[Cite as *Cleveland Civ. Serv. Emps. Assn. v. Cleveland*, 2010-Ohio-4352.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93922

CLEVELAND CIVIL SERVICE EMPLOYEES ASSN.

PLAINTIFF-APPELLEE

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-264201

BEFORE: Dyke, J., Stewart, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: September 16, 2010

ATTORNEYS FOR APPELLANTS

Robert J. Triozzi, Esq.
Director of Law, City of Cleveland
By: Theodora M. Monegan, Esq.
Chief Assistant Law Director
James C. Cochran, Esq.
Gary S. Singletary, Esq.
Assistant Directors of Law
Cleveland City Hall, Room 106
601 Lakeside Avenue
Cleveland, Ohio 44114-1077

ATTORNEYS FOR APPELLEE

John Swansinger, Esq.
Drue M. Skaryd, Esq.
Ritzler, Coughlin & Swansinger, Ltd.
1360 East Ninth Street
1000 IMG Center
Cleveland, Ohio 44114

Kevin P. Prendergast, Esq.
27999 Clemens Road, Suite One
Westlake, Ohio 44145

ANN DYKE, J.:

{¶ 1} Defendants the city of Cleveland and the Cleveland Civil Service Commission ("defendants") appeal from the order of the trial court that found them in contempt of court and imposed sanctions, in connection with an action filed by the Civil Service Employees' Association ("CSEA") and other plaintiffs

challenging the city's temporary appointments that exceeded 90 days, the city's designation of job classifications as "non-competitive," and the absence of competitive testing and eligibility lists for other classified civil service positions. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

{¶ 2} The background of this litigation was explained in *Cleveland Civ. Srvc. Emps. Assn. v. Cleveland,* Cuyahoga App. No. 79593, 2002-Ohio-586:

{¶ 3} "The [Cleveland City] charter creates two classes of civil service employees: classified and unclassified. The unclassified civil service includes all officers elected by the people, all directors of departments, the clerk of the city council, the chief of police, the members of boards or commissions appointed by the mayor, the mayor's secretary and one secretary for each director of a department, eight executive assistants for the mayor, students enrolled in a recognized college or university training program, school crossing guards, and members of the auxiliary police force. See Cleveland City Charter, Section 126(1)." Id.

{¶ 4} Pursuant to Section 126(2) of the charter:

{¶ 5} "The classified service shall comprise all positions not specifically included by this Charter in the unclassified service. There shall be in the classified service three classes to be known as the competitive class, the noncompetitive class and the ordinary unskilled labor class.

{¶ 6} "(a) The competitive class shall include all positions and employment for which it is practicable to determine the merit and fitness of applicants by competitive tests.

{¶ 7} "(b) The noncompetitive class shall include all positions requiring peculiar and exceptional qualifications of a scientific, managerial, professional or educational character, as may be determined by the Commission, the fitness of applicants for which may be determined by noncompetitive tests.

{¶ 8} "(C) The ordinary unskilled labor class shall include all ordinary unskilled labor positions for which it is impractical to give competitive tests. Such positions shall be filled from unskilled labor eligible lists established and maintained by the Commission. The Commission shall register applicants for positions in the labor class either continuously or at such times as there are vacancies to be filled, provided, however, that no registration may be accepted until public notice of the intention to so accept registrations shall be made by the Commission. Priority of such registration shall determine an applicant's place on the eligible list, provided the applicant meets required standards as to age, citizenship, physical fitness and residence as established by the Commission. Eligibility to be called for examination following registration shall expire one year following the date of registration.

{¶ 9} "The Civil Service Commission shall be the sole authority under the Charter to determine the grade and classification of positions as to duties and responsibilities in all branches of the classified service."

{¶ 10} Under these rules, as further explained in *Cleveland Civ. Srvc. Emps. Assn. v. Cleveland,* supra:

{¶ 11} "The civil service commission has established rules for testing that generally require open, competitive tests to be given for all applicants. Non-competitive tests may be given if the position requires particular and exceptional qualifications of a scientific, managerial, professional or educational nature. See Cleveland Civil Service Commission Rule 4.60."

{¶ 12} However, "a temporary civil service employee is an employee appointed to a position without first having undergone civil service testing or placement on an eligibility list. By law, workers cannot maintain temporary civil service positions for more than ninety days. The city of Cleveland employs a number of temporary civil service workers, even though many of those workers have been on the payroll for considerably longer than the ninety days permitted by law in some cases, many years longer." Id.

