**[Cite as *Madigan v. Cleveland*, 2010-Ohio-1213.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 93367**

## PATRICK MADIGAN, ET AL.

PLAINTIFFS-APPELLEES

vs.

## CITY OF CLEVELAND

DEFENDANT-APPELLANT

**JUDGMENT:**
AFFIRMED IN PART; REVERSED IN PART

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-675397

**BEFORE:** Cooney, J., McMonagle, P.J., and Stewart, J.

**RELEASED:** March 25, 2010

**JOURNALIZED:**
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COLLEEN CONWAY COONEY, J.:

**{¶ 1}** Defendant-appellant, city of Cleveland ("City"), appeals from the trial court's judgment denying its motion to dismiss and granting plaintiffs-appellees, Patrick Madigan ("Madigan"), Cara Milcinovic ("Milcinovic"), and the Cleveland Civil Service Employees Association's ("CSEA") (collectively referred to as "CSEA appellees") motion for preliminary and permanent injunction.[1] Finding some merit to the appeal, we affirm in part and reverse in part.

**{¶ 2}** In September 2008, Cleveland City Council enacted Ordinance No. 1319-08, Sections (1)-(6), which approved for submission on the November 4, 2008 election ballot a proposal to amend the City's Charter as it relates to civil service. Ordinance No. 1319-08 provides in pertinent part:

> "Section 1. That this Council authorizes the submission to the electors of the City of Cleveland at a general election to be held * * * in the City of Cleveland on Tuesday, November 4, 2008, of a proposal to amend the Charter of the City of Cleveland by amending existing Sections 121, 126 and 130 and enacting new Section 131-1 * * *."

**{¶ 3}** The proposal, which is found in Section 6 of Ordinance No. 1319-08, was placed on the ballot as Issue 38, and reads as follows:

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[1]Madigan is the President of CSEA, and Milcinovic is an employee of CSEA.

> "Shall various sections of the Charter of the City of Cleveland related to civil service be amended to (1) allow appeals of employees to the Civil Service Commission from suspensions of more than 3 days and authorize the Commission to set the appeal for hearing within 30 days; (2) provide that the unclassified service shall include assistant directors of departments, executive and special assistant to the Mayor, temporary employees for a period not to exceed 90 days, seasonal employees for a period not to exceed 180, and students enrolled in any recognized educational institution; (3) provide that the non-competitive class shall include all positions requiring specialized training, or skills requiring certifications or licensure, and qualifications of a scientific, business, managerial, professional or educational character, as determined by the Commission and that fitness of applicants in the non-competitive class shall be based on the applicant's knowledge, skills and abilities relative to the qualifications for the position; (4) rename the ordinary unskilled labor class as the general labor class that includes semi-skilled and unskilled labor positions for which it is impractical to give competitive tests and that vacancies in the general labor class shall be filled from the registration list containing qualified applicants provided to the appointing authority by the Commission; (5) provide that in the absence of an eligible list, any position in the competitive service may be filled temporarily, without test, for a period not to exceed one year; and (6) grandfather employees hired in their current position on or before August 6, 2008, who have served for 90 consecutive days without test, who meet the qualifications for their position, and who have a satisfactory employment record as regular employees in their position without test, provided that any grandfathered employee is not eligible to apply for any other position in the classified service without test and compliance with all other applicable civil service laws and rules?"

**{¶ 4}** Cleveland voters passed the proposal on November 4, 2008. The next day, the CSEA appellees filed a complaint for declaratory relief, seeking that the trial court declare "Ordinance Number 1319-08 unconstitutional as it violates Article XV, Section 10 of the Ohio Constitution" and that "Ordinance Number 1319-08 [was] unconstitutionally enacted[.]"

**{¶ 5}** The CSEA appellees also sought a temporary restraining order, preliminary injunction, and permanent injunction, to prohibit the City from enacting or enforcing the unconstitutional "Charter Amendment commonly known as Ordinance No. 1319-08." The trial court granted the temporary restraining order and set the matter for a preliminary injunction hearing on November 19, 2008.

**{¶ 6}** Prior to the hearing, intervenors-appellees, Walter May, President, and Brian Betley, Vice-President, of the Fraternal Order of Police, Lodge 8 (collectively referred to as "FOP"); Steve Loomis and the Cleveland Police Patrolmen's Association (collectively referred to as "CPPA"); and Stephen Palek and the Cleveland Association of Rescue Employees (collectively referred to as "CARE") each moved to intervene as a new-party plaintiff.[2] At the preliminary injunction hearing, the court granted the intervenors' motions and found that the City did not violate the Ohio Constitution by placing the proposed Charter amendments on the November 2008 ballot. The court then continued the hearing and instructed the parties to submit briefs on the constitutionality of the approved Charter amendments.

[2] CPPA included a complaint for declaratory judgment and temporary, preliminary, and permanent injunctive relief to its motion to intervene.

