

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

AKRON FIREFIGHTERS ASSOCIATION
IAFF LOCAL 330, AFL-CIO

CASE NO. CV 2015-01-0619

Plaintiffs

-vs-

CITY OF AKRON, et al.,

Defendants

JUDGE TODD McKENNEY

**MEMORANDUM OPINION &
JUDGMENT ENTRY**
FINAL APPEALABLE ORDER

INTRODUCTION

This matter is before the court on cross motions for summary judgment based upon the amended verified complaint for a preliminary injunction and declaratory judgment filed by Akron Firefighters Association, IAFF Local 330, AFL-CIO and three individual firefighters employed by the Akron Fire Department (collectively "the Union") against the defendant city of Akron and the Akron Civil Service Commission (collectively "Akron").

The Union is challenging a 2010 charter amendment approved by Akron residents that provides, in competitive civil service promotional examinations, 20% bonus points are awarded for being a resident of the city of Akron and another 20% bonus points are awarded for being a veteran.

Civil service promotional examinations for Fire Lieutenant and Fire District Chief were conducted on February 7 & 8, 2015. Because of an agreement in the separate pending federal action, the Union is no longer pursuing a claim concerning the promotions for Akron's District Fire Chiefs. The remaining issue has to do with promotions to the position of Fire Lieutenant and whether or not the charter amendment awarding bonus points for residency and military service runs afoul of the Ohio Constitution and Ohio law.

On March 10, 2015, the court issued a preliminary injunction finding a likelihood success on the merits for the Union on their claim that Akron charter amendment on residency violates the Ohio Constitution and Ohio law. At the same time, the court found that the Union could not demonstrate a likelihood of success on its position that the award of bonus points for military service violated the Ohio Constitution and the court indicated that those points could be part of promotions resulting from the February 2015 testing.

The court then set out a briefing schedule to bring this matter to final resolution. The parties have filed cross motions for summary judgment and replies in support of those motions. The court has held further proceedings that resulted, on July 14, 2015, with Akron filing under seal with the court the test results from the February exams for both positions, rankings based upon the test results and indications concerning residency and military service.

These further proceedings were prompted by the Union filing a Rule 56(F) motion for additional discovery to disclose all the test results and ranking because of an argument made in Akron's summary judgment motion. The court found that the test results were relevant and to date they had not been provided to the court. Because of the pending federal action, the court ordered that the test results be filed under seal in this state court action so that they might be part of the record on appeal. In effect, the court has granted the Union's Rule 56 motion for additional discovery but based upon the decision in this case, the court also finds it unnecessary to unseal the test results or to provide them to the Union in this case.

With the summary judgment motions now at issue, the primary issues for this court's consideration are whether veterans and residency preference points provided by Akron Charter § 106(a) and Akron Civil Service Rule 2, Sections 4 & 5, each used as part of the

City of Akron's civil service promotional examination process, (1) violate the Ohio constitution because they are arbitrary and keep the civil service promotions from being made according to merit and fitness, in violation of Article XV, Section 10, Ohio Constitution, or (2) with respect to residency, violate Ohio law because the residency preference points awarded by Akron Charter § 106(a) and Akron Civil Service Rule 2, Section 5 intrinsically establish a residency requirement as a condition of employment in violation of R.C. 9.481.¹

For the following reasons, there being no material facts in dispute, the court finds that residency preference points violate both the Ohio Constitution and Ohio law and that veterans' preference points are permissible under the Ohio Constitution.

DISCUSSION: CONSTITUTIONALITY OF THE CHARTER AMENDMENTS

The Ohio Constitution provides as follows:

¹ THE AKRON CHARTER PROVISIONS

1) Section 106a of the Charter of the City of Akron, dealing with veterans and residency preference points and approved by the voters on November 2, 2010, provides:

Veterans of the Armed Forces of the United States of America who receive a passing grade on any non-promotional and promotional examinations and Akron residents who received a passing grade on any non-promotional and promotional examinations shall be awarded by the Civil Service Commission 20% preference points. In order to receive the 20% veteran's preference points, the candidate must have served on active duty in the Armed Forces of the United States of America for more than 180 days, and submit proof of honorable discharge. In order to receive the 20% preference points for being an Akron resident, the candidate must have been a resident citizen for at least one year immediately prior to the examination and remain a resident citizen of Akron throughout the selection process.

AKRON CIVIL SERVICE RULES PROVISIONS

Akron Civil Service Rule 2, Section 4, setting out veterans preference points, provides in pertinent part:

(4) **VETERANS' PREFERENCE.** A candidate participating in an open competitive or promotional examination, who obtains a passing grade on the examination, shall have twenty percent (20%) of such grade added to the examination score provided the candidate:

1. meets the minimum qualifications for the position.
2. has served on active duty in the Armed Forces of the United States of America for more than one hundred-eighty (180) days, other than for training purposes.
3. Submits proof of being honorably discharged from active duty as prescribed by the Personnel Director.