{¶ 13} Plaintiffs filed the instant action on January 18, 1994, seeking to enforce the hiring requirements outlined in the charter. They alleged that the city hired numerous temporary appointees who maintained their positions in excess of the 90-day limit set in the city's charter, without taking civil service examinations, failed to create eligibility lists for classified civil service positions, and improperly promoted certain individuals who lacked civil service certification. The trial court concluded that the mandatory procedures set forth in the charter

provide for the hiring and promotion of non-bargaining employees were violated. In an order dated February 11, 1998, the trial court ordered the following:

{¶ 14} "1) Pursuant to Section 130 of the Cleveland City Charter, the Defendants are required to prepare and administer examinations for any non-bargaining unit position in the classified service now, or hereinafter, held by any temporary appointee within ninety (90) days of the hiring of any temporary appointee;

{¶ 15} "2) Pursuant to Section [sic] of the Cleveland City Charter, the Defendants are required to prepare and administer promotional examinations for any non-bargaining unit position in the classified service below the lowest grade which is now or hereinafter occupied by a temporary appointee unless it is not practicable to do so, and

{¶ 16} "3) Pursuant to Section 128 of the Cleveland City Charter, Defendants are required to prepare and administer open, competitive examination for any non-bargaining unit position in the classified service unless the Commission makes a specific finding that the position requires peculiar and exceptional qualifications of a scientific, managerial, professional or educational character."

{¶ 17} Defendants assert that the charter term "original appointment" does not include persons hired into union positions who had not been tested.

{¶ 18} The trial court rejected this argument and ordered as follows:

{¶ 19} "It is therefore ordered that Defendants City of Cleveland and Cleveland Civil Service Commission shall:

{¶ 20} "1. Administer open, competitive examinations for all original appointments in the classified service of the City of Cleveland unless the Civil Service Commission finds that the appointment is to the non-competitive class or to the unskilled labor class.

{¶ 21} "2. Administer non-competitive examinations for all original appointments into the non-competitive classified service of the City of Cleveland, provided that the Civil Service Commission has complied with Civil Service Rule 4.60 and Charter Section 128(I).

{¶ 22} "3. For all original appointments into the Unskilled Labor Class, the Civil Service Commission shall comply with Charter Section 131 and Civil Service Rule 10.00 *et seq.*

{¶ 23} "4. The term 'original appointment' shall include all appointments made into the classified service of the City, including regular and temporary appointments, but shall not include the promotional appointment of a City employee pursuant to procedures contained in a collective bargaining agreement."

{¶ 24} CSEA appealed to this court, which affirmed, stating:

{¶ 25} "We fail to see how original appointments must be made within the spirit of the civil service system, but that temporary appointments are not subject to the same requirements. A temporary appointment is made only because the

city could not comply with the civil service requirements at the time of hire. In fact, the city charter defines a temporary appointment as one made in the absence of an eligible list to a position in the Classified Service of the City pending an examination. This would, of course, explain why the city charter makes temporary appointments valid for only ninety days, so that an eligible list can be created.

{¶ 26} "* * *

{¶ 27} "We also reject the city's argument that temporary employees cannot be tested because this would violate the terms of collective bargaining agreements covering those workers. The collective bargaining units are the representatives of affected workers, and only one of those unions tried to intervene in the matter." *Cleveland Civ. Serv. Emps. Assn. v. Cleveland,* supra.

{¶ 28} In 1998, the Civil Service Commission enacted Rule 5.10, which provides that a temporary appointee who has held a position for more than 90 days and has passed the appropriate exam "may be appointed to the position as a permanent employee * * * before the Commission prepares the eligible list* * *," and Rule 6.10, which provides that a person who the City has been laid off from one position may be appointed to another position without taking the appropriate examination and without regard to the eligible list. See *Civ. Serv. Emps. Assn. v. Cleveland,* Cuyahoga App. No. 87784, 2006-Ohio-6595.

{¶ 29} In separate proceedings, CSEA filed a complaint for declaratory judgment, asserting that Rules 5.10 and 6.10 were unenforceable. *Civ. Serv.*

Emps. Assn. v. Cleveland, Cuyahoga Common Pleas No. CV-558706. The trial court determined that the rules were in conflict with the city's charter and determined that they were void and unenforceable. This court affirmed. See *Civ. Serv. Emps. Assn. v. Cleveland,* Cuyahoga App. No. 87784, 2006-Ohio-6595.

{¶ 30} Thereafter, in 2005, plaintiffs in this matter filed a motion to show cause. The lower court found the city in contempt of court on February 27, 2006. On March 24, 2006, the trial court issued an order instructing defendants to:

{¶ 31} "1) identify all Temporary Appointees by 4/07/06; 2) provide a list of the most regular/frequent hired classifications by 4/14/06; and 3) categorize classifications and determine how to test."

