

IN THE SUPREME COURT OF OHIO

<b>RICHARD O. PIETRICK</b>	:	<b>Case No. 2013-0052</b>
	:	
<b>Appellees,</b>	:	<b>On Appeal from the Eighth District</b>
	:	<b>Court of Appeals, Cuyahoga County,</b>
<b>v.</b>	:	<b>Ohio</b>
	:	
<b>CITY OF WESTLAKE,</b>	:	<b>Court of Appeals</b>
<b>CIVIL SERVICE COMMISSION, ET</b>	:	<b>Case No. 98258</b>
<b>AL.</b>	:	
	:	
<b>Appellants.</b>	:	

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**BRIEF OF AMICUS CURIAE THE OHIO MUNICIPAL LEAGUE  
IN SUPPORT OF APPELLANTS CITY OF WESTLAKE, CIVIL SERVICE  
COMMISSION, ET AL.**

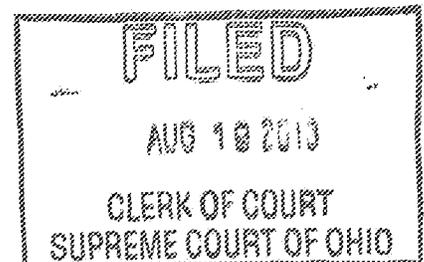
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**INTRODUCTION: THIS CASE INVOLVES  
MATTERS OF PUBLIC AND GREAT GENERAL INTEREST**

The Ohio Municipal League (“League”), as amicus curiae on behalf of the City of Westlake and the Westlake Civil Service Commission (the “City”), urges this Court to reverse the portion of the Eighth District Court of Appeals in *Richard O. Pietrick v. City of Westlake, Civil Service Commission, et al.*, 2012-Ohio-6009, holding that the trial court did not abuse its discretion when it modified the penalty of the City’s Civil Service Commission (“Commission”) and reinstated former fire chief Richard Pietrick (“Pietrick”) to a higher rank than the disciplinary penalty rank imposed by the Mayor and upheld by the Commission. In reaching this decision, the Eighth District also concluded that R.C. 124.34 requires a public employee to commit a criminal act or ethical violation before he or she may be disciplined for acts of misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior.

R.C. 124.34 does not require consideration of an employee’s tenure or disciplinary history and is silent on the issue of progressive discipline. R.C. 124.34 provides that the tenure of any employee in the classified service “shall be during good behavior and efficient service” and that no employee shall be reduced in pay or position, suspended or removed except for certain stated reasons, including neglect of duty, failure of good behavior, misfeasance, malfeasance, and nonfeasance.

This Court has an opportunity to clarify that R.C. 124.34 does not require consideration of tenure or disciplinary history, does not require progressive discipline, and that a court abuses its discretion in a R.C. 124.34 appeal when it reduces a disciplinary penalty rank because the employee, who is not covered by a collective bargaining agreement, had no other prior reprimands or disciplinary action. This Court also has an opportunity to clarify that a public employee can be disciplined under R.C. 124.34 for acts of misfeasance, malfeasance,

nonfeasance, neglect of duty, and failure of good behavior, regardless of whether a criminal act or ethical violation was committed.

These matters are of great concern to state and local governments. Consideration of tenure, prior disciplinary history, and progressive discipline should not be required in the absence of a collective bargaining agreement requiring such procedures. In order to ensure the proper operation of government departments and the delivery of services, a public entity must be able to discipline employees for misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior, absent a finding that a criminal act or ethical violation was committed. It is unreasonable and contrary to state law to exempt public employees that engage in acts of misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior from disciplinary action because their conduct did not rise to the level of a criminal or ethical violation.

This case involves matters of public and great interest and the League urges this Court to reverse the portion of the Eighth District Court of Appeals in *Pietrick* holding that the trial court did not abuse its discretion when it modified the Commission's penalty and reinstated Pietrick to a higher rank than the disciplinary penalty rank imposed by the Mayor and upheld by the Commission.

#### **STATEMENT OF AMICUS INTEREST**

The League is a non-profit Ohio corporation composed of a membership of more than 700 Ohio cities and villages. The League and its members have an interest in ensuring that municipal corporations are able to discipline employees that are not subject to a collective bargaining agreement in a manner that best serves the operations of the municipal corporation, regardless of the employee's history and regardless of whether such discipline adheres to a progressive discipline structure. Additionally, the League and its members have an interest in

ensuring that public employees can be disciplined for acts of misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior, regardless of whether a criminal act or ethical violation occurred.

### STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Brief of Appellant City.

### ARGUMENT

**Proposition of Law No. 1: In the absence of an applicable collective bargaining agreement requiring progressive discipline, R.C. 124.34 does not require progressive discipline and a trial court abuses its discretion when it reduces a disciplinary penalty rank because the employee, who is not covered by a collective bargaining agreement, had no other prior reprimands or disciplinary action.**

As the Eighth District Court of Appeals correctly stated, when a firefighter appeals his dismissal, R.C. 124.34 controls. *Hall v. Johnson*, 90 Ohio App.3d 451, 629 N.E.2d 1006 (1st Dist. 1993). R.C. 124.34 provides:

The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities . . . shall be during good behavior and efficient service. No officer or employee shall be reduced in pay or position, fined, suspended, or removed, or have the officer's or employee's longevity reduced or eliminated, except as provided in section 124.32 of the revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority . . . any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony.

R.C. 124.34 creates a comprehensive list of offenses that authorize a reduction in pay or position, or suspension, of an officer in the classified service of a city. R.C. 124.34 further provides an appeals process in matters involving the suspension, demotion, or removal of any member of a fire department who is in the classified civil service of a municipality and provides that such appeal may be "on questions of law and fact."

This Court has held that an appeal on questions of law and fact is a trial *de novo* and that the appellate court “proceeds in respect to all phases thereof as if the causes had never been tried below.” *Cupps v. Toledo*, 172 Ohio St. 536, 538, 179 N.E.2d 70 (1961).

In *Pietrick*, the trial court conducted a trial *de novo* and did not find that there were any conflicting issues of law or fact; the court concluded that Pietrick’s conduct was “improper,” “demonstrated extremely poor judgment, reasonably drawing his leadership of the Department into question,” and reflected an “instance of grossly poor judgment.” *Pietrick v. City of Westlake Civil Service Commission*, Cuyahoga C.P. No. CV-08-660103 (March 26, 2012), pages 8-9.

However, the trial court also incorrectly considered Pietrick’s tenure with the Westlake Fire Department, and noted that Pietrick served twelve years as Chief before his demotion and “had received no prior reprimands or other disciplinary action prior to his demotion.” *Id.* Pursuant to this reasoning, the trial court reinstated Pietrick to the rank of Captain. This was an abuse of the trial court’s discretion.

First, by the Eighth District’s own admission, R.C. 124.34 controls. R.C. 124.34 does not require, or even permit, consideration of prior disciplinary history or length of tenure. R.C. 124.34 simply delineates certain acts or offenses that authorize a city to suspend, demote, or remove any member of a fire department who is in the classified civil service of a municipality. By considering factors that are outside the scope of the controlling state statute, such as tenure and disciplinary history, the trial court abused its discretion when it modified Pietrick’s demotion and placed him in the position of captain of the fire department.

The trial court considers the “whole record,” including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the

preponderance of substantial, reliable, and probative evidence. *Posener v. Newark*, 5th Dist. No. 10 CA 42, 2010-Ohio-6073, *Pataskala Banking Co. v. Etna Twp. Bd. Of Zoning Appeals*, 5th Dist. Nos. 07-CA-116, 07-CA-117, 07-CA-118, 2008-Ohio-2770, ¶ 13. Yet, the trial court made no such determination. In fact, the trial court explicitly stated that “the circumstances surrounding the repair of appellant’s automobiles and those of his family members merited discipline.” *Pietrick v. City of Westlake Civil Service Commission*, Cuyahoga C.P. No. CV-08-660103 (March 26, 2012), page 10. The trial court then impermissibly relies on Pietrick’s tenure and disciplinary history to conclude that his demotion was “unwarranted” and “excessive.” *Id.*

The decision to demote Pietrick was made based on uncontroverted, substantial, reliable, and probative evidence, and was in accordance with R.C. 124.34. The trial court’s decision was not. The trial court abused its discretion by modifying the Commission’s penalty and reinstating Pietrick to a higher rank.

Additionally, by first concluding that Pietrick demonstrated “extremely poor judgment” and “grossly poor judgment” and then ordering a reinstatement at a higher rank because lack of a prior disciplinary record, the trial court was clearly concerned that the disciplinary penalty rank issued by the City did not adhere to a progressive discipline structure. R.C. 124.34 does not require progressive discipline unless a public entity agrees otherwise in a collective bargaining agreement. *Gaither-Thompson v. Ohio Civil rights Commission*, 176 Ohio App.3d 493, 2008-Ohio-2559 (1st Dist.); *Swigart v. Kent State University*, 2005 Ohio 2258, 2005 Ohio App. LEXIS 2139 (11th Dist.).

In this case, the trial court did not cite any conflicting issues of fact or law and simply concluded that Pietrick’s tenure “must be considered,” and that his “unblemished record” did not justify the disciplinary rank penalty imposed by the Mayor and upheld by the Commission.

