

NO. 33807

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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JASON EASTHAM,

Appellee/Plaintiff,

vs.

From the Circuit Court of  
Cabell County, West Virginia  
CIVIL ACTION NO. 06-C-0948

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

Appellants/Defendants.

and

JOSH COFFEY,

Appellee/Plaintiff,

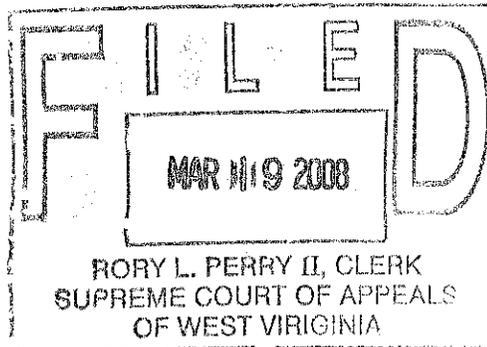
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Appellants/Defendants.

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**BRIEF OF APPELLEES**

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## **INTRODUCTION**

Article 202 § 202.10 of the Codified Ordinance of the City of Huntington mandates the immediate termination of Huntington's civil service employees in violation thereof. Absent exigent circumstances, the immediate termination of civil service employees violates their due process rights, the protections afforded by West Virginia's Civil Service Statutes and is inconsistent with the West Virginia Supreme Court's findings in Morgan v. City of Wheeling, 205 W.Va. 34, 516 S.E.2d 55 (W.Va. 1999).

## **KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL**

On December 13, 2006, Appellees, Jason Eastham and Josh Coffey, filed civil actions pursuant to the Uniform Declaratory Judgment Act, W.Va.Code § 55-13-1, et seq., requesting the Circuit Court to declare the rights, status and legal relations arising out of Article 202 § 202.10 of the Codified Ordinance of the City of Huntington (hereinafter referred to as the "Huntington residency ordinance") for employees and appointees of the City of Huntington, West Virginia. On or about December 19, 2006, Appellee, Jason Eastham, filed a motion for summary judgment requesting the court to find as a matter of law that the Huntington residency ordinance conflicted with the West Virginia Constitution and the civil service provisions found in Chapter 8 of the West Virginia Code. Thereafter, the Circuit Court consolidated Eastham v. City of Huntington, et al. and Coffey v. City of Huntington, et al. as both actions involved the same issues of fact and law.

This appeal arises out of an Order entered by the Circuit Court of Cabell County on January 22, 2007, granting summary judgment to the Appellees and ruling that the Huntington

residency ordinance is repealed and rendered void and unenforceable as applied to civil service employees. In the Order, the Circuit Court found that:

- a. Morgan v. City of Wheeling, 205 W.Va. 34, 516 S.E.2d 55 (W.Va. 1999) does not support the validity of the Huntington residency ordinance. There is a fatal flaw in the Huntington residency ordinance which is not found in Wheeling's residency ordinance.
- b. The Huntington residency ordinance does not afford permanent civil service employees, who are in violation or alleged to be violation of the residency requirement, due process as afforded by Article III § 10 of the West Virginia Constitution;
- c. The Huntington residency ordinance conflicts West Virginia's civil service provisions at W.Va.Code § 8-14-20(a), W.Va.Code § 8-15-25(a) and W.Va.Code § 8-14A-3(a) and (b);
- d. The conflicts and inconsistencies between the Huntington residency ordinance and West Virginia's civil service provisions are governed by W.Va.Code § 8-15-27 and W.Va.Code § 8-14-23 which require the Huntington residency ordinance be repealed;
- e. The Home Rule for Municipalities, Article VI § 39(a) of the West Virginia Constitution renders municipal ordinances invalid and void if they are inconsistent or in conflict with State law.

## STATEMENT OF FACTS OF THE CASE

1. Huntington firefighter, Jason Eastham, and Huntington police officer, and Josh Coffey, at all times relevant to this civil action, are residents of Huntington, West Virginia, and are civil service employees hired by the City of Huntington after July 1, 2002<sup>1</sup>.

2. Article 202 § 202.10(a) of the Codified Ordinance of the City of Huntington provides that all personnel employed or appointed to the City of Huntington after July 1, 2002<sup>1</sup>, are required to become bona-fide residents of the City of Huntington.

3. Article 202 § 202.10(d) of the Codified Ordinance of the City of Huntington provides that “[f]ailure of any officer, employee or appointee in the classified civil service of the unclassified positions of the City of Huntington to comply with the provisions of this section shall result in the immediate discharge from the City service.” (Emphasis added)

4. Article 202 § 202.10 of the Codified Ordinance of the City of Huntington does not provide for any pre-termination hearing prior to or subsequent to the termination of City employees.

