appx. 3).

Article IV, Sec. 12 ("Civil Service Commission"), subsection (c) of the Westlake City charter provides:

> Classification of Service. The Civil Service of the Municipality is hereby divided into the Classified and Unclassified Service. Classified Service shall include: Police Officers, Firefighters/Paramedics, and other sworn members of the Department of Police and Fire. The Unclassified Service shall include all other positions not specifically included in the Classified Service by this provision or other provisions of the Charter of the City of Westlake.

(Appx. 15).

Not only is the position of Fire Chief in the classified civil service, it is a *competitive* classified civil service position. Civil Service Rule IX ("Appointment"), Sec. 5.1 provides for a promotional examination to be administered whenever a vacancy is created in the position of Fire Chief. (Appellants' Appx. 92).

Members of the classified civil service are not "at-will" employees. Regardless of whether "just cause" is the appropriate term, the appointing authority must have justifiable and articulable reasons for any removal, suspension, demotion, or other adverse employment actions taken against such employees. Revised Code Section 124.34(A) guarantees continued employment for classified civil servants during times of good behavior and efficient service by providing, in relevant part, as follows:

> The tenure of every officer or employee in the classified service of the... cities... of the state, holding a position under this chapter, shall be during good behavior and efficient service. No officer or employee shall be reduced in pay or position, fined, suspended, or removed, or have the officer's or employee's longevity reduced or eliminated, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of this chapter or the rules of the director of

> administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony.

(Appellants' Appx. 70-72).

At the administrative level, as acknowledged by the City's trial board and its civil service rules, the burden of establishing "that the administrative action undertook was proper and for cause" rests with the employer. (Tr.12-13; Supp.12-13; Appellants' Appx. 98, Civil Service Rule XII "Hearing Procedure" Section 3).

b. The particular application of Revised Code Section 124.34(C).

The City suggests that the common pleas court abused its discretion when it substituted its judgment for that of the civil service commission. However, the authority relied upon by the City is not applicable to these proceedings. Here, the common pleas court was statutorily authorized to conduct a trial de novo on questions of law and fact and owed no deference to the findings of fact or judgment of the civil service commission. Further, because of the *de novo* standard of review, the burden of proof remained on the City to prove that the administrative actions taken were supported by reliable, probative and substantial evidence. *Cupps v. City of Toledo*, 172 Ohio St. 536 (1961), at syllabus ¶ 1.

Civil service employees in Ohio appealing an adverse administrative decision of a municipal civil service commission have the option of filing their administrative appeals pursuant to either Chapter 119 (and Chapter 124 when applicable) or Chapter 2506 of the Ohio Revised Code. Cf. *Crocket v. Robinson* 67 Ohio St.2d 363, 365 (1981); *Wolf v. City of Cleveland*, 2003-Ohio-3261 (App. 8 Dist.); *Ward v. City of Cleveland*, 2002-Ohio-482 (App. 8 Dist.). Pietrick filed his appeal pursuant to Ohio Revised Code Chapter 119 and

R.C. 124.34 on questions of law and fact. (SupplI.1-4). Subsection C of R.C. 124.34, which applies *only* to police officers and firefighters in the classified civil service of the cities and civil service townships, provides added discretion and latitude in judicial review of adverse employment actions affecting the tenure of those specific civil servants.

Due to the *de novo* nature of the review **"[t]he evidence must be considered anew as if there had been no proceeding before the commission."** *Ward*, citing *Lincoln Properties, Inc. v. Goldslager*, 18 Ohio St.2d 154 (1969). Accordingly, **the common pleas court owes no deference to the findings and judgment of the civil service commission and may substitute its own judgment based upon its own independent examination and determination of the evidence in the record.** *Id.*, citing *Newsome v. Columbus Civ. Serv. Comm.*, 20 Ohio App.3d 327 (App. 10 Dist. 1984).

Given this key distinction between R.C. 124.34(C) appeals on questions of law and fact and other administrative appeals, puzzling is the City's significant and undeterred reliance on *Mauer v. Franklin Cty. Treasurer*, 2008-Ohio-3468 (App. 10 Dist.) The employee at issue in *Mauer* was not a police officer or firefighter entitled to the level of judicial review afforded to the dedicated safety force members targeted by R.C. 124.34(C). In fact, *none* of the cases cited by the City involves an administrative appeal to which R.C. 124.34(C) is applicable.

Mauer involved a county employee appealing his termination from the Treasurer's office. Explaining the common pleas court's review under the circumstances presented in that case, the Tenth District stated:

> The common pleas court's "review of the administrative record is neither a trial *de novo* nor an appeal on questions of law only, but

> a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207.

Mauer at ¶15. While the *Mauer* court took special care to emphasize the deference which the lower court was required to afford the decision of the State Personnel Board of Review, no such deference was owed in *this* case. As has been consistently determined by caselaw interpreting R.C. 124.34(C), the common pleas court was free to substitute its judgment for that of the civil service commission.

The City focuses on one non-applicable sentence in paragraph 16 of the *Mauer* decision which provides that "[w]here the evidence supports the board's decision, the common pleas court must affirm the board's decision and has no authority to modify the penalty." Demonstrating the above noted distinction, however, the very next sentence of the *Mauer* court's decision states, "[u]nder such circumstance, the common pleas court may not substitute its judgment for that of the board." Clearly, under *these* circumstances involving a R.C. 124.34(C) appeal, the trial court *did* have proper authority to substitute its judgment for that of the civil service commission. See *Ward*, supra; *Chupka v. Saunders* 28 Ohio St.3d 325 (1986); *Raisk v. Brewer*, 2003-Ohio-1266 (App. 12 Dist.)

The City also directs this Court to *Franklin Cty. Sheriff v. Frazier*, 2007-Ohio-7001 (App. 10 Dist.). While *Frazier* at least involved adverse employment action taken against a safety force employee (the county sheriff), the decision still did not involve the classification of employee which would trigger the provisions of R.C. 124.34(C). Subsection C applies solely to members in the police and fire departments of cities and civil service townships. The same elevated civil service protections are not extended to county sheriffs and their deputies.

