

**IN THE SUPREME COURT OF THE STATE OF WEST VIRGINIA**

at Charleston

Appeal from the Circuit Court of Cabell County, West Virginia  
SUPREME COURT CASE NO. 33807

JASON EASTHAM,

Plaintiff/Appellee,

v.

CIVIL ACTION NO.: 06C-0948  
The Honorable John L. Cummings, Judge

THE CITY OF HUNTINGTON,  
a Municipal Corporation, and  
DAVID FELINTON, Mayor for the  
City of Huntington,

Defendant/Appellant,

and

JOSH COFFEY,

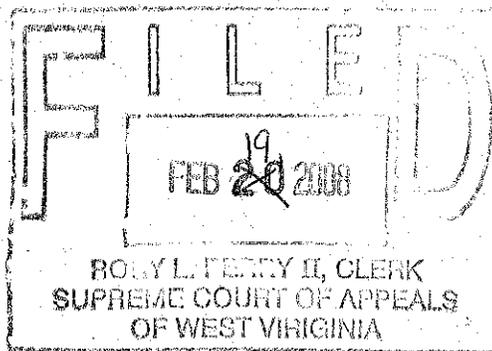
Plaintiff/Appellee,

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DAVID FELINTON, Mayor for the  
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Defendant/Appellant.



**BRIEF OF THE APPELLANTS**

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## QUESTIONS PRESENTED

- I. Did the Circuit Court err in granting the Plaintiff's Motion for Summary Judgment and holding that the City of Huntington's residency requirement found in §14.3 of the City Charter and Article 202 of the Codified Ordinances of the City of Huntington are "repealed and rendered void and unenforceable" as they would apply to civil service employees and civil service appointees of the City of Huntington, West Virginia?
  
- II. Did the Circuit Court err in construing the City of Huntington's residency requirement as denying civil service employees due process rights secured by the West Virginia Constitution and the Civil Service Statutes?

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## STATEMENT OF THE CASE

On February 11, 2002, the governing body for the City of Huntington enacted Article 202.10 of the Codified Ordinances of the City of Huntington establishing a residency requirement for all City of Huntington employees hired after July 1, 2002. A copy of this Ordinance is attached as Exhibit A. Though the Charter of the City of Huntington contained a residency requirement for all city employees in §14.3 of said Charter, Huntington enacted an ordinance that provided clarity and certainty to the City's residency requirement for municipal employees.

As a basis for constructing a residency ordinance, the City of Huntington utilized an ordinance from the City of Wheeling which had been held valid and constitutional by this Court in the matter of Morgan v. City of Wheeling, 516 S.E.2d 48 W.Va. 1999). A copy of this Ordinance is attached as Exhibit B. The ordinance ultimately adopted by the City of Huntington was a near mirror image of the Wheeling ordinance upheld by the West Virginia Supreme Court.

Though not conflicting, the two ordinances contained some dissimilarities. The Wheeling ordinance merely required municipal employees to be residents of the City of Wheeling or Ohio County within six months of employment. Conversely, the Huntington ordinance required employees to be residents of the City of Huntington within ninety days of employment. Further, the Wheeling ordinance, in subsection (d), provided that "failure to any officer or employee or appointee in the classified civil service or the unclassified positions of the City to comply with the provisions of this section shall be cause for that employee's removal or discharge from the City service." The Huntington ordinance, in subsection (d), provided that "failure of any officer, employee or appointee in the classified civil service or the unclassified positions of the City of Huntington to comply with the provisions of this section shall result in immediate discharge from the City service." It is this

minor variance in words that the Circuit Court has based its entire decision.

The Huntington ordinance contains a subparagraph (e) not found in the Wheeling ordinance. This paragraph requires that each prospective employee of the City of Huntington sign a sworn affidavit acknowledging the residency requirement and that "failure to establish or maintain such residency within the City of Huntington will result in [my] immediate dismissal for cause."

On November 27, 2006, after hearing complaints that certain employees were not living within the city limits, the governing body of for the City of Huntington passed a resolution requiring the Mayor to obtain proof from all employees hired after July 1, 2002 of current residence within the municipal corporate limits in accordance with Section 202.10 of the Codified Ordinances of the City of Huntington. A copy of the Resolution is attached hereto as Exhibit C. On November 29, 2006, the Mayor dispatched a letter to all personnel hired after July 1, 2002, requiring each to provide documentation of continued residency in the city limits of Huntington. A copy of the letter is attached hereto as Exhibit D. This letter was sent to all employees hired after July 1, 2002 though each employee had previously signed an affidavit of residency upon employment with the City of Huntington.