{¶ 32} In September 2006, the trial court awarded plaintiffs $26,890 for attorney fees and costs. Also in 2006, defendants were well aware of the "possibility of fines for each violation." The lower court continued to monitor the case. During this time, the city hired a consultant, the Magnet Network, to assist the city in complying with the court's orders. Subsequent court orders also instructed defendants to report to the court its plan to implement the required testing. The court continued to require defendants to provide documentation outlining its hirees and the dates of scheduled and completed tests.

{¶ 33} In June 2008, CSEA filed a third motion to show cause in the instant matter. Within this motion, plaintiffs asserted that defendants were in violation of the charter and the 1998 court order for continuing to hire temporary appointees

who had not been tested for their positions within 90 days. Due to the lack of testing, most classifications lacked an eligibility list of persons who may be hired. Plaintiffs also asserted that defendants were in contempt of court for determining that various classifications were "non-competitive," without making the required "specific finding" of peculiar and exceptional qualifications. According to plaintiffs, defendants had impermissibly used the "non-competitive" designation to hire persons with "minimum qualifications," and, concomitantly, to avoid competitive testing and the hiring of candidates in the top three test ranking.

{¶ 34} Defendants filed a motion to purge the contempt of court order, arguing that it could not comply with the trial court's orders.

{¶ 35} In September 2008, Cleveland City Council enacted Ordinance No. 1319-08, Sections (1)-(6), to modify the charter provisions at issue. See *Madigan v. Cleveland,* Cuyahoga App. No. 93367, 2010-Ohio-1213. Cleveland voters passed the proposal on November 4, 2008. Id. In separate proceedings, plaintiffs challenged Ordinance No. 1319-08. See *Madigan v. Cleveland,* Cuyahoga Common Pleas No. CV-675397. In that separate matter, the court concluded that the new charter provisions were unconstitutional.[1]

---

[1]On appeal to this court, we determined that the trial court erred in failing to grant the city's motion to dismiss, concluding that plaintiffs had simply challenged the ordinance that merely authorized the placement of the proposed amendments on the ballot, instead of challenging each specific Charter Section in their complaint. *Madigan v. Cleveland,* Cuyahoga App. No. 93367, 2010-Ohio-1213. We therefore reversed that matter and remanded for further proceedings. Id. The docket in that matter indicates that CSEA now seeks to file an amended complaint, reasserting their original allegations. In the instant matter, the trial court noted in its Amended Order that the "Charter Amendments were a direct attempt by the City to circumvent the rulings in this

{¶ 36} In September 2008, the trial court held an evidentiary hearing in the instant matter on plaintiffs' motion to show cause.

{¶ 37} The evidence presented by plaintiffs demonstrated that during the administration of Mayor George Voinovich, the city completed large-scale testing of temporary employees and had eight civil service test examiners on staff. In 1990 alone, 600 non-safety force civil service examinations were administered. By the end of Mayor Voinovich's term, approximately 200 temporary appointees remained untested. Through the ensuing years, however, the number of temporary appointees who remained untested in their positions past 90 days again continued to grow. The evidence demonstrated that there were approximately 940 job classifications within the city, and at the time of the hearing, only about 140 of these had an eligibility list. Although the city had retained the Magnet Network to assist them with analyzing job requirements and administering examinations, only about 120 examinations were administered in 2008. Amid budget concerns, the city's Civil Service Commission now has only two examiners. Presently, the city's records list approximately 900 temporary appointees who are subject to civil service testing, but have not been tested within the 90 day limit. Eligibility lists are not in place, so these employees have

---

case and were found unconstitutional [by the trial judge in that matter.] Therefore, the Court awards fees and costs up to the filing of * * * the declaratory judgment lawsuit." In its Final Order, the court additionally stated that it imposed the sanctions "for the past acts of the City prior to September 2008 [and w]hether the Amendments are upheld on appeal or reflect the will of the voters has no impact on the City's past acts that the Court has found contemptuous."

no right to appeal disciplinary actions, obtain a promotion, or be included in a layoff list. Cleveland Civil Service Commission Rules 6.50.

{¶ 38} Plaintiffs also presented evidence that for those positions designated as "non-competitive," the city established minimum qualifications. The city is not required to rank applicants meeting this minimum, and is permitted to hire any applicant meeting the minimum qualifications. Civil Service Commission Secretary Lucille Ambroz conceded that there were probably a few temporary appointees who did not meet the minimum qualifications. Ms. Ambroz further acknowledged that, although these positions must require peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character, the Board of the Civil Service Commission had frequently approved requests to deem a classification "non-competitive" on the basis of information presented in a bulletin and without additional discussion or inquiry.

{¶ 39} Plaintiffs also maintained that the city had impermissibly used the "non-competitive" designation for classifications that do not possess the requisite peculiar and exceptional qualifications in order to hand-pick a predetermined candidate and to avoid competitive testing. In support of this claim, plaintiffs presented evidence that Ricky Smith, the Director of Port Control, had implemented the "non-competitive" designation to hire individuals with whom he had previously worked.