Recognizing a clear legislative intent to provide added employment safeguards to police officers and firefighters, courts in Ohio have uniformly differentiated between standards applicable to appeals brought by the employees identified in R.C. 124.34(C) and other classified civil servants. See, e.g., *Sandusky v. Nuesse*, 2011-Ohio-6497 (App. 6 Dist.); *Williams v. Akron*, 141 Ohio App.3d 724 (App. 9 Dist. 2001); *Caudill v. Brunswick*, 2011-Ohio-5337 (App. 9 Dist.); *Baron v. Civil Service Board of Dayton*, 2012-Ohio-6179 (App. 2 Dist.) While the City urged the common pleas court and the court of appeals to apply the deferential standard of review applicable to non-R.C. 124.34(C) appeals, doing so would have constituted reversible error. As discussed by the Second District in *Baron*:

> {¶ 13} The trial court erred in applying the deferential standard set forth in R.C. 119.12 and discussed in *Bartchy* in Baron's case. Although R.C. 119.12 generally applies to administrative appeals, R.C. 124.34 sets forth the appeal procedure from an administrative action involving the suspension, fine, demotion or removal of "any member of the police or fire department of a city or civil service township, who is in the classified civil service." R.C. 124.34(C) * * *
>
> {¶ 14} **It is well settled that, when a conflict exists between a specific provision of law and a general provision, the specific provision prevails**. See R.C. 1.51; *Meerland Dairy L.L.C. v. Ross Twp.*, 2d Dist. Greene No. 07CA0083, 2008–Ohio–2243, ¶ 18; *Palco Invest., Inc. v. Springfield,* 2d Dist. Clark No.2004 CA 80, 2005–Ohio–6838, ¶ 11, citing *Love v. Port Clinton,* 37 Ohio St.3d 98, 99, 524 N.E.2d 166 (1988). Thus, **while some of the general provisions of R.C. 119.12 may apply to a firefighter's appeal from the decision of the Civil Service Board, the common pleas court is required to apply the standard of review set forth in the more specific statute, R.C. 124.34, which permits de novo review of questions of law and fact**. In Baron's case, the standard of review discussed in *Bartchy,* which was a general administrative appeal unrelated to the removal of a police officer or firefighter in the classified civil service, was not controlling.

> * * * * *
> {¶ 16} R.C. 124.34 allows an appeal on questions of law and fact from the decision of the municipal or civil service commission to the court of common pleas after an intermediate appeal to the municipal or civil service township civil service commission, **and grants the court of common pleas the authority to affirm, disaffirm, *or modify* the judgment of the appointing authority.** [*Resek*]. An appeal under this section involves a rehearing and retrial of a cause upon the law and the facts; i.e. a trial *de novo.* See R.C. 2505.01(A)(3).
>
> Thus, **under R.C. 124.34 a court may substitute its judgment for that of the administrative tribunal.**

(Emphasis added). As confirmed by the Twelfth District in *Raizk*, modifying the penalty itself is within the common pleas court's discretion:

> {¶ 25} Additionally, we conclude that the trial court did not abuse its discretion by substituting its judgment for that of the commission when it vacated the portion of the commission's order restricting Brewer from seeking promotion to the position of fire chief for 180 days.

c. The appellate standard of review

The appropriate standard of review for the court of appeals reviewing a common pleas court's decision on a R.C. 124.34 appeal has been appropriately stated as follows:

> In reviewing the common pleas court's decision on an administrative appeal pursuant to R.C. 124.34 and 119.12, the appellate court's review is limited to a determination of whether the common pleas court's decision is supported by reliable, probative and substantial evidence and is in accordance with law. *Wolf,* supra at ¶10, citing R.C. 119.12; *Arlen v. State* (1980), 61 Ohio St.2d 168, 399 N.E.2d 1251; *Ohio State Bd. of Pharmacy v. Poppe* (1988), 48 Ohio App.3d 222, 549 N.E.2d 541. This court's review, therefore, is limited to a determination of whether the court of common pleas abused its discretion. Id., citing *In re Barnes* (1986), 31 Ohio App.3d 201, 208, 510 N.E.2d 392. Abuse of discretion suggests more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

> ***"'The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *In re Barnik*, Cuyahoga App. No. 88334, 2007-Ohio-1720, at ¶9, quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264.

Ruck v. Cleveland, 2008-Ohio-1075 (App. 8 Dist.) (emphasis added). Therefore, the focus of this appeal should be steered away from unnecessary inquiries into whether some random dicta from the Eighth District's Journal Entry and Opinion could be misapplied in the future, and instead focused on whether any flaw in the reasoning warrants reversal of the *decision*. The court of appeals decision, which also denied Pietrick's cross-appeal, was simply that the common pleas court did not abuse its discretion in *either* upholding the issuance of discipline or modifying the discipline imposed.

Appellants' Proposition of Law No. 1: Criminal or unethical conduct is not a pre-requisite to a finding that a public employee has engaged in neglect of duty or failure of good behavior pursuant to R.C. 124.34.

OML's Proposition of Law No. 2: A public employee may be disciplined under R.C. 124.34 for acts of misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior, regardless of whether a criminal act or ethical violation occurred.

Because Appellants' first proposition of law raises the same issue as OML's second proposition of law, Pietrick will respond to both propositions together. **Pietrick does not disagree with either of these propositions of law as written**. He never has argued that a finding of criminal or unethical conduct (as defined by Ohio law), or lack thereof, is anything more than a *consideration* which can be used in determining both

whether discipline should be imposed and whether the degree of discipline imposed was warranted. Moreover, neither of the lower courts determined that a finding of criminal or unethical conduct is a "pre-requisite" to a finding that a public employee has engaged in conduct warranting some form of discipline. Conclusive of this simple fact is that **significant discipline – demotion and a 30-day unpaid suspension – was indeed <u>upheld</u> in the absence of any finding of criminal or unethical conduct**.