**{¶ 7}** The City, CSEA appellees, and intervenors FOP and CARE all filed briefs addressing constitutionality. The City also moved to dismiss the CSEA appellees' complaint. In January 2009, the trial court held a hearing on the constitutionality of the Charter amendments and issued its decision in May 2009, denying the City's motion to dismiss and granting CSEA appellees' motion for preliminary and permanent injunction. The court also issued an opinion, stating that:

> "Cleveland charter amendment, Ordinance No. 1319-08, Sections (2)-(6), is unconstitutional as it violates Article XV, Section 10, of the Ohio Constitution which requires that appointment and promotion in the civil service of the city shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. The Court hereby grants a permanent [restraining] order prohibiting the City of Cleveland from enforcing or enacting Ordinance Number 1319-08, Sections (2)-(6) as those provision are found to be unconstitutional and void."

**{¶ 8}** It is from this order that the City appeals, raising seven assignments of error for our review, which shall be discussed out of order where appropriate.

Motions to Intervene

**{¶ 9}** In the sixth assignment of error, the City argues that the trial court erred in granting the intervenors' motions to intervene. It claims that FOP, CARE, and CPPA cannot be plaintiffs because they did not file complaints as required by Civ.R. 24.

**{¶ 10}** The decision to grant or deny a motion to intervene is within the sound discretion of the trial court and will not disturbed on appeal absent an abuse of discretion. *Cleveland v. State*, Cuyahoga App. No. 92735, 2009-Ohio-6106, citing *Univ. Hosps. of Cleveland, Inc. v. Lynch*, 96 Ohio St.3d 118, 2002-Ohio-3748, 772 N.E.2d 105, ¶47; *In re Stapler* (1995), 107 Ohio App.3d 528, 531, 669 N.E.2d 77. "The term 'abuse of discretion' connotes 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, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

**{¶ 11}** The party seeking to intervene must comply with Civ.R. 24(C), which provides that:

> "A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention and shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought."

**{¶ 12}** Civ.R. 7(A) defines a pleading as a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, or a third-party answer.

**{¶ 13}** In the instant case, CPPA attached a complaint to its motion to intervene and also incorporated by reference "all claims, averments, and

arguments" set forth in the CSEA appellees' pleadings and motions. FOP incorporated by reference the CSEA appellees' case, alleging that Ordinance No. 1319-08 is unconstitutional. CARE requested to intervene, alleging that certain positions of rescue workers would no longer be required to be filled under Ordinance No. 1319-08. FOP and CARE failed to attach a proposed complaint to their motions to intervene. At the preliminary injunction hearing, the City objected to the intervenors participating. The court overruled the City's objection, and allowed FOP, CARE, and CPPA to intervene.

**{¶ 14}** We note that Civ.R. 24 is generally liberally construed in favor of intervention. *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections* (1995), 74 Ohio St.3d 143, 144, 656 N.E.2d 1277; *State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, 905 N.E.2d 1192, ¶20. See, also, *W. 11th St. Partnership v. Cleveland*, Cuyahoga App. No. 77327, 2001-Ohio-4233. Because CPPA included a complaint with its motion to intervene, we find that the trial court did not abuse its discretion in granting CPPA's motion to intervene.[3] However, FOP's and CARE's motions to intervene were not proper because the motions were not accompanied by a pleading.

[3]We note that CPPA did not submit an appellate brief.

**{¶ 15}** CSEA appellees rely on *Crittenden Court Apt. Assoc. v. Jacobson/Reliance*, Cuyahoga App. Nos. 85395 and 85452, 2005-Ohio-1993, in which this court reversed the trial court's denial of Fidelity & Guaranty Insurance Company's ("Fidelity") motion to intervene. The trial court had denied Fidelity's motion to intervene because its motion was filed approximately 30 days before trial and the matter had been pending for over three years. Fidelity failed to attach an intervening complaint, and the failure to do so was addressed in its motion as follows: "'Because [Fidelity] has no separate and independent claims to assert in this litigation, it is neither necessary or appropriate that it submit a pleading in conjunction with this motion as described in [Civ.R. 24(C)].'" *Crittenden* at ¶7. This court found that Fidelity's failure to attach an intervening complaint was not fatal to its motion to intervene. This court further found that intervention by Fidelity was appropriate because Fidelity, as the insurer, had no other method to protect its interests.