{¶ 40} There was also evidence that after the "non-competitive" designation had been implemented and a list of eligible employees was prepared, the city had

allowed the hiring of a temporary employee whose name was not on the eligibility list. In other instances, the minimum qualifications for a position had been changed over short periods of time, demonstrating, according to plaintiffs, that the city had simply tailored the qualifications to match a pre-selected candidate. In still other instances, the city hired an applicant with less education or experience than other candidates.

{¶ 41} Defendants' evidence demonstrated that in 2007, the city entered into a $500,000 contract with Magnet Network to comply with its testing duties. It intended to analyze 40 classifications but analyzed only 26 due to budget limitations. Overall, however, the city had made progress since 2007. In that year, there were 1,143 temporary appointees, or 39 percent of the non-union workforce. In 2008, there were 1,177 temporary appointees, or 24 percent of the non-union workforce. At the time of the hearing, there were also approximately 226 individuals who had been tested, but the "follow-up paperwork" had not been completed, so the "temporary" designation had not been removed.

{¶ 42} With regard to the claim that defendants had improperly utilized the "non-competitive" classification, defendants noted that plaintiffs identified only 64 disputed designations. Further, defendants' evidence demonstrated that such positions require peculiar and exceptional qualifications of *either* a scientific, managerial, professional, *or* educational character; only one such criteria is required. Further, the charter expressly states that the "Civil Service Commission shall be the sole authority under the Charter to determine the grade

and classification of positions as to duties and responsibilities in all branches of the classified service."

{¶ 43} Defendants also indicated that numerous steps are required before a classification is designated as "non-competitive." First, a Personnel Identification Document is created. In a weeks-long process, the mayor's office, the office of budget, the personnel department, and the Commission all have input in establishing the minimum qualifications. The Board of the Civil Service Commission must approve this action, and to that end, the Commission sends the Board members bulletins that describe the job criteria. The Board members review the bulletins in advance of the meeting, hold a public vote on the issue, and review the minutes of the previous meeting.

{¶ 44} As to testing, the Commission determines that all applicants meet the minimum qualifications. The test for such applicants may be written, oral, or a "resume_ test." The hiring authority then need only hire someone with the minimum qualifications. Individuals who dispute the hiring decision have five days to appeal.

{¶ 45} With regard to plaintiffs' specific hiring complaints, defendants presented evidence that none of the specific matters raised at trial were asserted as a complaint with the Commission. Further, as to the hiring at the port control, the evidence demonstrated that the positions required specialized educational or professional knowledge, and one of the employees who was hired is an engineer. With regard to changes in the minimum qualifications, the evidence indicated

that job requirements may change to reflect additional job responsibilities. Positions have also been eliminated. As to the hiring of seemingly less-qualified individuals, there was evidence that one complaining applicant, though well-educated, did not meet the stated minimum supervisory qualifications for the position.

{¶ 46} Finally, the city presented evidence that it was projecting a deficit in revenue for 2008, but had kept funding of the civil service testing programs at the same levels as previous years.

{¶ 47} In an order dated April 10, 2009, the trial court found defendants in contempt of court. The court found that the "city's hiring practices woefully fail to comply" with the purposes of the civil service laws, and concluded:

{¶ 48} "The hearing transcript is replete with instances of noncompliance. In fact, there is evidence of intentional manipulation of the civil service hiring process. The evidence reveals that the appointing authorities are not educated on the Charter requirements or the prior court orders. Neither are the Civil Service Committee members, who merely rubber-stamp the classifications as presented to them by the Committee's secretary. That this is a low priority for the city is glaringly evident." The lower court additionally determined that the "city does not have a plan in place to comply with its orders."

{¶ 49} The court also rejected the city's contention that compliance is not practicable or impracticable, concluding that impossibility and impracticability are not defenses. The court further noted that the previous administration had

tested over 600 employees in one year, but the present administration had not committed the resources to accomplish sufficient testing. The court stated:

{¶ 50} "Here, defendants have ignored three separate court orders that require them to administer examinations.

{¶ 51} "Therefore, the Court finds by clear and convincing evidence that the city has continued to hire and promote individuals following the Contempt Order of February 28, 2006 contrary to civil service rules and have continued to violate the prior orders of this Court to test temporary appointees within the ninety day framework required by the Charter. The Court finds that the city has been in contempt of the orders of this Court despite being given numerous opportunities to purge the contempt and refuses to allocate funds to comply with the Charter. The Court also finds that the Civil Service Commission has failed to make any specific findings when designating a test to be non-competitive, in violation of prior orders of the Court.