The common pleas court did not even list the lack of any unethical or criminal finding in the discussion provided in its decision. (Appellants' Appx.40-44). The court of appeals cited to the lack of any such finding in the Greenberg Report simply as one of many considerations providing support (but hardly *the* sole basis) for the trial court's decision. (Appellants' Appx.18). While the presence of criminal or unethical conduct would certainly be relevant to the inquiry, the absence of the same is also relevant.

The City either has already forgot or willfully ignores that the court of appeals also affirmed the decision to demote Pietrick from his civil service position as Fire Chief, as well as the suspension, when it denied Pietrick's cross-appeal.[7] Therefore, no logical argument can be made that the court of appeals decision *requires* that a public employee must have engaged in criminal or unethical behavior to be disciplined for neglect of duty or failure of good behavior pursuant to R.C. 124.34. While it is absolutely true that Pietrick did not engage in any criminal or unethical behavior – as now confirmed by the City's own investigator, the trial court, and the court of appeals – significant disciplinary

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[7] Pietrick filed a cross-appeal when the City rejected the resolve offered by the common pleas court decision by instituting an appeal in the Eighth Appellate District. His cross-appeal simply argued that if the common pleas court did indeed abuse its discretion by upholding the imposition of discipline after determining that the discipline imposed was not warranted, the error was to the prejudice of Pietrick, not the City.

action was upheld nonetheless and the above stated propositions of law, therefore, are not applicable to any issue the decisions below offer for this Court's review.

<u>OML's Proposition of Law No. 1:</u> In the absence of an applicable collective bargaining agreement requiring progressive discipline, R.C. 124.34 does not require progressive discipline and a trial court abuses its discretion when it reduces a disciplinary penalty rank because the employee who is not covered by a collective bargaining agreement, had no other prior reprimands or disciplinary action.

OML's second proposition of law, which is touched upon randomly by the City in its own merit brief, is similarly far afield of the issues properly before this Court. The common pleas court did not require any form of progressive discipline. Instead, the court merely *considered*, inter alia, Pietrick's "tenure" with the department as a mitigating factor. The court took into account several considerations, including but not limited to: (1) the absence of any applicable work rules or policies, (2) the lack of any similar prior complaints, (3) the want of any specific directives or guidelines discouraging the practice at issue, (4) the non-existence of any adverse employment action taken by Pietrick against any of the mechanics for non-compliance with his requests for assistance, (5) Pietrick's response to the union letter acknowledging the concerns and assuring that no further requests for assistance would be made, (6) the circumstances surrounding the issuance of the union letter and the extremely high tensions at the time, and (7) the patently obvious ulterior motives of the Mayor. (Appellants' Appx.42-43).

Simply because the common pleas court took note of Pietrick's long and exceptional tenure as a member of the City's fire department in reaching its ultimate decision on whether his tenure was justifiably disturbed, does not mean that it required that the City adhere to the tenets of progressive discipline. The fact that Pietrick had no prior disciplinary action in his civil service file was a valid and important consideration

when applied to the facts of this case. Yet in no way is OML correct in suggesting that the trial court premised its decision *solely* on a lack of disciplinary history or that it even remotely considered the tenets of progressive discipline as a guiding factor.

Certainly, the trial court did consider the fact that Pietrick had no disciplinary history through the various ranks he held in his decades with the fire department, but the trial court's decision is much more comprehensive and detailed than one single consideration. Indeed, the trial court took several factors under advisement and the lack of disciplinary history was simply one factor it took into account while reviewing and weighing the entire evidentiary record.

If the reverse situation was presented, and the record demonstrated that Pietrick had a disciplinary history replete with reprimands, suspensions, and other adverse employment actions, OML certainly would not be before this Court suggesting that the Court may not consider the relevant employment history. Just as a long disciplinary record suggests a lack of fitness for duty, a civil service file spanning several decades yet lacking even the hint of any conduct worthy of discipline suggests quite the opposite.

Many courts and arbitrators have issued varying tests to determine whether 'cause' was established for a given adverse employment action. Each and every generally accepted and respected test for determining whether 'cause' has been established by the employer takes into consideration the past disciplinary history of the employee. Again, it is simply a consideration and not the determining factor, as it may or may not be under certain collective bargaining agreements. The relevance and weight to be given to any finding of past disciplinary history or lack thereof generally depends on the totality of the circumstances. Here, the lack of disciplinary history only *further*

established that the discipline imposed was driven largely by the improper and ulterior motives of the Mayor.

<u>Appellants' Proposition of Law No. 2:</u> Regardless of the term of art used to describe the conduct subject to discipline, the Court of Common Pleas upheld the Appellants' determination that Appellee engaged in neglect of duty and/or failure of good behavior.

The City believes that, so long as any 'failure of good behavior' (no matter how trivial) is shown, its ability to discipline its civil service employees (up to and including termination) is completely beyond judicial review. In essence, the City seeks a declaration from this Court that the common pleas court was without discretion, in its *de novo* review on questions of law and fact, to evaluate whether the discipline imposed was unwarranted and/or excessive.

As clearly established above, the common pleas court did hold the discretion to substitute its judgment for that of the civil service commission given the latitude in judicial review provided by the General Assembly. But even putting aside general legal authority on the issue, this Court may find relevant the discretion possessed by the Westlake civil service commission in this very case. Specifically, pursuant to the commission's own rules, and upon appeal by the adversely affected employee, it may "affirm, disaffirm or modify the judgment of the appointing authority." (Rule XI, Sec. 2, Appellants' Appx.96). Because the civil service commission had the authority to "modify" the judgment of the appointing authority, the common pleas court certainly possessed the same discretion in its *de novo* review. The court exercised that very discretion and nothing about its decision is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.

