

**ANNUAL EMPLOYMENT LAW GROUP  
SEMINAR**

- I. Overview of Analysis of Public Employment Issues**
- II. Current Public Employment-Related Case Law**
- III. Residency Law**
- IV. Civil Service Law Update and Issues**

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## I. OVERVIEW OF ANALYSIS OF PUBLIC EMPLOYMENT ISSUES

The analysis of issues involving public employees and public positions can be much more complicated than they would be in the private sector. There is a virtual maze of statutes, rules, regulations, and court rulings at the local, state, and federal levels that must be navigated when analyzing such public employment issues.

Generally, the analysis of issues arising in public sector employment should be as follows:

A. Is the employee or position covered by a collective bargaining (union) agreement ("CBA")? (Caveat: The CBA may incorporate provisions of municipal civil service regulations, state code, or municipal ordinance provisions on various issues.) Pursuant to Ohio Revised Code Chapter 4117 and court rulings, CBA provisions supersede local law on issues that are covered by the CBA, even municipal charter provisions.

B. If the employee/position is not covered by a CBA, the CBA is silent on the issue, or the CBA incorporates civil service rules, is the employee/position a classified civil service position, as opposed to unclassified? If it is a classified position, the municipal civil service rules will govern. Where the municipal civil service rules are silent, one will need to review the municipal charter and ordinances and/or state statute (generally Ohio Revised Code Chapter 124) for answers.

C. If the employee/position is unclassified, a review of all pertinent municipal charter and ordinances must be made for guidance, as well as state statutes where the charter and ordinances are silent. (Caveat: There may be some issues where courts have held that state law supersedes local law -- e.g., residency of public employees and transfer of sick time.)

D. Depending upon the nature of the issue, there may be state statutory law, as written and interpreted by the courts, that should be considered --e.g., state civil rights laws.

E. Finally, one must always be aware that the issue involved may be governed by federal constitutional and statutory law that will always supersede both local and state law on an issue addressed by federal law, unless the federal law expressly makes exceptions for local governments -- e.g., overtime, compensatory time, family medical leave, and, of course, civil rights laws.

## II. CURRENT PUBLIC EMPLOYMENT-RELATED CASE LAW

### A. Civil Rights & Title VII

*Ricci v. DeStefano* (2009), 129 S.Ct. 2658.

The plaintiffs in this case were all firefighters employed by the City of New Haven, Connecticut, and are all white except for one Hispanic firefighter. The plaintiffs had taken the civil service examinations for promotions to the rank of lieutenant or captain in the fire department. The examinations were prepared by a consulting firm specializing in promotional examinations for fire departments and were job-related, as well as being facially neutral. The results of the examinations were that all of the top candidates were white except for the one Hispanic. The city's civil service board refused to certify the results of the examination based on the disparate impact it would have upon other racial minorities and possible violation of Title VII of the Federal Civil Rights Act of 1964 (42 USC §2000e, et seq.). The white and Hispanic candidates who could have been promoted as a result of their test scores sued the city, the mayor and other city officials under Title VII and the Equal Protection Clause of the Fourteenth Amendment. The district court upheld the city's decision by granting it summary judgment stating that there was no discriminatory intent based on the City's motivation to avoid making the promotions on a test with a racially disparate impact. A divided Court of Appeals affirmed the decision with current Supreme Court Justice Sonia Sotomayor in the two-person majority.

The U.S. Supreme Court in a 5 to 4 decision reversed and remanded the case finding that the city's decision was race-based and impermissible under Title VII unless the employer could demonstrate a strong basis in evidence that had it not taken the action, it would have been liable under the disparate impact theory of liability under the statute. The court further concluded that the city could not meet that threshold standard.

*U.S. v. City of New York*, 2010 WL 234768 (E.D.N.Y.).

The federal district judge, even in the face of *Ricci*, held the City intentionally discriminated against minority candidates for firefighter in its tests for the position over an eight-year period after seeing the low minority hiring numbers. There was no other evidence of intentional discrimination.

### B. Civil Service

*Dworning v. Euclid* (2008), 119 Ohio St.3d 83.

The city fire chief was in the process of being terminated by the city when he submitted a retirement notice. Later he filed an action alleging various claims of discrimination under ORC Chapter 4112 that he claimed resulted in his termination. The city filed a

motion for summary judgment based upon the fact the chief failed to exhaust his administrative remedies by not appealing to the city's civil service commission. The Supreme Court of Ohio held "a public employee alleging employment discrimination in violation of R.C. Chapter 4112 need not exhaust the administrative remedy of appeal to a civil service commission before pursuing the civil action allowed in R.C. 4112.99" and stated "until the General Assembly expressly incorporates an exhaustion requirement into R.C. Chapter 4112, we have no basis for requiring it as a matter of course to those workers who have available civil service remedies."

### C. Residency

*City of Lima v. State of Ohio* (2009), 122 Ohio St.3d 155.

The Ohio legislature enacted Ohio Revised Code §9.481 in 2006 which prevented municipalities from requiring employees to live within the municipality which employs them. In a 5 to 2 decision the Supreme Court upheld the constitutionality of the state statute. The Court concluded that R.C. §9.481 was enacted pursuant to Article II, Section 34 of the Ohio Constitution and, therefore, "prevails over conflicting local laws, because no other provision of the Constitution can "limit or impair" laws enacted pursuant to Section 34." The city framed the case as involving a traditional home rule power of municipalities under Ohio Const. Art. XVIII, §3, and that Art. II, §34 deals with the terms and conditions of an employee's workplace. This case determined several other cases before the court on the same issue from the Cities of Cleveland, Akron, Toledo, Dayton and Warren, as well as lower court cases involving Youngstown and Cleveland.

*Paxson v. Dayton* (Montgomery Cty. 2009), 183 Ohio App.3d 89.

Former city employee filed an administrative appeal of his discharge from city service by a final decision of the city civil service commission for violating the city's residence requirement. Former employee maintained an efficiency apartment in Dayton but was actually residing in an outlying township with his daughter and her mother. Employee was charged, found guilty at a departmental hearing and discharged from city employment in 2005. He then appealed his discharge to the city's civil service commission which upheld the discharge on June 8, 2006. In the meantime, the General Assembly passed ORC 9.481 -- the anti-residency law -- effective May 1, 2006. The court held the date of discharge was in 2005 and ORC 9.481 did not apply retroactively.

The former employee also raised a claim that the city's residency requirement violated his fundamental right to raise a child. The court held the city residency requirement did not direct an employee's decisions concerning his child's welfare, but rather only prohibited him from residing with his child outside the city limits while being employed by the city. The court further held there is no constitutional right to be employed by a municipality while living elsewhere. Finally, the court stated a city residency requirement requires more from a city employee than simply renting an apartment in the city, voting from that address, and registering a car and drivers license at that address

while regularly living elsewhere. It requires a city employee to spend significant parts of each day at the location for purposes consistent with residence.

D. Sovereign Immunity from Employee Tort Claim

*Price v. Austintown Local School Dist. Bd. of Edn.* (2008), 178 Ohio App.3d 256.

Plaintiff, a public school district bus driver, filed a complaint against the school district alleging defamation and malicious prosecution after the school board filed a criminal complaint against Price for failure to return a \$6,000 overpayment of sick time pay. The trial court denied the school's motion for summary judgment, which had asserted immunity under ORC Chapter 2744.

The court of appeals reversed the trial court concluding: (1) political subdivisions are immune from liability from intentional tort claims, including malicious prosecution; and (2) the employee's defamation claim against the board of education was based on activities related to a governmental function and there was no applicable exception to the general rule of immunity that is afforded to governmental actions.

### III. RESIDENCY LAW

#### A. The Statute

The Ohio General Assembly passed the following prohibition against political subdivision residency laws, effective May 1, 2006:

#### **9.481 Residency requirements prohibited for certain employees.**

(A) As used in this section:

(1) "Political subdivision" has the same meaning as in section 2743.01 of the Revised Code.

(2) "Volunteer" means a person who is not paid for service or who is employed on less than a permanent full-time basis.

(B)(1) Except as otherwise provided in division (B)(2) of this section, no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.

(2)(a) Division (B)(1) of this section does not apply to a volunteer.

(b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state. For the purposes of this section, an initiative petition shall be filed and considered as provided in sections 731.28 and 731.31 of the Revised Code, except that the fiscal officer of the political subdivision shall take the actions prescribed for the auditor or clerk if the political subdivision has no auditor or clerk, and except that references to a municipal corporation shall be considered to be references to the applicable political subdivision.

(C) Except as otherwise provided in division (B)(2) of this section, employees of political subdivisions of this state have the right to reside any place they desire.

#### B. The Case Law

1. *City of Lima v. State of Ohio* (2009), 122 Ohio St.3d 155.

The Ohio legislature enacted Ohio Revised Code §9.481 in 2006 which prevented municipalities from requiring employees to live within the municipality which employs them. In a 5 to 2 decision the Supreme Court upheld the constitutionality of the state statute. The Court concluded that R.C. §9.481 was enacted pursuant to Article II, Section 34 of the Ohio Constitution and, therefore, “prevails over conflicting local laws, because no other provision of the Constitution can “limit or impair” laws enacted pursuant to Section 34.” The city framed the case as involving a traditional home rule power of municipalities under Ohio Const. Art. XVIII, §3, and that Art. II, §34 deals with the terms and conditions of an employee's workplace. This case determined several other cases before the court on the same issue from the Cities of Cleveland, Akron, Toledo, Dayton and Warren.

2. R.C. 9.481 cannot be applied retroactively to those persons discharged from public employment for residency violations prior to the effective date of the statute (5/1/06). *Paxson v. Dayton* (Montgomery Cty. 2009), 183 Ohio App.3d 89.

- C. Can a municipality enforce a residency requirement through a term in an employment contract? Given the language of R.C. 9.481(B)(1), such a contractual term is not likely to be upheld if the contract was entered into *after* the effective date of the statute.

#### IV. CIVIL SERVICE LAW UPDATE AND ISSUES

The subject of civil service regulations is a matter of home rule in Ohio and so long as there is specific municipal charter authority, the municipal civil service regulations can differ from the State's regulations.

Generally, if there is a conflict between the city's civil service rule and the State rule on a particular subject, the city rule will govern. In the absence of a city rule on a certain matter, the State rule applies.

##### ISSUES RELATED TO LOCAL CIVIL SERVICE RULES AND POSSIBLE AMENDMENTS THERETO

1. Pursuant to Ohio Revised Code 124.23(C), the Commission may list the types of testing that it will perform for classified positions. The state statute, amended by H.B. 187 in 2007, includes "assessment centers" as an acceptable means of testing. "Assessment centers" are often used as a testing tool in the higher ranks of the safety forces. You may also wish to include "assessment centers" as a type of examination in your local rules.
2. Ohio Revised Code 124.271 states that persons who are placed in positions in the classified service without a competitive examination, even if temporary or provisional, become permanent appointees after serving six (6) months of continuous service in the position or by demonstrating merit and fitness for the position and successfully completing the probationary period for that position, whichever is longer. Often a city's civil service rules do not provide for such automatic permanent appointments of temporary or provisional appointees. It may be important to your community that the local rules be amended to make absolutely clear that neither a temporary nor provisional appointment becomes permanent at any time or only upon conditions specified by the municipality's rules.
3. Ohio Revised Code 124.34(A) lists the reasons for "cause" for discipline of classified employees. The statute has recently added as a reason for "cause" the "violation of any policy or work rule of the appointing authority". A municipality may wish to include language to this effect in its local rules. You may wish to amend the language to add: "violation of any policy or work rule of the appointing authority or the appointing authority's designee" in order to accommodate the policies and work rules of more immediate supervisors than just the appointing authority.
4. Although this Section of the Ohio Revised Code was not substantively amended by H.B. 187, Revised Code 124.22 states, "An applicant for a

civil service examination must be a United States citizen or have legally declared the intention of becoming a United States citizen".<sup>1</sup>

A blanket requirement of this type likely violates the Equal Protection Clause of the U.S. Constitution, but there are certain positions in government that go to the essence of being governed that U.S. citizenship, or the legally declared intention to become a U.S. citizen, may constitutionally be required. Some municipal civil rules make mention of citizenship as a requirement and others do not. At the very least, it may be important to your municipality that the position of police officer or any of the promoted ranks in the police department, including chief of police, require U.S. citizenship or the legally declared intention to become a U.S. citizen.

It is highly uncertain under current case law whether fire fighters, and certainly other positions in the classified service in the City, would pass constitutional muster if there is a challenge to this type of restriction for those types of positions.

5. Ohio Revised Code 124.23(B) refers to service in the "uniformed services" as a basis to add credits to a passing grade in a civil service examination for what has been commonly known as "military credit". The state statutory language is as follows:

Any person who has completed service in the uniformed services, who has been honorably discharged from the uniformed services or transferred to the reserve with evidence of satisfactory service, and who is a resident of this state and any member of the national guard or a reserve component of the armed forces of the United States who has completed more than one hundred eighty days of active duty... may file with the... [Commission] a certificate of service or honorable discharge, and, upon this filing, the person shall receive additional credit of twenty per cent of the person's total grade given in the regular examination in which the person receives a passing grade.

As used in this division, "service in the uniformed services" and "uniformed services" have the same meaning as the "Uniformed Services Employment and Reemployment Rights Act of 1994,... " 38 U.S.C.A. 4303.

The term "uniformed services" in the federal statute cited above means:

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<sup>1</sup> The U.S. Department of Homeland Security has an official form called a "Declaration of Intention" (Form N-300).

The Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or a full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in the time of war or national emergency.

As you can see, the definition of "uniformed services" is much broader than the term "armed forces" traditionally used by local civil service commissions for military credit. Use of the term "uniformed services" would include many more persons who serve the national interest in time of war or national emergency and may be in harms way during those events.

6. Ohio Revised Code 124.321(B)(2) defines the term "lack of funds" for purposes of layoffs in the civil service. A local civil service commission may wish to consider defining the term "lack of funds" which is often undefined in local rules. Employees and employee unions have often challenged layoffs for "lack of funds". The definition in the state statute is:

..."lack of funds" means an appointing authority has a current or projected deficiency of funding to maintain current, or sustain projected, levels of staffing and operations. This section does not require any transfer of money between funds in order to offset a deficiency or projected deficiency of funding for programs funded by the federal government, special revenue accounts, or proprietary accounts. Whenever a program receives funding through a grant or similar mechanism, a lack of funds shall be presumed for the positions assigned to and the employees who work under the grant or similar mechanism if, for any reason, the funding is reduced or withdrawn.

7. Ohio Revised Code 124.34(B) and (E) refer to "last chance agreements". "Last chance agreements" is defined in Subsection (E) as:

..."Last chance agreement" means an agreement signed by both an appointing authority and an officer or employee of the appointing authority that describes the type of behavior or circumstances that, if it occurs, will automatically lead to removal of the officer or employee without the right of appeal to the ... commission."

The substantive provision in Subsection (B) of the state statute with respect to last chance agreements states:

However, in an appeal of a removal order based upon a violation of a last chance agreement, the ... Commission, or trial board may only determine if the employee violated the agreement and thus affirm or disaffirm the judgment of the appointing authority.

A local civil service commission may wish to address these issues in its rules.

8. At Ohio Revised Code 124.341, H.B. 187 applied the state "whistleblowers" statute to both classified and unclassified civil service employees of a municipality. The statute is quite lengthy but a local commission may wish to consider a reference in its rules to this whistleblowers statute without restating the entire statute.

Generally, the state whistleblower statute sets forth a procedure for a public employee to report violations of state, federal and local laws or the misuse of public funds by other employees and supervisors and not be required to report this behavior through the normal chain of command, provided there is a criminal violation. The state statute also prohibits discipline for such whistleblowing unless the employee has not made a reasonable effort to determine the accuracy of the information being reported.

9. Ohio Revised Code 124.388 provides for an appointing authority to place an employee on administrative leave without pay for a period not to exceed two (2) months if the employee has been charged with a felony. If the employee subsequently does not plead guilty to or is not found guilty of a felony, the appointing authority is then required to pay the employee at the employee's base rate of pay, plus interest, for the period the employee was on the unpaid administrative leave.

Many local civil service rules do not address this situation. Often times felonies are not resolved within a two month period of time and, therefore, the two month limitation under this newer state statute is problematic. If the local municipality does not have a rule on this subject matter, the state statute would apply in this situation if the appointing authority determines to place an employee on unpaid administrative leave when being charged with a felony. A local civil service commission may wish to provide in its rules for the appointing authority to exercise discretion to place an employee on unpaid administrative leave for an indefinite period of time until the felony charged is resolved or to provide for incremental extensions of the two month period.

10. Note that Ohio Revised Code 124.44 now gives the City the authority to require longer than a twelve (12)-month tenure as a prerequisite for promotions in police departments above the rank of patrol officer.
11. Note that Ohio Revised Code 124.45 now provides for a tenure of 48 months for a fire fighter to be eligible for a promotion to a higher rank in a municipal fire department. The previous tenure was twenty-four (24) months. (This does not apply if there are less than two persons eligible for the promotional examination.)