Akron Civil Service Rule 2, Section 4, setting out residency preference points, provides in pertinent part:

(5) **RESIDENCY PREFERENCE.** A candidate participating in an open competitive or promotional examination, who obtains a passing grade on the examination, shall have twenty percent (20%) of such grade added to the examination score provided the candidate:

1. meets the minimum qualifications for the position.
2. has been a resident citizen for at least one (1) year immediately prior to the date of the examination.
3. remains a resident citizen of the City of Akron throughout the selection process.
4. Residency preference points shall be determined without taking into account veterans' preference points. Veterans' preference points shall be determined without taking into account residency preference points.

Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as is practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision.

Ohio Constitution Article XV, Section 10.

This "merit and fitness" requirement has been defined in a series of Ohio Supreme Court cases beginning with *State ex rel. King v. Emmons*, 128 Ohio St. 216, 190 N.E. 468 (1934), which held that a 20% veterans preference provided under G.C. 486-10 & 486-13 did not conflict with Ohio Constitution, Article XV, Section 10.

With respect to military service, the Ohio Supreme Court noted:

[I]f it be conceded that an *examination* to ascertain merit and fitness may consist of other inquiries, in addition to those relating merely to knowledge, can we say that the legislature is without power to prescribe a reasonable weight to be given to military service? In our opinion the weight prescribed in this statute is neither so arbitrary or so unreasonable as to violate the constitution. We may not strike down the statute merely because, in our judgment, different allowances might be wiser. While the benefit derived from military training varies, doubtless, from case to case, we find ourselves unable to say that its value is so little in any case as to make the action of the legislature arbitrary and void.

Merit, as well as fitness, is prescribed by the constitution as a qualification for appointment. Merit, as the dictionary shows, means deserving well. The legislature, in our opinion, was amply within its powers in providing that their deserts be reasonably reflected in the examination marks accorded veterans for military services.

To hold this legislation unconstitutional would appear to require a course of reasoning leading logically to serious consequences. It might require an adherence to the result of the question and answer examination so strict as to eliminate eligible lists. The absolute high man might have to be the only one certified for appointment. Such rigidity and disregard of all personal equations would greatly change the civil service system as we now have it.

Whether or not the provisions of these statutes are wise or represent the best public policy is not for us to say. Such considerations fall within the province of the legislature, which we may not invade.

King, 116 Ohio St. at 224-225.

A party such as the Union seeking to invalidate legislation via a constitutional

challenge must overcome “a strong presumption of constitutionality, and that party challenging the constitutionality of a law bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.” *Yajnik v. Akron Department of Health, Housing Division*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 16, citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus.

In *King*, the Ohio Supreme Court allowed a 20% promotional bonus for veterans. Other factors in addition to military service that have been upheld as additional scoring factors in addition to competitive test scores for firefighters are “seniority” and “efficiency” as well as participation in a fire apprentice program. See R.C. 124.45 and *IAFF, Local 136 v. Dayton Civ. Serv. Comm.*, 107 Ohio St. 3d 10 (2005), 2005-Ohio-5826; 836 N.E.2d 544.

With respect to the constitutionality of the Akron charter amendment, the first question is: does military service continue to be recognized as it was in the *King* decision? Second, does residency, defined as living within in the city for one year prior to the exam and remaining a resident during the selection process but not afterward, qualify as one of the additional factors that may be added by, in this case by Akron residents, to the competitive testing process to determine a candidate’s merit and fitness?

With respect to its veteran’s preference, Akron argues that the *King* case affirms its charter provision and because there is no evidence in this case to overcome the strong presumption of constitutionality to be afforded to the decision of Akron voters to provide extra incentive and benefit to veterans in the promotional process.

The Union argues that the modern trend in the court decisions is to determine

merit and fitness by more and better testing and that the evidence is clear that providing bonus points in addition to competitive testing is outcome determinative, meaning that adding 20% to the results of a competitive examination will skew the scores in favor of whichever group receives the preference points.

In this case, where the testing is competitive and yields results within a small range of percentage points, it is true that adding points for veteran's service is outcome determinative. The court has considered the test results and rankings for the February 2015 Fire Lieutenants examination filed under seal with the court. While not revealing the specifics out of deference to the pending federal action, the court summarizes the test results as follows: Approximately 104 candidates passed the test and were ranked as eligible for promotion. There were 18 veterans in that list. The top 17 overall ranked positions were earned by those who received the veteran's preference points. The remaining candidate to receive the veteran's preference was ranked at the 23rd overall position. The top scorer on the test without veteran's preference points came in 18th place on the rankings as a result of the addition of the preference points.