5. Appellant, Mayor David Felinton, issued a declaration that all civil service employees who failed to show proof of residency on or before December 15, 2006, “shall be dismissed immediately *for cause*.” See *Mayor Felinton’s Termination Notice dated November 29, 2006 and attached to the Brief of the Appellants as Exhibit D*. The Mayor’s sudden

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<sup>1</sup> Standing: Appellees are persons interested in a written contract whose rights, status or other legal relations are affected by a municipal ordinance. As such, Appellees have standing to assert a question of construction or validity arising under the ordinance and obtain a declaration of rights, status or other legal relation thereunder. W.Va.Code § 55-13-2.

announcement was the result of a knee-jerk political reaction to a public sparring match with Huntington's City Council over a Kentucky resident on the Mayor's staff<sup>2</sup>.

6. Appellees filed a preliminary injunction and declaratory judgment action before the Mayor's unlawful deadline to protect their fellow civil service workers.

7. Rather than fix the fatal errors in Huntington's residency ordinance, the Appellants have filed this appeal asking the Court to consider the same de minimus and/or reform the ordinance to conform with existing West Virginia law.

### **APPELLANTS' ASSIGNMENT OF ERRORS**

1. Appellants argue the Circuit Court erred in holding that the Huntington residency ordinance is repealed and rendered void and unenforceable as applied to civil service employees and appointees of the City of Huntington, West Virginia.
2. Appellants argue the Circuit Court erred in construing the Huntington residency ordinance as denying civil service employees due process rights secured by the West Virginia Constitution and Civil Service Statutes.

### **DISCUSSION OF LAW**

#### **I. ENFORCEMENT OF RESIDENCY REQUIREMENTS**

Municipalities, by charter, and their governing bodies, by ordinance, have the right determine and prescribe residency requirements for employment in accordance with State law.

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<sup>2</sup> Huntington's firefighters and police officers were threatened with termination for failure to show proof of residency. Failing to show proof of residency does not mean one is not a bona fide resident of Huntington. The civil service protections afforded under West Virginia law safeguard against such arbitrary decisions.

W.Va.Code § 8-5-11. They also have plenary power and authority to prescribe reasonable penalties to make the residency requirements effective and enforceable. W.Va.Code § 8-11-1. Penalties enacted to enforce any such residency requirement must be by ordinance. W.Va.Code § 8-11-3(3).

Huntington's City Charter creates a residency requirement. *The Charter of the City of Huntington, West Virginia, Article 14, Section 14.3*. The Huntington residency ordinance enforces the same and prescribes a penalty for violation thereof. *Codified Ordinance of the City of Huntington, Article 202 § 202.10*.

## II. CONSTRUING MUNICIPAL ORDINANCES

The rules for construing statutes also apply to the interpretation of municipal ordinances. Citizens Bank of Weston, Inc. v. City of Weston, 209 W.Va. 145, 544 S.E.2d 72 (W.Va. 2001). The primary objective in construing an ordinance is to ascertain and give effect to the intent of the municipality. See Syl. pt. 1, Smith v. State Workmens' Comp. Comm'r, 159 W.Va. 108, 219 S.E.2d 361 (W.Va. 1975). When an ordinance is clear and unambiguous and the municipality's intent is plain, the ordinance should not be interpreted by the courts, and in such case it is the duty of the courts not to construe, but to apply the ordinance as written. See Syl. pt. 5, State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W.Va. 137, 107 S.E.2d 353 (W.Va. 1959).

The lower court found Huntington's residency ordinance to be clear and unambiguous. As written, the ordinance calls for the "immediate discharge" of all City of Huntington employees in violation of the Huntington residency ordinance.

The lower court also found the Appellants' intent to be clear. There was no evidence to suggest Huntington's civil service employees, alleged to be in violation of Huntington's residency ordinance, would be afforded pre-disciplinary hearings.

Furthermore, Mayor Felinton notified all City employees they must provide proof of residency by the close of business on December 14, 2006. Any City employee who failed to provide proof of residency (even if they actually lived within City limits) "shall be immediately dismissed from employment for cause." The Mayor clearly intended to terminate civil service employees, without a pre-disciplinary hearing, for missing his arbitrary and self-imposed artificial deadline.

The Appellants attempt to justify their position by relying upon a similar ordinance adopted by the City of Wheeling and discussed in Morgan v. City of Wheeling, *supra*. The penalty section of each residency ordinance is written as follows:

**WHEELING residency ordinance:**

"Failure of 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." Wheeling City Ordinance 9046 (d); Morgan v. City of Wheeling, 516 S.E.2d at 51.

**HUNTINGTON residency ordinance:**

"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." Huntington City Ordinance, Article 202 § 202.10(d).