*Pietrick*, Cuyahoga C.P. No. CV-08-660103, page 10. The trial court failed to cite any authority to support these conclusions.

A court of appeals will reverse a trial court if its decision is not supported by “competent, credible evidence going to all the essential elements of the case.” *C.E. Morris Co. v. Foley Construction Company*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578 (1978), syllabus. Here, the trial court made its decision despite concluding that Pietrick demonstrated “extremely poor judgment” and “grossly poor judgment” and that Pietrick’s “suspension without pay for 30 days and his demotion from the position of Fire Chief are supported by the record.” *Pietrick* at page 11.

The trial court abused its discretion by modifying the disciplinary penalty rank and reinstating Pietrick to caption. There is no “competent credible evidence” to support the finding of the trial court and the decision is against the manifest weight of the evidence. *Shirley v. Beal*, 118 Ohio App.3d 678, 683, 693 N.E.2d 1146 (1st Dist. 1977). To the contrary, there was evidence, including the findings of the trial court, to support the disciplinary penalty issued by the City.

**Proposition of Law No. 2: A public employee may be disciplined under R.C. 124.34 for acts of misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior, regardless of whether a criminal act or ethical violation occurred.**

R.C. 124.34 provides that the tenure of any employee in the classified service “shall be during good behavior and efficient service” and that no employee shall be reduced in pay or position, suspended, or removed except for certain stated reasons, including neglect of duty, failure of good behavior, misfeasance, malfeasance, and nonfeasance.

In *Pietrick*, the Eighth District concluded that because the trial court found Pietrick’s conduct to be “grossly poor judgment” and because Pietrick’s conduct “was not criminal and was

not likely an ethical violation under the laws of Ohio,” he could not be disciplined for misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior. *Pietrick* at ¶ 34. By this conclusion, the Eighth District appears to be requiring that a public employee commit a criminal or ethical violation before the employee can be disciplined for acts of misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior under R.C. 124.34. This requirement is erroneous and contrary to the statute. Additionally, it is contrary to the plain meaning of misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior.

None of these terms require a criminal or ethical violation and, in fact, misfeasance is the performance of a *lawful* act in a wrongful manner. See Black’s Law Dictionary (9<sup>th</sup> edition), definition of misfeasance. (Emphasis added.) Ohio courts have recognized that disciplinary action may occur regardless of whether the offense was also a crime. *Jackson v. Department of Rehabilitation and Correction*, 2009-Ohio-897, 2009 Ohio App. LEXIS 752; *In re Fortune*, 101 N.E.2d 174, 45 Ohio Op. 449 (C.P. 1951).

To prohibit a public entity from disciplining an employee for misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior unless the employee committed a criminal or ethical violation would severely limit the ability of public employers to provide services. For example, the failure to report to work and the failure to perform job duties would not be subject to discipline under the misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of good behavior standards, unless there was some type of corresponding criminal or ethical violation, which is highly unlikely to be the case.

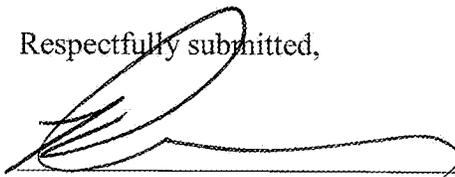
R.C. 124.34 does not require a criminal or ethical violation to occur before an employee can be disciplined for misfeasance, malfeasance, nonfeasance, neglect of duty, and failure of

good behavior. It is irrelevant whether Pietrick committed a criminal or ethical violation. The Eighth District's conclusion that Pietrick could not have committed misfeasance, malfeasance, nonfeasance, neglect of duty, or failure of good behavior because an outside law firm concluded he "had not done anything criminal and had not done anything that was likely an ethical violation" was erroneous. Furthermore, this conclusion is not a reasonable justification to support the Eighth District's finding that the trial court did not abuse its discretion. *Pietrick* at ¶ 38.

### CONCLUSION

This case involves a matter of public and great general interest to municipal corporations throughout Ohio. The League respectfully requests this Court to reverse the portion of the Eighth District Court of Appeals in *Pietrick* holding that the trial court did not abuse its discretion when it modified the Commission's penalty and reinstated Pietrick to a higher rank than the disciplinary penalty rank imposed by the Mayor and upheld by the Commission.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

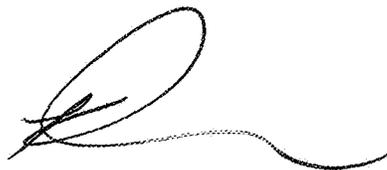
A copy of the foregoing *Brief of Amicus Curiae The Ohio Municipal League*, has been sent via regular U.S. mail, postage pre-paid this 19<sup>th</sup> day of August, 2013 to:

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