**{¶ 16}** However, the instant case presents far different circumstances. Unlike *Crittenden*, timeliness was not at issue and the trial court in the instant case granted the motions to intervene. Furthermore, neither FOP nor CARE provided any reason to explain their failure to attach an intervening complaint to their motions to intervene. Lastly, unlike Fidelity,

FOP and CARE have an alternative method for relief — they can file a separate declaratory judgment action to attack the specific Charter amendment they allege impacts them. Therefore, we find that the trial court abused its discretion when it allowed FOP and CARE to intervene.[4]

**{¶ 17}** Accordingly, the sixth assignment of error is sustained in part and overruled in part.

Motion to Dismiss

**{¶ 18}** In December 2008, the City moved to dismiss the CSEA appellees' complaint for declaratory judgment and injunctive relief under Civ.R. 12(B)(1), 12(B)(6), and 12(C), arguing that: (1) the CSEA appellees failed to state a claim upon which relief may be granted; (2) a declaratory judgment was improper due to the lack of a justiciable issue or a real controversy; (3) the trial court lacked jurisdiction because of the absence of necessary parties; (4) laches barred the CSEA appellees' claims; and (5) the CSEA appellees lacked standing. The CSEA appellees requested an extension of time to respond to the City's motion. In its May 2009 entry, the trial court granted the CSEA appellees' motion and denied the City's motion to dismiss.

[4]Although FOP and CARE filed a joint brief as part of this appeal, we have not considered it based on our decision that they are not proper intervenors.

**{¶ 19}** In the first assignment of error, the City argues that the trial court erred in failing to dismiss the CSEA appellees' claim that Ordinance No. 1319-08 violates Section 10, Article XV, of the Ohio Constitution because their complaint does not contain any allegations to support their claim.

**{¶ 20}** An appellate court reviews a Civ.R. 12(B)(6) motion to dismiss under a de novo standard of review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶5. In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief may be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 493, 2006-Ohio-2625, 849 N.E.2d 268, citing *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753. Also, a reviewing court accepts as true all material allegations of the complaint and makes all reasonable inferences in favor of the plaintiffs. *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 465, 2004-Ohio-5717, 816 N.E.2d 1061. "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063.

**{¶ 21}** In the instant case, the CSEA appellees' complaint alleges that: "[o]n or about September 3, 2008, the Cleveland City Council enacted Ordinance Number 1319-08, authorizing the submission to the electors at the November 4, 2008 general election certain Charter amendments dealing with the civil service system in the City of Cleveland." The complaint asks the court to declare "Ordinance Number 1319-08 unconstitutional as it violates Article XV, Section 10 of the Ohio Constitution" and that "Ordinance Number 1319-08 [was] unconstitutionally enacted[.]"

**{¶ 22}** The CSEA appellees argue that "[t]he City cannot, in good-faith, claim that by referencing the amendments on the Ordinance by Ordinance Number and not each Charter section that was being amended that the City some how is unaware of what is being challenged." They further argue that the City failed to raise this argument before the trial court and is prohibited from raising it for the first time on appeal. We disagree.

**{¶ 23}** It is clear from the record that the City raised this argument in its motion to dismiss. Furthermore, the City does not argue that it was unaware of what the CSEA appellees challenged. Rather, it argues that the CSEA appellees failed to present any evidence or make any arguments to demonstrate that Ordinance No. 1319-08 violates Section 10, Article XV, of the Ohio Constitution. The City claims that not one of the allegations in the

CSEA appellees' complaint specifies a Cleveland Charter Section concerning civil service that is unconstitutional under Section 10, Article XV, of the Ohio Constitution.

**{¶ 24}** The sole purpose of Ordinance No. 1319-08 was to authorize the submission to the electors of the City a proposal to amend Cleveland Charter Sections 121, 126, and 130 and enact a new section, Section 131-1. Once the voters passed Issue 38, amended Charter Sections 121, 126, and 130, and newly enacted Charter Section 131-1 became effective. Section 10, Article XV, of the Ohio Constitution provides that: "[a]ppointments and promotions in the civil service * * * shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations." Clearly, this provision does not address the method of placing civil service amendments on the ballot. Furthermore, none of the sections in Ordinance No. 1319-08 authorize or declare appointments in the civil service. We find that Ordinance No. 1319-08 is akin to an Ohio House or Senate bill enacting a new Ohio Revised Code provision.

**{¶ 25}** By challenging the ordinance that merely authorized the placement of the proposed amendments on the ballot, instead of challenging each specific Charter Section in their complaint, we find that the CSEA

appellees failed to allege any facts that would entitle them to relief. Thus, the trial court erred in denying the City's motion to dismiss.

**{¶ 26}** Accordingly, the first assignment of error is sustained.

**{¶ 27}** In the second assignment of error, the City argues that the trial court erred in finding all the Charter provisions unconstitutional. In the third assignment of error, the City argues that the trial court erred in shifting the burden to the City to prove that the Charter provisions were constitutional. In the fourth assignment of error, the City argues that the trial court erred in not dismissing the declaratory judgment. In the fifth assignment of error, the City argues that the trial court lacked jurisdiction to decide whether Cleveland Charter Section 131-1 is constitutional. In the seventh assignment of error, the City argues that the trial court erred in denying its motion to dismiss for lack of standing.

**{¶ 28}** However, based on our disposition of the first assignment of error, we overrule these assignments of error as moot. See App.R. 12(A)(1)(c).

**{¶ 29}** Judgment is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellees share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
MELODY J. STEWART, J., CONCUR