The common pleas court found that the City failed to meet its burden of proof and, consequently, refused to affirm the order of demotion. The court therefore determined that that the City failed to prove what it alleged – i.e. that Pietrick is guilty of conduct warranting the discipline imposed by the City. Nonetheless, the court stopped short of reinstating Pietrick to his position as Fire Chief because "the City of Westlake *may* have been justified in stripping [Pietrick] of his position[.]" (Appellants' Appx.43) (emphasis added). While it is questionable that such a tentative finding of *possible* grounds to support *some* level of discipline provided a reasonable basis for removing Pietrick as Fire Chief, it in now way equates with a finding that the City satisfied the burden of proof necessary to justify the severe punishment initially imposed by the City.

Regardless of how the City attempts to twist the dicta in the lower court decisions to label them as something they are not, the common pleas judge plainly and for good cause determined that the civil service commission's decision was not supported by the requisite degree of evidence. The court's review concerned the civil service commission's decision to uphold the full extent of the discipline imposed by Mayor Clough, and was not simply limited to whether Pietrick's conduct merited some form of discipline.

In addition to the reasons explicitly cited by the trial court, the record on appeal clearly establishes why the life-altering and career debilitating demotion imposed by the City was not warranted under the circumstances. Pietrick had absolutely no knowledge that requesting a mechanic to assist in the repair of his personal vehicle would result in

him losing everything he has worked so hard for over the past 25 years and cause him such monumental economic harm.[8]

The record also establishes that the actions alleged to be the basis for discipline in no way interfered with the orderly, efficient, and safe operation of the Fire Department. (Tr.103, 126, Supp.103, 126). Notably, the only time an objection to the practice was ever raised was during a period of high tension between the union and Pietrick which boiled over into Grealis's letter of June 6, 2007. While Pietrick subsequently admitted that he might have made an error in judgment, it was all in the family atmosphere of the fire house where firefighters help other firefighters with various personal issues. As Provisional Chief Janicek testified:

> Q: Nobody stopped the practice so everybody assumes when the practice is occurring that it's okay to do?
>
> A: Correct.

(Tr.88; Supp.88).[9]

The trial court's findings closely mirrors the findings of the City's own investigator. The Greenberg Report determined that the mechanics were never ordered to perform any of the repairs, and that the repairs were done as a favor. Spriesterbach also admitted to Greenberg that making the repairs did <u>not</u> interfere with his normal routine duties for the Fire Department. Spriesterbach further acknowledged that Pietrick never

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[8] Pietrick testified that the subject discipline, in addition to the complete loss of pay and benefits (including healthcare) for the 30 day suspension, results in a loss of income ranging from $30,000 to $39,000 per year. (Tr.165, Supp. 165).

[9] Janicek acknowledged he was complicit in the alleged wrongdoing by never reporting the incidents of repair to anyone. Janicek also recognized his personal stake in this matter, knowing that he stands to replace Pietrick as Fire Chief. (Tr. 85, 86, 92, 94, Supp. 85, 86, 92, 94)

suggested or intimated that if the repairs were not performed, that his mechanic designation would not be renewed. The investigator concluded it is virtually impossible to make any informed judgment about the repairs being of such value as to manifest a "substantial and improper influence." Moreover, when the Union objected to the practice, Pietrick apologized for any perceived impropriety and honored the Union's wishes. (A.r.5; Supp.365-80).

Admittedly, the Greenberg Report did suggest some level of poor judgment on Pietrick's part, a finding with which the common pleas court concurred. However, the question for the trial court then became whether or not a tentative finding of "poor judgment" in the face of the applicable mitigating circumstances and such an exemplary career in the civil service warrants a demotion from the highest to the lowest grade position in the Fire Department, along with a 30-day unpaid suspension. The court, exercising its discretion, obviously found that it did not warrant the full extent of the discipline upheld by the civil service commission and modified the order accordingly.

Demotion has an extremely heavy impact when used as discipline because of its everlasting effect on the employee. Not only is the employee disciplined immediately for the activity he was involved in, but the discipline is ongoing in that it affects his wage for a continuing and lasting period of time, often indefinitely. Taking into account the totality of the circumstances surrounding the subject mechanical repairs, the lack of bad faith, the apology that Pietrick provided to those involved, his promise to never again engage in conduct of this nature, and his exemplary record as a Firefighter, Lieutenant, Captain, and Chief, the discipline handed down by the City was clearly excessive and the modification ordered by the common pleas court was indeed reasonable.

Certainly, a Fire Chief (especially one who holds office for more than 10 years) will exhibit *some* limited instances of poor judgment. But do those limited instances, especially when they are not in violation of any written rule and when they cease immediately as soon as any concern of impropriety in their continuation is raised, justify stripping away multiple levels of promotion the Chief has achieved over the course of several decades? The common pleas court answered this question in the negative.

Closing Commentary:

As a classified civil servant, Pietrick had a protected property right in his continued employment as Fire Chief. See *Ohio Assn. of Pub. School Emp. v. Lakewood Bd of Edn.* (1994), 68 Ohio St.3d 175; *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532 (1985). In violation of the tenets of due process, Pietrick was denied a fair hearing due to lack of objectivity (on Mayor Clough's part which the City readily admitted to in its opening statement), the failure of notice, and the improper and ulterior motives for which the discipline was imposed.

As is established by the evidence in the record, the true motivating force driving the Mayor's "investigation" of Pietrick had nothing to do with any automobile repair practice. During direct examination, Mayor Clough spent an inordinate amount of time discussing the McGrath Reports. As they had no relevance to the specific charges levied against Pietrick, the McGrath Reports were introduced into the record in an attempt to sully the reputation of Pietrick and somehow provide support for the disciplinary action. Pietrick was essentially 'sand-bagged' with the City's arguments on this point, having prepared for a hearing which was supposed to concern an automobile repair practice never once mentioned in the McGrath Reports. Regardless, the McGrath Reports did not

recommend or otherwise suggest a change in the Fire Department's management, just its management style. (A.r. 13, Supp. 176-361).

The second McGrath Report acknowledged and noted the following relative to the continually deteriorating relationship between Mayor Clough and Pietrick:

> Not much has changed in the relationship between the Mayor and the Fire Chief. The Mayor lacks confidence in the Fire Chief and expressed his expectations that the Fire Chief needs to manage the department more effectively. The Fire Chief was not afraid to express his position which included a statement that he has no intention of retiring, accepting reassignment or resigning...

(A.r.14, Pg. 31, Supp.349). While the Mayor sought Pietrick's resignation, Council never expressed any such desire to Pietrick. In fact, at the urging of other City officials, a "truce" meeting was held at City Hall in hopes that the dispute could be resolved and Pietrick and the Mayor could return to a harmonious relationship. (Tr.145, Supp.145).

Unfortunately, the Mayor was not interested in any "truce" and began to secretly solicit support for the Chief's removal. The Mayor specifically sought a vote of "no confidence" from the Union and attempted other forms of improper influence on the rank and file members of the department to undermine the Chief's standing and authority. (Tr.66-70, Supp.66-70).

Having used both McGrath Reports to try to coerce Pietrick's resignation, denying him use of personal time, hampering his attempts to satisfy the training requirements of the Fire Department, and having failed in his attempt to obtain a no confidence vote from the union, the Mayor kept a watchful eye for another vehicle to get rid of Pietrick. In the Mayor's opinion, that vehicle was provided in the form of a carbon copy he received of the Grealis letter of June 6, 2007. (A.r. 3, Supp.362). Clearly, the

Mayor used this letter and its contents as a means to accomplish what he could not through proper disciplinary procedure.

In the end, Pietrick was the subject of unwarranted and harsh discipline that will haunt him for the rest of his career as a public servant, not to mention the enormous financial impact it has on his earning potential.

CONCLUSION

For all the foregoing reasons, Pietrick respectfully requests that this Honorable Court sustain the judgment of the court of appeals in full.

Respectfully submitted,

JOSEPH W. DIEMERT, JR. (0011573)
(counsel of record)
receptionist@diemertlaw.com
THOMAS M. HANCULAK (0006985)
tmhanculak@aol.com
DANIEL A. POWELL (0080241)
dapowell@diemertlaw.com
Diemert & Associates Co., L.P.A.
1360 S.O.M. Center Road
Cleveland, Ohio 44124
(440) 442-6800 (telephone)
(440) 442-0825 (facsimile)

Counsel for Appellee
Richard O. Pietrick

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief has been sent by regular U.S. Mail on the 17th day of September, 2013 to the following:

John D. Wheeler
Robin R. Leasure
27700 Hilliard Blvd.
Westlake, Ohio 44145

Counsel for Appellants
City of Westlake, et al.

Phillip Hartman
Rebecca K. Shaltenbrand
Stephen J. Smith
Ice Miller LLP
250 West Street
Columbus, Ohio 43215

John Gotherman
Ohio Municipal League
175 South Third Street, #510
Columbus, Ohio 43215

Counsel for Amicus Curiae
The Ohio Municipal League

DANIEL A. POWELL (0080241)

Counsel for Appellee

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APPENDIX

ARTICLE IV
ADMINISTRATIVE OFFICES

SECTION IV-1. SPECIFIC PROVISIONS.

(a) Departments. A Department of Law, Department of Finance, and Department of Public Service are hereby established by this Charter and Council shall provide by ordinance for the organization thereof. Each department shall be headed by a director, except Police and Fire which shall be headed by chiefs. The Council may by ordinance provide for the establishment and organization of other departments or divisions thereof and may provide for the abolishment or combination of any department or division not established by this Charter.

(Amended 11-2-10.)

(b) Boards and Commissions. A Board of Zoning Appeals, Planning Commission, Civil Service Commission and Board of Building Appeals are hereby established by this Charter. In addition to the boards and commissions so established by this Charter, Council may by ordinance provide for the establishment of additional boards and commissions and prescribe their powers and duties. Such additional boards and commissions may be abolished by Council.

(Amended Nov. 2, 1965.)

SECTION IV-2. GENERAL PROVISIONS.

(a) Department Heads. All department heads except the Chiefs of Police and Fire, whose appointments shall be governed by applicable civil service laws, rules, and regulations, and the Director of Law, who shall be elected, shall be appointed by the Mayor subject to the confirmation by a majority of the members of Council. Dismissal of any department head by the Mayor, with the exception of the Director of Law who shall be elected, shall require the approval of a majority of the members of Council. The appointment or dismissal of the Police or Fire Chief shall be governed by applicable civil service laws, rules, and regulations. All department heads shall perform such duties consistent with their office as shall be required by this Charter, by ordinance, or as directed by the Mayor.

(Amended Nov. 2, 2004.)

(b) Salary of Department Heads. The starting salary of each department head at the time of appointment shall be considered the base salary and there shall be no reduction of salary below the base salary during the appointee's tenure of office.

(Amended Nov. 7, 1972.)

(c) Board and Commission Appointees. Except as otherwise provided by this Charter, the Mayor shall appoint, dismiss, or suspend any members of the various boards and commissions subject to the confirmation of a majority of the members of Council. Such appointees shall be qualified electors of the City and shall reside in the City during their term of office. They shall serve without compensation unless otherwise provided by ordinance.

(Amended Nov. 7, 1972.)

(d) Continuation in Office. On January 1, 1966, the Board of Building and Zoning Appeals shall become the Board of Zoning Appeals. Each present member of the Board of Building and Zoning Appeals, Planning Commission, and Civil Service Commission shall continue to serve until the expiration of his present term or until the appointment of his successor has been confirmed by Council.

The terms of the members first appointed to the Board of Building Appeals shall commence January 1, 1966, and, except as provided in subsection (f) hereof, each member subsequently appointed to said Board and each member appointed to any other board or commission established by this Charter shall be appointed for a term of four years, which term shall commence upon the expiration of the term of his immediate predecessor on such board or commission.

(Amended Nov. 7, 1972.)

(e) Reappointment. A member of any board or commission established by this Charter shall be eligible for reappointment.

(Amended Nov. 7, 1972.)

(f) Vacancy. A vacancy occurring during the term of any member of a board or commission established by this Charter shall be filled for the unexpired term in the manner authorized for an original appointment.