December 14, 2006 was established as the deadline for submitting proof of residency. On December 13, 2006 Plaintiffs Eastham and Coffey filed suit for declaratory relief. On that date an Order Granting Preliminary Injunction was granted by the Circuit court. A copy of the Order is attached hereto as Exhibit E. For purposes of summary judgment the Court consolidated the two matters.

The Cabell County Circuit Court has previously addressed the constitutionality of the residency requirement codified Article 202.10 of the Codified Ordinances in the matter of Davidson

v. The City of Huntington, et al., Civil Action No. 03C-560 (Honorable Dan O'Hanlon). In the Davidson matter the Circuit Court specifically held that "The City of Huntington, consistent with the ruling of Morgan v. City of Wheeling, 516 S.E.2d 48 (1999), enacted a residency ordinance that mirrors the residency ordinance enacted by the City of Wheeling and subsequently upheld by the Circuit Court of Ohio County and the West Virginia Supreme Court." A copy of this Order attached hereto as Exhibit F. Further, the court held that "The West Virginia Supreme Court rules that the residency requirement ordinance is valid and not in contravention of the civil service laws or the State and Federal Constitutions." It appears that the Circuit Court in the current cases has endeavored to overrule the decision rendered in Morgan v. City of Wheeling.

At the request of the parties, the Circuit Court consolidated the matters of Eastham v. City of Huntington, et al. and Coffey v. City of Huntington, et al. inasmuch as both actions involved identical questions of fact and law. Plaintiff Eastham is employed by the Huntington Fire Department; Plaintiff Coffey is employed by the Huntington Police Department. Both employees were hired after July 1, 2002. On January 12, 2007, the Circuit Court heard arguments from the parties on Plaintiff's Motion for Summary Judgment. On January 22, 2007, the Circuit Court entered an Order granting Plaintiff's Motion for Summary. A copy of the Order is attached hereto as Exhibit G. In granting the Plaintiff's summary judgment, the Circuit Court held, in pertinent part, that "the City of Huntington's residency requirements do not afford permanent civil service employees or appointees, who are in violation of the residency requirements, due process which contradicts the protection provided by Article III, Section 10, of the West Virginia Constitution."

Further, the Circuit Court held that "the City of Huntington's residency requirement goes one step further by mandating the "immediate discharge" of any city employee in violation of the

residency requirement.” Lastly, the Circuit Court ruled that the “immediate discharge” of a City employee was not an issue in Morgan v. City of Wheeling. Rather, the Court ruled, the City of Wheeling ordinance simply provided that failure to comply with the Wheeling residency requirement shall be cause for that employee’s removal or discharge from the City Service. It is from this decision of the Cabell County Circuit Court that the City of Huntington appeals.

## ARGUMENT

### PROPOSITION OF LAW NUMBER ONE

**I. The Circuit Court erred in holding that the City of Huntington’s residency requirement denies the civil service employees due process as provided by the State Constitution and civil service statutes.**

It is beyond debate that municipal corporations may enact a residency requirement as a condition of continued employment for its employees. McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976). A copy is attached hereto as Exhibit H. Further, it is equally clear that a West Virginia municipality may enact a continuing residency requirement for its employees in accordance with §8-5-11 of the West Virginia Code and such enactment is not contrary to the State Constitution or civil service statutes.<sup>1</sup> Morgan v. City of Wheeling, 516 S.E.2d 48 at pg. 52. Such requirement does not conflict with §8-14-6 through §8-14-24 of the police civil service act inasmuch as such provisions are not exclusive. Id. At 54-55. The Police Civil Service Act merely excludes measures which are inconsistent with the express provisions of the act. Id. At p.

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<sup>1</sup> The Civil Service regulations for terminating municipal police officers are found in 8-14-20 et seq., and §8-14A-1 et seq., of the West Virginia Code. Civil Service regulations for terminating firefighters are found in 8-15-25 et seq., and §8-14A-1 et seq., of the West Virginia Code. The provisions are identical and are referenced generally as the “civil service statutes.” Plaintiff Eastham is a firefighter. Plaintiff Coffey is a police officer.

55. Plaintiff proffered and the Circuit Court accepted all the constitutional and statutory arguments expressly rejected by the West Virginia Supreme Court in the matter of Morgan v. City of Wheeling and, in effect, overruled the decision enunciated in Morgan.

It appears that the only basis for the Circuit Court's decision is the fact that the Wheeling ordinance provides that failure to comply with the residency requirement "shall be cause for that employee's removal or discharge" and the Huntington ordinance provided that failure to comply with the residency requirement "shall result in the immediate discharge from the City service," and further, failure to establish and maintain such residency will result in "immediate dismissal for cause." As a result of said distinctions, the Circuit Court determined that the Huntington ordinance denied civil service employees due process of law. It is important to note that neither ordinance references the state constitution or the civil service statutes. Perhaps this is because both legislative bodies understood that no municipal ordinance can operate to deny municipal employees enumerated rights guaranteed by the State Constitution and civil service statutes.