{¶ 52} "The Court finds that beginning with the administration of Mayor White and continuing to this day, the staff of the Civil Service Commission has been significantly reduced and sufficient funding has failed to be allocated, causing the Commission's inability to carry out the testing requirements of the Charter.

{¶ 53} "The Court finds that at least 902 temporary appointees are on the City payroll as of the date of the hearing and those temporary appointees have

been on the payroll over ninety days in violation of the Charter and prior orders of the Court."

{¶ 54} In an amended order dated August 14, 2009, the trial court noted that "[i]mplicit in the exercise [of a court's powers to punish for contempt] is the authority to fashion a punishment that will induce the condemner to remedy the contempt involved." The court also noted its authority to uphold payment of a fine to a damaged party where damages are proven to have occurred as a result of the contempt, and concluded that plaintiffs have established that they were damaged and have incurred costs as a direct result of the City's contempt at the show cause hearing." The court then imposed a freeze in hiring for certain positions. Finally, the court determined that "at least 902 temporary employees were on the payroll of the City who had not been given civil service exams as required by the City Charter and prior Orders of this Court." It fined the city $250 for the first such temporary employee, $500 for the second, and $1,000 for each of the remaining 900 temporary employees who had not been tested as per the court's prior orders, for a total of $900,750. The court authorized the city to obtain a "rebate" of funds for implementing the requirements of the court's order, and of portions of the fine for "each temporary appointee tested, or with each specific finding of particular or specific expertise as to non-competitive classifications * * * [as well as] any remaining funds upon full or substantial compliance."

{¶ 55} The trial court additionally ordered that, of the $900,750 sanction, $265,025[2] was to be paid to CSEA "as a penalty for the contempt and to cover their reasonable attorney fees, costs, and expenses" and that this order was made "in lieu of a separate order to pay plaintiff's attorney fees, costs and expenses, as would be justified in this matter."

{¶ 56} Defendants now appeal and assign four errors for our review. We shall begin our analysis with the third assignment of error because it challenges a 2006 order.

{¶ 57} In their third assignment of error, defendants maintain that the trial court's February 2006 finding that defendants were in contempt of court is invalid since it did not provide defendants with an opportunity to purge the contempt.

{¶ 58} We note that the mere adjudication of contempt of court is not a final appealable order until a sanction or penalty is also imposed. *Cooper v. Cooper* (1984), 14 Ohio App.3d 327, 471 N.E.2d 52; *Chain Bike v. Spoke N' Wheel, Inc.* (1979), 64 Ohio App.2d 62, 410 N.E.2d 802; *In re Estate of Sheehan,* Geauga App. No. 2007-G-2774, 2007-Ohio-2571.

{¶ 59} Further, the sanction must afford the contemnor an opportunity to purge the contempt. *Tucker v. Tucker* (1983), 10 Ohio App.3d 251, 461 N.E.2d 1337, citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 416 N.E.2d 610, and *State v. Kilbane* (1980), 61 Ohio St.2d 201, 400 N.E.2d 386.

---

[2]This sum was established in the court's final amended order dated September 4, 2009.

{¶ 60} In this matter, the lower court found the city in contempt of court on February 27, 2006. In September 2006, the trial court awarded plaintiffs $26,890 for attorney fees and costs. This contempt of court finding therefore became a final, appealable order as of September 2006, upon the award of sanctions. The claimed failure to allow plaintiffs to purge that contempt finding raises a challenge to the 2006 sanction that is not properly before this court. In any event, the record clearly indicates that the trial court continued to work with the parties from the February 2006 contempt finding until the September 2006 award of costs and fees in an effort to bring defendant into compliance with the court's orders.

{¶ 61} This assignment of error is without merit.

{¶ 62} In their first assignment of error, defendants assert that the trial court erred in concluding that there was clear and convincing evidence to conclude that defendants had violated previous orders of the court and were in contempt of court. Defendants assert that the trial court disregarded their evidence of compliance with the court's orders that showed that the number of temporary appointees had declined. Defendants also contend that they properly designated 64 positions in the non-competitive classification and that the commission's public vote on these positions constitutes a "specific finding" that meets the charter's requirements. Defendants additionally maintain that the court did not define the requirements of a "specific finding."

A. Introduction

{¶ 63} Among the inherent powers of a court necessary for the orderly and efficient exercise of justice are the powers to punish the disobedience of the court's orders with contempt proceedings. *Zakany v. Zakany* (1984), 9 Ohio St.3d 192, 459 N.E.2d 870. Accord *Denovchek v. Bd. of Trumbull Cty. Commrs.* (1988), 36 Ohio St.3d 14, 15, 520 N.E.2d 1362 (the power of contempt is inherent in a court, such power being necessary to the exercise of judicial functions). See, also, *State v. Local Union 5750* (1961), 172 Ohio St. 75, 173 N.E.2d 331; *Hale v. State* (1896), 55 Ohio St. 210, 45 N.E. 199.