(Amended Nov. 7, 1972.)

SECTION IV-3. DEPARTMENT OF FINANCE.

(a) General Duties. The Department of Finance shall be headed by the Director of Finance who shall be the chief fiscal officer of the Municipality and of the several departments and offices thereof. He shall keep an accurate account of all taxes and assessments, of all the assets and liabilities of the Municipality, of all receipts and disbursements of the Municipality and of all appropriations made by the Council. He shall examine and approve, if in proper form, and if an appropriation has been duly made therefor, payrolls, bills, and other claims, and prepare and sign all warrants.

(Amended Nov. 2, 1965.)

(b) Appropriations and Reports. He shall be responsible for the preparation and submission of appropriation measures and shall assist the Mayor and Council in the preparation of estimates, budgets and other financial matters. He shall submit to Council through the Mayor at the second regular Council meeting of each succeeding month, a monthly statement showing:

All receipts had during the preceding month.

All disbursements made during the preceding month.

A cumulative statement for each appropriation showing:

Amount of appropriation;

Amount expended against the appropriation at the end of the preceding month;

Balance remaining.

The foregoing statement shall be in such further sufficient detail as may be required by Council to show the exact financial condition of the Municipality.

(c) Collections. He shall be the collector and the custodian of all monies of the Municipality, including license fees, fines, court costs and waivers. He shall receive and preserve such monies in such manner and in such places as the Council shall direct. He shall also receive and disburse all other public monies coming into his hands, pursuant to such requests as may be prescribed by the authorities having lawful control over such funds.

(d) Certification. No contract, agreement or other obligation involving the expenditure of money shall be entered into by any officer of the Municipality, nor shall any ordinance, resolution, or order for the expenditure of money be passed by Council, unless he first certifies to Council or to the proper officer, as the case may be, that the money required for such contract, agreement, obligation or expenditure is in the treasury, to the credit of the fund for which it is to be drawn, or in the process of collection, and not appropriated for any other purpose, which certificates shall be filed and immediately recorded. The sums so certified shall not thereafter be considered unappropriated until the Municipality is discharged from the contract, agreement or obligation.

(e) Funds Subject to Certification. All monies actually in the treasury to the credit of the fund from which they are to be drawn, and all monies applicable to the payment of the obligation or appropriation involved, that are anticipated to come into the treasury before the maturity of such contract, agreement or obligation, from taxes or assessments or from sales or services, productions or from any City undertakings, fees, charges, accounts and bills receivable, or other credits in the process of collection; and all monies applicable to the payment of such obligation or appropriation, which are to be paid into the treasury prior to the maturity thereof, arising from the sale or lease of lands or other property, and the monies to be derived from lawfully authorized bonds sold and in the

process of delivery shall, for the purpose of such certificate, be deemed in the treasury and subject to such certification.

(f) Failure to Comply. All contracts, agreements or other obligations and all ordinances, resolutions and orders entered into or passed contrary to the provisions of subsections (d) and (e) of this section of this Charter shall be void, and no person whomsoever shall have any claim or demand against the Municipality thereunder, nor shall the Council nor any officer of the Municipality waive or qualify the limits fixed by such ordinance, resolution or order or fasten upon the Municipality any liability whatever in excess of such limits, or release any party from an exact compliance with this Charter under such ordinance, resolution or order.

(g) Attendance at Council. He shall attend all meetings of the Council and he shall perform all other duties required by this Charter and by ordinance or resolution of Council.

SECTION IV-4. DEPARTMENT OF LAW.

The Department of Law shall be headed by the Director of Law and commencing with the regular municipal election in the year 2005, and every fourth (4th) year thereafter, he shall be elected for a term of four (4) years. The Director of Law's term shall commence and he shall assume office on the first day of January following his election and shall serve out his term or until his successor is elected and qualified, whichever occurs last. During his term of office he shall continue to be a resident and qualified elector of the municipality. The Director of Law shall appoint all assistant directors of law and office staff; assistant directors of law shall be subject to confirmation by a majority of the members of Council. The Director of Law shall be a qualified elector at the time of his election, shall have been a resident of the City for at least eighteen (18) months immediately preceding his election, an attorney at law duly admitted to the practice of law before the courts of the State of Ohio, and been engaged in the active practice of law in Ohio for a period of six (6) years next preceding his election. The annual salary for the Director of Law for the term commencing January 1, 2014 and each succeeding term thereafter shall be fixed by Council at least forty-five (45) days prior to the time a person is required to file nominating petitions for the office of Director of Law for that particular term. The annual salary may be increased but shall not be decreased during the term it was set.

He shall serve the Mayor, the various administrative departments, boards, and officers of the Municipality and the Council, as attorney and legal counsel, and shall represent the Municipality in all proceedings in courts of law and before any administrative body. He or his designee shall attend all Council meetings and Committee meetings of Council. He shall perform all other duties now or hereafter imposed by law upon directors of law of cities unless otherwise provided by ordinance of Council. He shall act as the Prosecuting Attorney of the City.

Council may, by a two-thirds (2/3) vote of the members of Council after public hearing, expel or remove the Director of Law from office for gross misconduct, malfeasance, nonfeasance, misfeasance in or disqualification for office; for violation of his oath of office; for conviction while in office of a crime involving moral turpitude; or for mental or physical disability rendering it impossible for him to perform the duties of the Director of Law. Prior to any such action by Council, the Director of Law shall be notified in writing of the charge against him at least ten (10) days in advance of the hearing upon such charge, and he and his counsel shall be given an opportunity to be heard, present evidence or examine any witness appearing in support of such charge.

In the event the office of Director of Law shall become vacant, for any reason, the Mayor shall appoint an Acting Director of Law subject to confirmation of Council. The Acting Director of Law shall be an attorney-at-law licensed to practice before the Courts of the State of Ohio but need not be resident of the municipality. The Council shall, within fourteen (14) days after the vacancy occurs, provide for a special election, with no preliminary primary, to be held one hundred twenty (120) days from the date of the vacancy to fill such vacancy.(Amended 11-2-10.)

SECTION IV-5. DEPARTMENT OF PUBLIC SERVICE.

The Department of Public Service shall be headed by the Director of Public Service who shall manage, supervise and be responsible for the maintenance of public works, City buildings, streets, parks and other properties, and all Service Department equipment under his control. He shall perform such other duties and functions in connection with the public service of the City as provided by ordinance or at the direction of the Mayor. He shall consult with the Director of Engineering on all services concerning matters of utilities, drainage, and general problems where engineering or surveying is concerned. (Amended Nov. 2, 1965.)

SECTION IV-6. DEPARTMENT OF ENGINEERING.

The Department of Engineering shall be headed by the Director of Engineering who shall be responsible for the general engineering requirements of the City, and shall be a civil engineer licensed by the State of Ohio with a minimum of five (5) years' experience in municipal work. The general and specific duties of the Director of Engineering shall be established by ordinance or at the direction of the Mayor. (Amended Nov. 2, 1965.)

SECTION IV-7. DEPARTMENT OF BUILDINGS, STRUCTURES AND INSPECTIONS.

(a) General Duties. The Department of Buildings, Structures and Inspections shall be headed by the Director of Inspections who shall be responsible for inspections, issuance of permits and enforcement of building codes with regard to original construction, remodeling and repair of all buildings, fences, signs, billboards and other structures within the City. The Director shall perform such other duties and functions as may be prescribed by ordinance or by the Mayor.

(Amended Nov. 2, 1965.)

(b) Qualifications. The Director of Inspections shall have at least ten years' experience in the building trades or related occupations, and shall be certified by the State of Ohio Board of Building Standards to exercise enforcement authority, to approve plans and specifications, and to make inspections under the Ohio Building Code, and shall, before assuming the duties of his office, execute a bond in such amount as may be fixed by Council.

(Amended Nov. 6, 1990.)

SECTION IV-8. DEPARTMENT OF PURCHASING.

(a) General Duties. The Department of Purchasing shall be headed by the Director of Purchasing who shall make all purchases of supplies for the City. He shall contract for, purchase on specifications, store and distribute all supplies required by the City. He shall be responsible for the inspection of all supplies and determine quantity, quality, and conformation to specifications. He shall sell any equipment or supplies not needed for public use or that have become obsolete. When an expenditure of the City for the purchase of supplies is required by this Charter to be let by bids, the Director of Purchasing shall advertise for, receive, open, and present all bids to Council.
(Amended Nov. 2, 1965.)

(b) Limitation on Purchases. The Director shall make no purchases except on authority of requisitions submitted by a department head and approved by the Mayor. Before any funds may be expended, the Director of Finance shall first certify that the City has sufficient funds to cover the purchase and that such funds have been lawfully appropriated or authorized. (Amended Nov. 2, 1965.)

(c) Inventory. All department heads shall submit to the Director of Purchasing annually an inventory of all municipal property in their care or control. It shall not be necessary to place valuations on the items in such inventory.
(Amended Nov. 6, 1990.)

SECTION IV-9. PLANNING COMMISSION.

(a) Membership. The Planning Commission shall consist of one member of Council selected by the President of Council for such a term as Council shall determine, and four electors of the Municipality appointed by the Mayor subject to the approval of a majority of the members elected to Council. Appointed members shall hold no other municipal office or appointment, except one appointed member of the Planning Commission shall be appointed to the Board of Zoning Appeals. (Amended Nov. 2, 1965.)

(b) Vacancy. A vacancy occurring during the term of any member shall be filled for the unexpired term in the manner authorized for an original appointment.

(c) Duties. The Planning Commission shall meet at least once a month. It shall be the function and duty of the Planning Commission to act as the platting commissioner of the Municipality and as such it shall have control of planning and shall provide regulations covering the platting of all lands within the Municipality so as to secure the harmonious development and to provide for the coordination of streets with other streets and with the official Municipal Plan and to provide for open spaces for traffic, utilities, access of fire-fighting apparatus, recreation, light and air, and for the avoidance of congestion of population. It shall make such regulations as it deems necessary as to the manner in which streets and other public ways shall be graded and improved; the manner in which and the extent to which water, sewer and other utility mains, piping or other facilities shall be installed, or establish any other conditions precedent to the approval of a proposed plat. The Commission shall make plans and maps of the whole or any portion of the Municipality and of any land outside the Municipality which, in the opinion of the Commission, bears a relation to the planning of the Municipality and to make changes in, additions to, and estimates of such plans or maps when it deems the same advisable. It shall have such powers as may be conferred on it by ordinance of the Council concerning the plan, design, location, removal, relocation and alteration of any public building or structure or those located on public streets or property, the location, relocation, widening, extension and vacation of streets, parkways, playgrounds and other public places, the zoning and rezoning of the Municipality for any lawful purpose and such other powers as now or may hereafter be conferred upon it by ordinance of the Council or the general laws of Ohio. All plans and recommendations made by the Planning Commission shall be submitted to Council for approval before the same shall be considered as official, unless Council shall, by ordinance, specifically waive this requirement and grant to the Planning Commission the power to finally determine any matter properly before it. (Amended Nov. 6, 1990.)

(d) Funds. A sufficient sum shall be appropriated by the Council each year to carry out the planning provisions of this Charter.