Akron argues that in an overall sense, since 2012, the application of the charter provision has not resulted in a significant discrimination against non-residents or non-veterans. *See*, Affidavit of Stacey Doty, Exhibit B, Paragraph 5. However, the affidavit lacks any context in terms of the rankings of those promoted, such as who gets promoted first and how long someone waits on an eligibility list, which often factors into competitive examinations as shown by the rankings in the Fire Lieutenant's examination. It is not just promotions but when those promotions occur that factors into assessing the charter's impact. In the court's view, it is beyond dispute the heavy role that preference points play in the competitive nature of firefighter's promotional examinations.

Despite this role that preference points play in competitive examinations, the Ohio Supreme Court in *King* upheld an award of an extra 20% points to veterans in the promotional process, a decision by which this court is bound. The court notes that the Ohio Supreme Court focused on the “merit” aspect of the “merit and fitness” requirement, acknowledging meritorious credit to be awarded for military service and the deference to be afforded to the legislature’s judgment on that issue. Accordingly, as previously indicated, the court finds that Akron’s 20% preference for military service is permissible under existing Ohio law.

With respect to residency, the same constitutional considerations apply. The court must find beyond a reasonable doubt that the strong presumption of constitutionality of Akron’s charter amendment is overcome by a lack of evidence, the lack of some reasoned basis, to support its legislated preference for residents to receive a 20% point advantage in its competitive firefighter’s examinations.

A similar case has been decided in *Cleveland Firefighters Assn. v. Cleveland*, 2013-Ohio-5439, 5 N.E.3d 676 (8th District). In that case, in 2012, Cleveland voters approved a charter amendment awarding 5% bonus points for residency for those who receive a passing grade on promotional exams. Both the trial court and the court of appeals decided that the charter amendment violated the Ohio Constitution and the R.C. 9.481. The matter was not considered by the Ohio Supreme Court.

In *Cleveland Firefighters*, the Eighth District listed the following reasons offered by the municipality for residency preference points: needing supervisors to live closer to station houses to respond faster to emergencies and that by living in the city, the officer would be better able to serve and understand its residents. The Court of Appeals concluded that not only were these reasons inadequate, but that the application of residency points was arbitrary

and violates the constitutional provision at Article XV, Section 10 requiring that promotions “shall be made according to merit and fitness, to be ascertained, as is practicable, by competitive examinations.” Proximity to the station was arbitrary because after promotion anyone could move out of the city and knowledge of the city was an issue for which testing could reveal the best candidates.

In this case, Akron argues that the *Cleveland Firefighters* decision unreasonably shifted the burden to the city to prove why its reasons were adequate. Instead, Akron argues that the burden falls on the Union to demonstrate why Akron’s residency provisions are unreasonable and reminds the court that in *King* deference to the will of the legislating body is urged. As stated in *King*: “Whether or not the provisions of these statutes are wise or represent the best public policy is not for us to say. Such considerations fall within the province of the legislature, which we may not invade.” *Id.* at 225.

Akron has also offered the affidavit of Robert Ross, Deputy Mayor for Public Safety and former Fire Chief. Chief Ross stated that there is merit to Akron residents to express a preference for hiring and promoting residents who have committed to living within the city limits. Chief Ross concluded that resident employees have a personal stake in the welfare of the city and that such qualities cannot be determined by examination. *See*, Affidavit of Robert Ross, Exhibit A, Paragraph 4.

What the court is looking for, as it considers the constitutionality of the Akron residency provision, is some reasoned basis to uphold the statute. The residence of a firefighter does not inherently make them better or more fit for duty, even if a local charter amendment states its preference for them. While, as Chief Ross says, there may be merit to a city to have its employees reside within its limits, the Constitution refers to the merit and fitness of the candidate, and where one lives does not make them better or worse. By

comparison, in *King*, the Ohio Supreme Court affirmed legislation that awarded merit consideration to veterans. The same merit considerations do not apply to residency. As to fitness for duty, there is no evidence to demonstrate that the qualities for which Akron seeks cannot be secured through testing.

Finally, as previously discussed, Akron has also argued that there is no distinctive harm from the application of the preference points to non-residents based upon the pattern and practice of the City of Akron administering civil service tests since 2012. With respect to residency, the court has examined the rankings and calculated the results of adding only the residency preference. Approximately 75 candidates were residents and 29 were non-residents. Based upon the court's calculations, the addition of residency preference points yields the same kind of outcome determinative results as with the veteran's preference points. The evidence admitted in this case demonstrates that granting the points, if as to residency or veterans preference, is a determinative factor in the outcome of promotions.²

The *Cleveland Firefighters* case found a 5% preference outcome determinative. In this case, where a 20% point preference for residency is awarded, the court finds the award of preference points even more outcome determinative in a manner that unlawfully supplants considerations of merit and fitness for the position.

² In its July 9, 2015 Order, the court ordered Akron to comply with two previous court orders in terms of producing, under seal, rankings based upon test results and seniority points. In its May 26, 2015 Order, the court ordered one final ranking list when the veterans preference was included. The court has now received that list. In the same order, the court also ordered a final ranking list with only residency points included. Despite having overruled Akron's objections to that order, and granting time to comply with the order, the court has never received a ranking with only the residency bonus points factored in. The determination was made based on the evidence provided. Because of the failure to comply with the court's orders, Akron has waived any challenge to the court's determination on that issue. Finally, the Union offered to supply the court those rankings if the materials were unsealed but because of the unique posture of this case, with an ongoing federal action and because of the court's rulings on the issues, the court finds it unnecessary to order the materials unsealed in this case.

Because of the lack of a reasoned basis to support the charter amendment, the court finds that Akron's charter provisions violate the merit and fitness provisions of the Ohio Constitution concerning civil service examinations.

RESIDENCY PREFERENCE AND R.C. 9.481

The court must also consider whether the residency preference points awarded by Akron Charter § 106(a) and Akron Civil Service Rule 2, Section 4 violate R.C. 9.481, which provides in pertinent part:

(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.

(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.

In *City of Lima v. State*, 122 Ohio St. 3d 155, 2009-Ohio-2597, 909 N.E.2d 616, the Ohio Supreme Court analyzed challenges to R.C. 9.481 by the city of Lima and the city of Akron, each of which had charter provisions requiring residency as a condition of employment for their civil service employees. The Ohio Supreme Court concluded that that "R.C. 9.481 is constitutional and, therefore, that municipalities may not require their employees to reside in a particular municipality, other than as provided in R.C. 9.481(B)(2)(b)." *Id.* at ¶ 17.

Specifically, the following language of R.C. 9.481, "no political subdivision shall require any of its employees, *as a condition of employment*, to reside in any specific area of the state," (emphasis added) conflicts with the following language of Section 106a of the Charter of the City of Akron, "[i]n order to receive the 20% preference points for being an Akron resident, *the candidate must have been a resident citizen for at least one year*

immediately prior to the examination and remain a resident citizen of Akron throughout the selection process.” (Emphasis added.)

The court acknowledges that Akron’s charter provision does not require residency to be hired into the fire department. However, in real and practical terms, in order to be considered for promotion as a Fire Lieutenant candidate, and to thereby receive the residency preference points, members must have lived in the city for the year prior to the exam and must maintain residency until promoted. Those members who either have not lived in the city or those who have lived in the city, even for a lifetime, but who have moved from the city within the one-year period before the exam or at any time until being promoted are not eligible for the preference points.

In order to be considered for continued employment at a different status within the department, residency is required. While residency does not act as a condition of continued employment on the plaintiffs as firefighters in their current, pre-promotion positions, it becomes a condition of employment that must be satisfied in order for any member to continue employment with the department by bettering his or her position within the department. See *Cleveland Firefighters*, at paragraph. 27.

For the reasons previously stated, the court concludes that Akron’s residency preference points unlawfully make residency a condition of employment and therefore violate R.C. 9.481.

CONCLUSION

For the reasons stated, the court grants Akron’s motion for summary judgment as to the veterans preference points and denies the Union’s motion for summary judgment as to the veterans preference points. Thus, the Court declares that the veteran preference points awarded by Akron Charter § 106(a) and Akron Civil Service Rule 2, Section 4, subsection

(4) does not violate Article XV, Section 10 of the Ohio Constitution nor does the inclusion of the veterans preference points in the February 2015 Fire Lieutenant's exam violate the Ohio Constitution.

With respect to the residency preference points, the court declares that Akron's Charter amendment violates the Ohio Constitution beyond a reasonable doubt and further violates R.C. 9.481. Accordingly, the Union's motion for summary judgment is granted and Akron's motion for summary judgment is denied.

As a result of this finding, the court orders that promotions to be based upon the February 2015 Fire Lieutenant's exam may not include residence preference points. Any relief occasioned by this decision shall be only prospective in nature as no challenges to prior testing and application of the charter provision at issue have been presented and because the plaintiffs herein have not requested such relief.

Pursuant to Civ. Rule 58, this is a final appealable order, there being no just reason for delay.

IT IS SO ORDERED.


JUDGE TODD McKENNEY

cc: Attorney Aretta K. Bernard (via email)
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WW:KAS
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