{¶ 64} Thus, the power to punish for contempt is said "* * * to exist independently from express constitutional provision or legislative enactment." *Cincinnati v. Cincinnati Dist. Council 51* (1973), 35 Ohio St.2d 197, 299 N.E.2d 686. Accord *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 271 N.E.2d 815, paragraph one of the syllabus

{¶ 65} The Court in *Denovchek v. Bd. of Trumbull Cty. Commrs.,* supra, stated:

{¶ 66} "In *Windham Bank,* supra, at paragraph two of the syllabus, we held, '[t]he purpose of contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice.' Therefore, since the primary interest involved in a contempt proceeding is the authority and proper functioning of the court, great reliance should be placed upon the discretion of the trial judge. The standard of review of a trial court's finding of contempt is abuse of discretion. *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10, 11, 417

N.E.2d 1249. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140."

{¶ 67} Similarly, in *Patino v. Foust,* Cuyahoga App. No. 86792, 2008-Ohio-6280, ¶17, this court explained:

{¶ 68} "A finding of civil contempt must be supported by clear and convincing evidence. *Sagan v. Tobin,* Cuyahoga App. No. 86792, 2006-Ohio-2602. 'Clear and convincing evidence implies that the trier of fact must have a firm conviction or belief that the facts alleged are true.' Id., quoting *Poss v. Morris,* Ashtabula App. No. 2004-A-0093, 2006-Ohio-1441. A trial court's finding of civil contempt will not be reversed on appeal absent an abuse of discretion. *Tradesmen Internatl. v. Kahoe* (Mar. 16, 2000), Cuyahoga App. No. 74420."

{¶ 69} Moreover, implicit in the exercise of the court's inherent contempt powers is the authority to fashion a punishment that will induce the contemnor to remedy the contempt involved. *Moraine v. Steger Motors, Inc*. (1996), 111 Ohio App.3d 265, 675 N.E.2d 1345. Thus, although R.C. 2705.05 sets forth the penalties for contempt of court, a court may, pursuant to its inherent powers, punish a contemptuous refusal to comply with its orders, without regard to the statutory penalties. See *Olmsted Twp. v. Riolo* (1988), 49 Ohio App.3d 114,

116-117, 550 N.E.2d 507; *McDaniel v. McDaniel* (1991), 74 Ohio App.3d 577, 599 N.E.2d 758.

B. Temporary Appointees

{¶ 70} In this matter, although the number of temporary appointees has declined since 2007, the record clearly indicates that there are approximately 900 temporary appointees who have been in their positions beyond the 90-day period set forth in the charter. While the city characterizes this figure as an improvement over the 2007 numbers, it is far more than what has previously been achieved. Further, the city's own witness established that the city would need to test 800 persons per year to remain current, and there is no plan in place for meeting that goal. Although the city has clearly expended a great deal of money to meet its duties under the charter and orders of the trial court, we agree with the trial court's determination that there is clear and convincing evidence that the city is in contempt of court. We find no abuse of discretion in connection with this portion of the trial court's orders, especially given the great length of time during which this issue has remained unsolved.[3]

{¶ 71} Finally, with regard to the city's assertion that the trial court improperly rejected its defense of impossibility due to intricacies in the testing process, this contention is belied by the record wherein significant testing was

[3] Parenthetically, we note that this court has addressed issues raised in connection with untested temporary appointees, in violation of Section 130 of the charter, at various times in the last 75 years. See *State ex rel. Rogers v. Green* (1935), 51 Ohio App. 182, 200 N.E. 146; *Gannon v. Perk* (1975), 47 Ohio App.2d 125,

accomplished in prior years. The city also asserts that the trial court improperly rejected the defense of impossibility insofar as the court did not recognize the budgetary reasons for fewer testing. This contention was rejected in *State ex rel. Rodgers v. Green,* supra, wherein the court stated "that neglect or omission could not operate to add nor to take from the authority and right of the relator or the respondents herein to assert their full legal rights[.]"

C. Non-Competitve Classification

{¶ 72} As an initial matter, defendants raise the contention that no order of the court defined how a "specific finding" that a position is non-competitive because it requires "peculiar and exceptional qualifications of a scientific, managerial, professional or educational character" is to be made.

{¶ 73} We find this contention to be somewhat untimely. In any event, absent a definition, the words are to have their ordinary meanings. See *Washington Cty. Home v. Ohio Dept. of Health,* 178 Ohio App.3d 78, 2008-Ohio-4342, 896 N.E.2d 1011. Further, in *Lewis v. Fairborn* (1997), 124 Ohio App.3d 292, 706 N.E.2d 24, the court ruled that a particularized assessment of the employee's duties was required.