The two ordinances are not "mirror" images. The Wheeling residency ordinance states violation thereof "shall be cause" for dismissal thereby preserving civil service statutory protections afforded by West Virginia law. The Huntington residency ordinance ignores the same by mandating "immediate discharge" from the City service. The difference creates a fatal flaw.

### III. CONSTITUTIONAL DUE PROCESS RIGHTS OF CIVIL SERVICE EMPLOYEES

Under West Virginia law, all permanent civil service employees have a property interest arising out of the statutory entitlement to continued, uninterrupted employment. Swiger v. Civil Service Comm'n, 179 W.Va. 133, 365 S.E.2d 797, 800 (W. Va. 1988); Fraley v. Civil Service Comm'n, 177 W.Va. 729, 356 S.E.2d 483, Syl. Pt. 2 (W.Va.,1987); Major v. DeFrench, 169 W.Va. 241, 286 S.E.2d at 695 (W.Va. 1982); Waite v. Civil Service Comm'n, 161 W.Va. 154, 241 S.E.2d 164, Syl. Pt. 4 (W.Va. 1977). Therefore, “the constitutional guarantee of procedural due process requires ‘some kind of hearing’ prior to the discharge of an employee who has a constitutionally protected property interest in his employment.” White v. Barill, 210 W.Va., 320, 557 S.E.2d 374, Syl. Pt. 1 (W. Va. 2001)(*per curiam*); Swiger v. Civil Service Comm'n, 365 S.E.2d at Syl. Pt. 2; Fraley v. Civil Service Comm'n, 356 S.E.2d at Syl. Pt. 3.

The Supreme Court of Appeals of West Virginia has expressly adopted the line of reasoning applied by the United States Supreme Court in holding that principles of due process mandate that civil service employees subject to civil service protection must be afforded a predisciplinary hearing prior to discharge, suspension, or reduction in rank or pay [...] unless exigent circumstances preclude such a predisciplinary hearing. City of Huntington v. Black, 187 W.Va. 685, 421 S.E.2d 58, 63 (W.Va. 1992) (modified on other grounds).

The clear and unambiguous language in the Huntington residency ordinance mandates the “immediate” termination of civil service employees and vacancy of the post without an opportunity to be heard. Residency is not an exigent circumstance. As written, the enforcement of the Huntington residency ordinance is inconsistent and in conflict with the police and firefighters’ due process guarantees afforded by Article III, § 10 of the West Virginia

Constitution.

Furthermore, under the Home Rule, Article VI §39(a) of the West Virginia Constitution, a municipal corporation is a creature of the state and can only perform such functions of government as have been conferred by the constitution, or delegated by the law-making authority of the state; it has no inherent powers, and only such implied powers necessary to carry into effect the powers, expressly granted. Toler v. City of Huntington, 153 W.Va. 313, 168 S.E.2d 551 (W.Va. 1969). A city's charter and local laws and ordinances that are not consistent with state statutes or the Constitution, are invalid and void. Hill v. Smith, 172 W.Va. 413, 305 S.E.2d 771 (W.Va. 1983). Since the Huntington residency ordinance is inconsistent and in conflict with constitutional due process, it is void ab initio under the Home Rule.

#### **IV. THE HUNTINGTON RESIDENCY ORDINANCE CONFLICTS WITH WEST VIRGINIA'S CIVIL SERVICE ACTS**

W. Va. Code § 8-5-11 [1969] authorizes a municipal corporation to include a residency requirement in its employment contracts:

Subject to the provisions of this State, the provisions of this article, and other applicable provisions of this chapter, any city may by charter provision, and the governing body of any municipality, consistent with the provisions of its charter, if any, may by ordinance, determine and prescribe the officers or positions which are to be filled by election, appointment of employment, the number, method of selection, tenure, qualifications, **residency requirements**, powers and duties of municipal officers and employees, and the method of filling any vacancies which may occur. (emphasis added).

There is no question that W. Va. Code § 8-5-11 expressly authorizes cities to govern the selection of city officers and employees in general which includes the power to enact residency requirements. The power delegated to cities by W. Va. Code § 8-5-11 is not plenary, however,

and is subject to “other provisions of this chapter.” Morgan v. City of Wheeling, 516 S.E.2d 48, 51-52. “Other applicable provisions” include the police civil service act found in W. Va. Code §§ 8-14-6 through 8-14-24. Morgan v. City of Wheeling, 516 S.E.2d at 52. The authority to enact residency requirements for municipal officers and employees “is subject to the police civil service act.” Morgan v. City of Wheeling, 516 S.E.2d at 54.