A simple analysis of the operative language shows that the Circuit Court had drawn an unwarranted distinction. Whether the ordinance indicates "removal or discharge" or "immediate discharge" the application and interpretation should be identical. Does the Wheeling ordinance mention that a civil service employee is entitled to a due process hearing prior to "removal or discharge?" Likewise, does the Huntington ordinance mention that a civil service employee is entitled to a due process hearing prior to "immediate discharge?" Of course, the answer is "no" because both ordinances lawfully assume that all civil service employees will be discharged in accordance with state law. See §8-5-11 of the West Virginia Code.

Moreover, the Circuit Court ignores the fact that only the Mayor is authorized to terminate

an employee of the City of Huntington. It is only after an "accused officer" is subject to termination that the Civil Service Commission analyzes the pertinent facts to determine if "just cause" exists for termination. See §8-14-20 and §8-15-25 of the West Virginia Code. In fact, no civil service hearing is necessary unless the written reasons for the termination are submitted to the civil service commission and entered upon its records and "the member demands a public hearing" in accordance with §8-14-20(a) and §8-15-25(a) of the West Virginia Code.

The most obvious and notable problem with the Circuit Court's legal interpretation is that neither §14.3 of the City Charter or §202 of the Codified Ordinances presume to deal with due process issues related to termination or discipline of civil service employees. The Circuit Courts impermissibly construed the Huntington ordinances as denying a civil service employee his or her constitutional and statutory protections. The Circuit Court reached this impermissible conclusion despite the fact that §8-5-11 of the West Virginia Code clearly recognizes that residency requirements and the like are already "subject to the provisions of that chapter." See §8-5-11 of the West Virginia Code. Entitlement to a pre- or post-disciplinary hearing for civil service employees is governed entirely by civil service statute and the state and federal constitutions.

The lower court mistakenly presumes that the use of the term "immediate" infers that the City of Huntington would not continue to abide by constitutional and statutory protections afforded civil service employees as mandated by state law. The City of Huntington is particularly aware of the necessity of providing civil service protections to civil service employees subject to any disciplinary action. City of Huntington v. Black, 421 S.E.2d 58, (W.Va. 1992). Moreover, This Court has held that "a statute should be so read and applied as to make accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the

legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design, thereof, if its terms are consistent therewith.” Smith v. State Workmen’s Compensation Commissioner, 219 S.E.2d 361 (W.Va. 1975).

## **PROPOSITION OF LAW NUMBER TWO**

**II. The Circuit Court erred in placing a construction on the residency ordinance in the first instance and, erred in construing the residency ordinance unconstitutional and in conflict with state civil service laws.**

When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by courts, and in such case it is the duty of the courts not to construe but to apply the statute. American Tower Corporation v. Common Council of the City of Beckley, 557 S.E.2d 752 (W.Va. 2001). Clearly the lower court “construed” the City of Huntington’s residency requirement as prohibiting a “due process” hearing for civil service employees. This construction appears to be unwarranted. Specifically, the residency ordinance simply requires municipal employees to be residents of the municipality; such pronouncement is clear and unequivocal. Further, if an employee fails to establish or maintain city residence he or she will be subject to immediate dismissal. The ordinance does not discuss or address the fact that certain municipal employees are entitled to civil service protections. Further, the ordinance does not discuss the fact the other municipal employees are subject to various collective bargaining agreements that elevate the employee’s status from “at-will” to “just-cause.” Employees subject to these collective bargaining agreements are entitled to certain termination procedures in much the same manner as

a civil service employee is entitled to a “due process” hearing.

It is a fundamental principle of statutory construction that a Court is required to construe a legislative act constitutional if possible. City of Huntington v. Huntington Water Corporation, 194 S.E. 618 (W.Va. 1937); citing Coach v. Gage, 138 P. 847 (ore 1914). A copy is attached as Exhibit I. Thus, it has been held that, where a statute is open to two constructions, one of which will render it unreasonable and unconstitutional, while the other will harmonize with reason, justice and constitutional prescriptions, the latter will be adopted. Coach v. Gage at p. 854. Moreover, our Court has held that “where there are two permissible constructions of an ordinance, one rendering it valid and the other invalid, the former should be preferred.” Cogan v. City of Wheeling, 166 W.Va. 393, 274 S.E.2d 516 (W.Va. 1981) at p. 396-397.

More importantly, this Court held that **“when the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.”** Sale v. Goldman, et al., 539 S.E.2d 446, 451 (W.Va. 2000); citing Willis v. O’Brien, 153 S.E.2d 178 (W.Va. 1967). Additionally, the Sale Court recognized that the “general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.” Sale at 451; citing, Sellitti Constr. Co. v. Caryl, 408 S.E.2d 336 (W.Va. 1991). The primary object in constructing a statute is to ascertain and give effect to the intent of the legislature. Id. At 452. The rule for construing statutes also apply to the interpretation of municipal ordinances. Burnsville v. Kwik-Pik, 408 S.E.2d 646 (W.Va. 1991).

To affirm the Circuit Court’s decision would require this Court to ignore these principles.

It is clear that the purpose of adopting a residency requirement is to ensure that all employees live within the corporate limits for the policy reasons recognized in the Morgan case. Such policy reasons that include stabilizing tax base, racial diversity, emergency response time etc., need not be addressed here. Obviously the purpose of a residency ordinance is not to violate civil service protections afforded municipal police and fire officers by state statute. A "reasonable" construction of the City of Huntington's residency requirement would be to read it as requiring all civil service protections available to police and fire personnel; as it was intended.

The Circuit Court in the current matters appears to have adopted a contrary policy to that enunciated above. The Huntington ordinance expressly provides; "Failure of any officer, employee or appointee in the classified civil service or the unclassified positions of the City of Huntington to comply with the provisions of this section **shall** result in immediate discharge from the City service." The lower court has interpreted his provision to read; "failure of any civil service employee of the City of Huntington to comply with the provisions of this section shall result in immediate discharge **without benefit of** statutory and constitutional due process protections." Such a construction is clearly contrary to the stated rules of construction enunciated in Sale v. Goodman, Cogan v. City of Wheeling and City of Huntington v. Huntington Water Company.

Further, the Circuit Court has misperceived the definition of "conflict" as the same is defined in state code. §8-1-6 of the West Virginia Code provides that the phrase "inconsistent or in conflict with" has been defined as meaning that a charter or ordinance provision is repugnant to the Constitution of this State or to general law because such provision (i) permits or authorizes that which the Constitution or general law forbids or, (ii) forbids or prohibits that which the Constitution or general law permits or authorizes." American Tower Corporation v. Common Council of the City

of Beckley, 557 S.E. 2d 752 (W.Va. 2001). Thus, the question is: "Does the City of Huntington's residency requirement expressly forbid a "due process" hearing before the termination of a civil service employee?" Inasmuch as the residency ordinance is entirely silent as to the issue of "due process" hearings, said ordinance cannot be considered repugnant to the State Constitution and Civil Service Statutes unless an unwarranted inference is permitted.

### CONCLUSION

Inasmuch as the residency requirements found in Article 202.10 of the Codified Ordinances of the City of Huntington contains similar language to that ordinance upheld by the West Virginia Supreme Court in the case of Morgan v. City of Wheeling, said ordinance is not contrary to the state constitution or the West Virginia Civil Service Statutes. In Morgan this Court expressly held that a residency requirement enacted pursuant to the authority of §8-5-11 is not contrary to the civil service statutes or the state constitution.

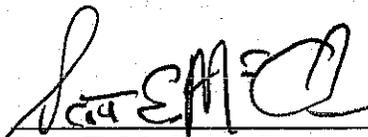
Moreover, §8-15-27 and §8-14-23 of the West Virginia Code, sections cited by the Circuit Court in support of its decision, require an opposite result to that reached by the lower court. Specifically, §8-15-27 provides that "all acts, whether general, special, local or special legislative charters, or parts thereof, in relation to any civil service measure affecting any paid fire department inconsistent with the civil service provision of this article, shall be, and the same are hereby repealed **insofar as such inconsistencies exist.**" Ironically, these provisions do not support the lower courts sweeping elimination of duly enacted municipal legislation. In fact the language of these statutes is clear and unambiguous: laws inconsistent with the civil service statutes are repealed only **insofar as inconsistencies exist.** If the statute presumed to repeal, in its entirety, all such legislation that

may contain inconsistencies then the last sentence should have ended with the word "repealed."

Further, the Circuit Court is not permitted to impermissibly construe a legislative act for the sole purpose of declaring it unconstitutional. A Circuit Court, consistent with pronouncements of the West Virginia Supreme Court, is required, where necessary, to construe an ordinance valid and constitutional as opposed to invalid and unconstitutional. In fact, the Circuit Court must resort to every reasonable construction of a statute in order to sustain constitutionality; and any doubt must be resolved in favor of the constitutionality of the legislative enactment. The Cabell County Circuit Court elected to do just the opposite.

For these reasons the City of Huntington requests this Court to reverse the judgment of the Cabell County Circuit Court.

Respectfully Submitted,



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