{¶ 74} In determining whether the trial court abused its discretion in determining that the city had simply "rubber stamped" the Commission's designations, we note that Charter Section 126(2) states:

---

352 N.E.2d 606.

{¶ 75} "The Civil Service Commission shall be the *sole authority* under the Charter to determine the grade and classification of positions as to duties and responsibilities in all branches of the classified service." (Emphasis added.)

{¶ 76} Accord Cleveland Civil Service Commission Rule 4.60:

{¶ 77} "* * *. Whenever the Commission deems it advisable, non-competitive examinations may be ordered for any position previously filled by competitive tests."

{¶ 78} Case law on this issue is likewise deferential. See *State ex rel. Barborak v. Hunston* (1962) 173 Ohio St. 295, 298, 181 N.E.2d 894, wherein the court stated:

{¶ 79} "From a reading of the statutes regarding noncompetitive examining, both before and after November 1959, it is apparent that the authority to create noncompetitive examinations was vested in the commission and now is vested in the Director of State Personnel. Since such administrators have the authority to create such examinations and since they have used their discretion in so creating these examinations, this court will not now substitute its judgment for that of the administrators." Cf. *Local No. 67, Internatl. Assn. of Firefighters v. City of Columbus* (Nov. 18, 1987), Franklin App. No. 86AP-428.

{¶ 80} Moreover, the evidence of record clearly indicates that only one of the requisite criteria is required, and the city must go through various departments in order to derive the non-competitive classification. The Commission's determination is set forth in a bulletin that is then sent to the Board

for their review. Although the trial court characterized the Board as a "rubber stamp" of the Commission, we cannot agree with that assessment. Although one member exhibited unfamiliarity with some aspects of the process, he admitted receiving the agenda prior to the meeting and requested an executive session for more information. Further, the Commission and the remaining Board members understood the process and the criteria at issue. Although the trial court complained that the Board did not request additional information, many of the positions, on their face, involve a scientific, managerial, professional, or educational character, such as "Administrator of Engineering & Planning, Chief Architect, and Chief of Health Planning." The record clearly indicates that a specific finding is made by the Commission with regard to each classification designated as "non-competitive."

{¶ 81} In accordance with the foregoing, we find no clear and convincing evidence that defendants were in contempt of court for the non-competitive designation of classifications. On the record presented, we conclude that the trial court abused its discretion in connection with this aspect of its ruling.

{¶ 82} The first assignment of error is well taken in part.

{¶ 83} In the second assignment of error, defendants complain that the city failed to give them an opportunity to purge the 2009 contempt finding.

{¶ 84} A sanction for contempt must afford the contemnor an opportunity to purge the contempt. *Tucker v. Tucker,* supra. The opportunity to purge the contempt finding is to fulfill the purpose of the sanction in order to allow it to be

discontinued. *City of Cleveland v. Ramsey* (1988), 56 Ohio App.3d 108, 564 N.E.2d 1089. "The contemnor is said to carry the keys of his prison in his own pocket * * * since he will be freed if he agrees to do as so ordered." *Brown v. Executive 200, Inc.,* supra at 253.

{¶ 85} In this matter, the trial court found the city in contempt of court on February 27, 2006. On March 24, 2006, the trial court issued an order instructing defendants to:

{¶ 86} "1) identify all Temporary Appointees by 4/07/06; 2) provide a list of the most regular/frequent hired classifications by 4/14/06; and 3) categorize classifications and determine how to test."

{¶ 87} Throughout this period, the trial court continued to monitor the matter. Defendants were well-aware of the "possibility of fines for each violation" pursuant to a 2006 court order, and it hired a consultant, the Magnet Network, to assist the city with complying with the court's orders. Subsequent court orders repeatedly instructed defendants to report to the court its plan to implement the required testing and meet the testing requirements.

{¶ 88} As to the trial court's 2009 order finding defendants in contempt, the court's final entry indicates that the city may obtain a "rebate" of funds for implementing the requirements of the court's order, and of portions of the fine for "each temporary appointee tested, or with each specific finding of particular or specific expertise as to non-competitive classifications * * * [as well as] any remaining funds upon full or substantial compliance."

{¶ 89} In accordance with the foregoing, we find that the trial court provided a lengthy period of time within which defendants could purge the contempt order, and the rebate provisions also offer an opportunity to purge the contempt finding.

{¶ 90} The second assignment of error is overruled.

{¶ 91} In the fourth assignment of error, defendants additionally challenge the award of attorney fees to plaintiff.