(e) Mandatory Referral. No public building, street, boulevard, parkway, park, playground, bridge, tunnel, publicly or privately owned utility or part thereof shall be constructed or authorized to be constructed in the Municipality, nor shall any street, avenue, parkway, boulevard or alley be opened for any purpose whatsoever, nor shall any street, avenue, parkway, boulevard or alley be widened, narrowed, relocated, vacated, or its use changed, or any ordinance referring to zoning or other regulations controlling the use or development of land, be adopted unless and until it shall have been submitted to the Planning Commission for report and recommendation. Any matter so referred to the Planning Commission shall be acted upon by it within sixty (60) days from the date of referral unless a different period of time be provided by Council. If the Planning Commission shall fail to act

within the time allotted, it shall be deemed to have approved such matter. Any provision or any resolution, ordinance or order disapproved by formal action of the Planning Commission shall require a two-thirds (2/3) vote of all members of the Council for adoption or authorization. If any plan, design or other proposal concerning the character, extent, location, or use of any public improvement or public property or change thereof within the territorial limits of the Municipality does not, under the law or Charter provision covering same, fall within the province of the Council or other official or agency of the Municipality, then the submission to the Planning Commission shall be by the State, County, District, School, Township or other official body, board, or commission having jurisdiction over such public improvement or property in accordance with the provisions of the general law of the State of Ohio. The Planning Commission's disapproval may be overruled at any time after seven (7) days' written notice by the excepting body to the Planning Commission stating the reason for such exception. Such overruling disapproval must be adopted by at least two-thirds (2/3) of such excepting body.

SECTION IV-10. BOARD OF ZONING APPEALS.

(a) Membership. There shall be a Board of Zoning Appeals which shall consist of five (5) members, one of which shall be a member of the Planning Commission, appointed by the Mayor with the approval of a majority of members of Council. Members of this Board shall hold no other municipal office or appointment, except as a member of the Planning Commission.

(Amended Nov. 2, 1965.)

(b) Powers. It shall be the duty of the Board of Zoning Appeals to hear and decide applications for exceptions to and variances from the zoning ordinances of the Municipality and to hear and decide all appeals from orders, decisions and regulations of municipal administrative officials or agencies in regard to the zoning ordinances. The Board shall not permit any exception or variance from the zoning ordinances unless it finds that a practical difficulty or unnecessary hardship would exist as a result of the literal application of the zoning ordinances because of some peculiarity of the property in question as distinct from the other properties in the same district. In such cases the granting of the exception or variance must not be detrimental to the public welfare or injurious to the property in the immediate surrounding area, and must be in keeping with the general purpose, intent and objective of the municipal zoning ordinances.

(Amended Nov. 2, 1965.)

SECTION IV-11. BOARD OF BUILDING APPEALS.

(a) Membership. There shall be a Board of Building Appeals which shall consist of not less than five (5) or more than nine (9) members appointed by the Mayor, subject to the approval by a majority of the members of City Council. The members shall be of such experience and occupation as determined by the Mayor and approved by Council.

(Amended 11-7-00.)

(b) Powers. The Board shall hear and decide appeals from any order, decision or determination of any administrative official or agency of the Municipality relating to the interpretation or application of the Building Code or such other related ordinances as may be determined by Council. The Board shall have no jurisdiction or authority with respect to the zoning ordinances of the Municipality but shall otherwise have such additional powers and duties as Council may provide by ordinance.

(Amended Nov. 2, 1965.)

SECTION IV-12. CIVIL SERVICE COMMISSION.

(a) Membership. The Civil Service Commission shall consist of three electors of the Municipality not holding other municipal office or appointment, not more than two (2) members of which shall be members of the same political party. A vacancy occurring during the term of any member of the Commission shall be filled for the unexpired term in the manner authorized for an original appointment.

(Amended Nov. 2, 1965.)

(b) Officers. The Commission shall designate one of its members as Chairman and may appoint a Clerk who need not be a member of the Commission and may hold other municipal office or appointment.

(Amended Nov. 2, 1965.)

(c) Classification of Service. The Civil Service of the Municipality is hereby divided into the Classified and Unclassified Service. The Classified Service shall include: Police Officers, Firefighters/Paramedics and other sworn members of the Departments of Police and Fire. The Unclassified Service shall include all other positions not specifically included in the Classified Service by this provision or other provisions of the Charter of the City of Westlake.

(d) Duties. The Commission shall provide by rule for the ascertainment of merit and fitness as the basis for appointment and promotion in the Classified Service of the Municipality and for appeals from the action of the Mayor or an official designated by the Mayor in any case of transfer, reduction, removal or other disciplinary action in excess of two (2) days suspension from employment, and the action of the Commission on any such appeal shall be final. The Commission shall keep a record of all public proceedings which shall be available for public inspection. Any person who has taken an examination for appointment or promotion in the Classified Service may inspect his own examination paper. The Commission shall have the authority to adopt rules to govern its proceedings and fulfill its duties hereunder and such rules may conflict with provisions of State law and in such event, rules adopted by the Commission shall supersede provisions of State law and shall be determinative and govern the Commission's proceedings. (Amended 11-7-00.)

(e) Funds. A sufficient sum shall be appropriated by the Council to carry out the civil service provisions of this Charter.

(Amended Nov. 2, 1965.)

SECTION IV-13. RIGHTS RETAINED BY PEOPLE.

(a) Neither the Council, the Mayor, any Board, including Boards of Appeal, or Commissions, appointed pursuant to this Charter, or any ordinance or resolution, whether proposed by Council or by initiative petition, or otherwise, of this Municipality, nor any other agent, employee, person or organization acting for or on behalf of this Municipality, by whatever authority or purported authority, shall by ordinance, resolution, motion, proclamation, statement, legislative or administrative action, or variance effect a change in:

(1) the zoning classification or district of any property or area in the City of Westlake to allow multi-family dwellings thereon;

(2) or grant any zoning classification or variation which would increase the density permitted on any property in any residential district;

(3) or grant a zoning classification or variation or conditional use which would permit commercial development consisting of establishments for retail sales, commonly known as shopping developments, by whatever name called, consisting of thirty (30) acres or more. In computing the acreage for purposes of this provision, the computation shall include contiguous land which is already zoned for shopping center development;

unless the change or grant, after its adoption in accordance with applicable administrative or legislative procedures, is approved at a regularly scheduled general election of the Municipality, State of Ohio or County of Cuyahoga, by a majority vote of electors voting thereon.

(Amended 11-7-00.)

(b) This amendment shall be severable and, if any section, subsection, part, word or application thereof is held invalid for any reason, such holding shall not invalidate or affect the force and effect of any other section, subsection, part, word or application thereof.

(Amended 5-8-84.)