The police civil service act, at W. Va. Code § 8-14-20(a), and its counterpart for firefighters, at W.Va.Code § 8-15-25(a)[1996], provide that no member of any paid police or fire department subject to the civil service provisions of the articles shall be removed, discharged, suspended or reduced in rank or pay except for just cause. The provisions also provide that in every case of removal, discharge, suspension or reduction, the member be provided proper notice and the right to be heard before the member may be removed, discharged, suspended or reduced in rank or pay. The type of hearing provided for is a public hearing. See City of Huntington v. Black, 421 S.E.2d at 61.

Moreover, W. Va. Code § 8-14A-3 governs the procedure for taking any “punitive action” against a police officer or fire fighter. Punitive action is defined as “any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand or transfer for purposes of punishment.” W. Va. Code § 8-14A-1(7).

W. Va. Code § 8-14A-3(b) requires that, before a civil service officer may be disciplined through discharge, suspension, or reduction in rank or pay, he/she must be afforded a predisciplinary hearing before a hearing board unless there exist exigent circumstances that require the recommended disciplinary action to precede such hearing. Alden v. Harpers Ferry Police Civil Serv. Comm’n, 209 W.Va. 83, 543 S.E.2d 364, Syl. Pt. 4 (W.Va. 2001).

The Huntington residency ordinance mandates the "immediate" termination of civil service employees in violation thereof without a proper predisciplinary hearing. Residency is not an exigent circumstance. As written, the Huntington residency ordinance is inconsistent and in conflict with the police and firefighters' civil service acts.

"Inconsistent or in conflict with" has been defined by the West Virginia Legislature as meaning that an 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 prohibits, or (ii) forbids or prohibits that which the Constitution or general law permits or authorizes. W.Va.Code § 8-1-2(b)(9). Any ordinance provision which is inconsistent or in conflict with any provision of W.Va.Code, Chapter 8, shall be of "no force and effect."

W.Va.Code § 8-1-6.

Inconsistencies and conflicts between the Huntington residency ordinance and the civil service acts are also governed by W.Va.Code § 8-14-23, which states:

All acts, whether general, special, local or special legislative charters, or parts thereof, in relation to any civil service measure affecting any paid police department inconsistent with the civil service provision of this article, shall be, and the same are hereby repealed insofar as such inconsistencies exist. It is intended by the civil service provisions of this article to furnish a complete and exclusive system for the appointment, promotion, reinstatement, removal, discharge, suspension and reduction of all members of all paid police departments in all municipalities. The status or tenure of all members of any paid police department, which members were employed on the effective date of this article, shall not be affected by the enactment of this article, but all such members shall be subject to all civil service provisions of this article with like effect as if they has been appointed members hereunder.

and W.Va.Code § 8-15-27 [1969], which states:

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. It is intended by the civil

service provisions of this article to furnish a complete and exclusive system for the appointment, promotion, reinstatement, removal, discharge, suspension and reduction of all members of all paid fire departments in all municipalities. The status or tenure of all members of any paid fire department, which members were employed on the effective date of this article, shall not be affected by the enactment of this article, but all such members shall be subject to all civil service provisions of this article with like effect as if they has been appointed members hereunder.

In this case, the Huntington residency ordinance is inconsistent and in conflict with W.Va.Code § 8-14-20(a), W.Va.Code § 8-15-25(a) and other civil service provisions. The Huntington residency ordinance calls for the immediate discharge of civil service employees and vacancy of the post. Violation of the Huntington residency ordinance does not give rise to exigent circumstances. Accordingly, the Huntington residency ordinance has no force and effect under W.Va.Code § 8-1-6, is repealed by W.Va.Code § 8-15-27 [1969] and is invalid and void under the Home Rule provisions in Article VI §39(a) of the West Virginia Constitution.

### CONCLUSION

Municipal residency requirements are antiquated, yet lawful, when properly formulated. The Huntington residency ordinance is not lawful and should be struck down as void ab initio. Huntington City Council and the Mayor may then consider re-submitting a residency requirement which complies with West Virginia law or, more likely, the antiquated rule may simply be left dormant.

Your APPELLEES, Jason Eastham and Josh Coffey, respectfully request this Honorable Court to uphold the lower court's ruling.

RESPECTFULLY SUBMITTED,  
JASON EASTHAM & JOSH COFFEE  
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CERTIFICATE OF SERVICE

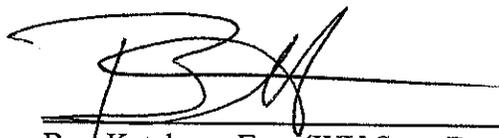
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I, Bert Ketchum, Esquire, do hereby certify that I have served the foregoing **BRIEF OF APPELLEES** upon counsel of record by depositing true and accurate copies thereof in the United State Mail, first class, postage paid, this **18th** day of **March**, **2008**, addressed as follows:

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An original and nine (9) copies have been filed with the Clerk of the Supreme Court pursuant to Rule 10(b) of the West Virginia Rules of Appellate Procedure.



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