{¶ 92} "A trial court may, within its discretion, include attorney fees as part of the costs taxable to a defendant found guilty of civil contempt." *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 67, 556 N.E.2d 157, citing *State ex rel. Fraternal Order of Police, v. Dayton* (1977), 49 Ohio St.2d 219, 361 N.E.2d 428, syllabus. Thus, a court's decision to award fees will not be reversed absent an abuse of discretion. *State ex rel. Sawyer v. Cendroski,* 118 Ohio St.3d 50, 2008-Ohio-1771, 885 N.E.2d 938.

{¶ 93} An attorney seeking fees has the burden of introducing sufficient evidence of his or her services and the reasonable value thereof. *In re Verbeck's Estate* (1962), 173 Ohio St. 557, 559, 184 N.E.2d 384. Pursuant to Sup.R. 71, "attorney fees in all matters shall be governed by Rule 1.5 of the Code of Professional Responsibility." Rule 1.5 sets forth the following factors that must be considered in determining the reasonableness of fees:

{¶ 94} "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

{¶ 95} "(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

{¶ 96} "(3) the fee customarily charged in the locality for similar legal services;

{¶ 97} "(4) the amount involved and the results obtained;

{¶ 98} "(5) the time limitations imposed by the client or by the circumstances;

{¶ 99} "(6) the nature and length of the professional relationship with the client;

{¶ 100} "(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

{¶ 101} "(8) whether the fee is fixed or contingent."

{¶ 102} In this matter, the record demonstrates that the trial court scheduled a hearing on the issue of attorney fees on May 20, 2009. The court continued this hearing and, at a pretrial held on May 21, 2009, "alternative court orders [were] discussed." Plaintiff submitted a request for attorney fees and costs in the amount of $283,046. Defendants opposed this request, complaining that plaintiffs improperly sought fees for lobbying the Cleveland Charter Review Commission and the Cleveland City Council. Defendants additionally complained that other requested amounts were unnecessary, duplicative, and in excess of the hourly fee that CSEA agreed to pay to one of its attorneys.

{¶ 103} In the August 14, 2009 amended order, the trial court ordered that $265,025 of the $900,750 sanction for contempt be paid to CSEA "as a penalty for the contempt and to cover their reasonable attorney fees, costs, and expenses" and that this order was made "in lieu of a separate order to pay plaintiff's attorney fees, costs and expenses, as would be justified in this matter."

{¶ 104} We conclude that the trial court abused its discretion by fashioning the attorney fee award herein. Although the record suggests that the parties may have discussed "alternatives," and briefed the issue of attorney fees, we do not find the materials submitted to sufficiently address the issues that must be addressed in Rule 1.5 of the Ohio Rules of Professional Conduct. Sup.R. 71. The trial court was therefore without crucial information regarding the reasonable value of the fees.

{¶ 105} Further, we note that the trial court specifically authorized a fee award for plaintiff's Charter Review, finding that the "Charter Amendments were a direct attempt by the City to circumvent the rulings in this case and were found unconstitutional by Judge McGinty in *Madigan v. City of Cleveland,* Case No. 08-675397." Assuming without deciding that a trial court may hold a city in contempt of court for amending its charter, Ohio Constitution, Article XVIII, Sections 3 and 7; *State ex rel. Fraternal Order of Police Captain John C. Post Lodge No. 44 v. City of Dayton* (1977), 49 Ohio St.2d 219, 361 N.E.2d 428, it is axiomatic that the fee applicant must demonstrate that the billed time was actually and reasonably expended in the prosecution of the litigation. See, e.g.,

Battelle Mem. Inst. v. Ins. Co. of N. America (Dec. 2, 1976), Franklin App. No. 76AP-407. Insofar as the trial court awarded attorney fees for matters unrelated to the prosecution of this litigation, it erred. Finally, with regard to the trial court's characterization of the attorney fee award as compensation for "loss and costs sustained by the contemnor's disobedience," (August 14, 2009 Amended Order), it is clear that a court may award damages to complainant where it can be proven that damages were a direct result of contempt. *RLM Industries, Inc. v. Indep. Holding Co.* (1992), 83 Ohio App.3d 373, 614 N.E.2d 1133. Nonetheless, such sanctions are subject to review for an abuse of discretion. *Burchett v. Miller* (1997), 123 Ohio App.3d 550, 552, 704 N.E.2d 636. In this matter, we are compelled to conclude that the trial court abused its discretion in concluding that the fees incurred in connection with the charter amendments were a "direct result" of defendants' contempt of court.

{¶ 106} In accordance with the foregoing, the fourth assignment of error is well-taken. The portion of the trial court's August 14, 2009 and September 4, 2009 orders that award CSEA $265,025 are hereby reversed, and the matter is remanded for further proceedings consistent with this opinion.

It is, therefore, considered that appellants and appellee split the costs herein.

It is ordered that a special mandate be sent to said 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.

ANN DYKE, JUDGE

MELODY J. STEWART, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR