

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MAR 24 2021

STATE OF OHIO, EX REL.,
MIKE BURKONS,

Relator,

No. 110139

v.

CITY OF BEACHWOOD,

Respondent.

JOURNAL ENTRY AND OPINION

JUDGMENT: WRIT DISMISSED

DATED: March 24, 2021

Writ of Mandamus
Motion No. 543360
Order No. 544797

Appearances:

The Pattakos Law Firm LLC, Peter Pattakos and Rachel Hazelet; The Botnick Law Firm, LLC, Robert B. Botnick, *for relator.*

Kenneth J. Fisher Co., L.P.A., Kenneth J. Fisher, *for respondent.*

LARRY A. JONES, SR., J.:

{¶ 1} On December 8, 2020, the relator, Mike Burkons, on behalf of himself and the taxpayers of the city of Beachwood, commenced this taxpayer's mandamus

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action to compel the respondent, the city of Beachwood, to terminate Stephanie Scalise's representation of Beachwood in the underlying case, *State v. Burkons*, Chardon M.C. No. 2020 CRB 00858. On January 11, 2021, Beachwood filed a motion to dismiss, and Burkons filed his brief in opposition on February 1, 2021. Beachwood filed a reply brief on February 5, 2021. For the following reasons, this court grants the respondent's motion to dismiss.

Factual and Procedural Background

{¶ 2} As gleaned from the filings, their attachments, and the dockets of the underlying cases, Alex Nouredine, a resident of Beachwood and an assistant law director for the city of Cleveland Heights, saw a white Beachwood police officer harassing a black child. In the summer of 2020, Nouredine emailed Beachwood, including members of the city council, and identified the officer. Only one member of council responded to the email.

{¶ 3} On July 12, 2020, relator Mike Burkons, another Beachwood councilmember, issued an email, to at least Nouredine, and proposed an ordinance that Beachwood post police video and audio of incidents resulting in death or injury within seven days of the event. Nouredine responded to Burkons that this was lip service and wondered why Burkons had not responded earlier. Burkons replied that councilmembers were instructed not to respond because they had no authority to do anything. Nouredine then asked why were you instructed not to reply. If the officer had acted appropriately, there would be no reason not to reply. He also criticized Beachwood's leadership and complained that they should be doing more.

{¶ 4} The next morning, July 13, 2020, Burkons emailed the Cleveland Heights City manager and council. He identified himself as a Beachwood councilmember and expressed his disappointment over Nouredine's emails. Burkons opined that as an assistant law director he must know that once a councilmember has been made aware that a complaint had been filed regarding a police officer's conduct and that once the complaint had been addressed by the chief, the mayor and the law director to their satisfaction, councilmembers should not insert themselves into the issue, especially if the matter happened two years ago. Burkons further stated that Nouredine's criticism was troubling, even if it was written as a Beachwood resident and not as an assistant law director.

{¶ 5} According to a September 14, 2020 "Motion of prosecuting attorney to withdraw as counsel and appointment of special prosecutor,"¹ a complaint was made about this email to the city of Beachwood, which "immediately engaged University Heights Prosecutor Stephanie Scalise to gather and review all of the relevant evidence" to determine whether criminal charges were appropriate and to ensure a fair and unbiased review.² Scalise agreed to take this appointment at no cost to the city. Beachwood represents that the engagement without compensation is pursuant to a mutual aid agreement and that this part was "solely in an investigatory capacity to gather and review relevant evidence and make an

¹ This motion was filed in *Beachwood v. Burkons*, Shaker Heights M.C. No. 20ARW00001, which is apparently a special administrative docket.

² Paragraph two of the September 14, 2020 motion to withdraw.

independent probable cause determination of possible criminal conduct.”³ Beachwood does not have an engagement agreement with Scalise relating to this matter.⁴ Beachwood City Council did not pass an ordinance for this arrangement.

{¶ 6} On September 25, 2020, Beachwood filed a criminal complaint against Michael Burkons charging him with one count of interfering with civil rights under R.C. 2921.45, a first-degree misdemeanor. *Beachwood v. Burkons*, Shaker Heights M.C. No. 20CRB00722. R.C. 2921.45(A) provides as follows: “No public servant, under color of his office, employment, or authority, shall knowingly deprive, or conspire or attempt to deprive any person of a constitutional or statutory right.” In an October 16, 2020 email to Burkons’ lawyer, Scalise articulated her theory of the case: after Nouredine complained to Beachwood, Burkons emailed Nouredine’s employer to “shut him up.”

{¶ 7} On September 28, 2020, the Shaker Height Municipal Court issued the following journal entry: “Beachwood city prosecutors motion to withdraw from case is granted.” This court notes that the Beachwood city prosecutor’s motion sought permission to withdraw because of conflicts of interest and to appoint Stephanie Scalise as special prosecutor for all matters concerning the prosecution of this matter. On October 6, 2020, the Shaker Heights Municipal Court transferred

³ February 5, 2021 Beachwood’s reply to relator’s opposition to motion to dismiss, pgs. 2-3.

⁴ October 19, 2020 email from Beachwood Law Director Diane Calta to Peter Pattakos, Michael Burkons’s attorney, in Exhibit B to the complaint.

the case to the Chardon Municipal Court. Burkons moved to dismiss the matter for lack of subject-matter jurisdiction because the jurisdiction of a municipal court is limited to crimes committed within its territory. The municipal court denied the motion. Burkons then filed for a writ of prohibition in the Eleventh District Court of Appeals, and the Chardon Municipal Court has stayed further proceedings.

{¶ 8} On October 22, 2020, Burkons, through his attorney, laid the necessary groundwork for a taxpayer's action by mailing a demand to the Beachwood Law Director to seek an injunction against or otherwise terminate Scalise's representation of Beachwood. He argued that Beachwood's Charter and ordinances require the city council to authorize and fund any assistant prosecutor. Without such authorization, Scalise's representation is void.

Discussion of Law

{¶ 9} Article V, Section 2 of the Beachwood Charter governs the Department of Law. Section 2.1 provides that the Law Director shall be appointed and supervised by Council and the "Council may also provide for Assistant Law Directors and special legal counsel." Section 2.3 further provides that

[t]he Law Director, or an Assistant Law Director, as designated by the Law Director shall act as the City's prosecuting attorney before the Mayor's Court, Municipal Court and upon appeals. The Law Director shall perform all duties required by this Charter, the Mayor and Council and all other duties now or hereafter imposed by law upon legal counsel for cities unless otherwise provided by Ordinance by Council.

{¶ 10} Beachwood Codified Ordinances (hereinafter "B.C.O.") 133.02 codifies that the Law Director shall perform all other duties now or hereafter

imposed upon municipal solicitors under the laws of Ohio, unless otherwise provided by ordinance of Council. B.C.O. 133.03 provides in pertinent part as follows:

When it becomes necessary or advisable, in the opinion of Council, to employ assistants and/or special counsel to assist the Law Director in the performance of his duties, Council may employ such assistants and/or special counsel, including any law firm with which the Law Director may be connected or a member, and agree to pay such assistants and/or special counsel such reasonable compensation as shall be approved by Council.

{¶ 11} From these provisions, Burkons concludes that only the Beachwood City Council may hire or engage assistant prosecutors or assistant law directors and only such assistants may represent the city of Beachwood. Because Council did not engage Scalise, her actions in representing Beachwood in the underlying case are ultra vires. Thus, the city of Beachwood, the Council, and the Mayor have the duty to remove her from representing Beachwood. The relator has the right to have her removed because her actions are not authorized by Council.

{¶ 12} The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. *State ex rel. Harris v. Rhodes*, 54 Ohio S.2d 41, 374 N.E.2d 641 (1978). Moreover, mandamus is an extraordinary remedy that is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977); and *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 113 N.E.2d 14 (1953).

{¶ 13} In the present case, mandamus is unavailable because there is an adequate remedy at law by filing a motion to dismiss or to remove counsel in the trial court with a right to appeal that decision, if necessary, at the conclusion of the proceedings. In *State ex rel. Johnson v. Talikka*, 71 Ohio St.3d 109, 1994-Ohio-260, 642 N.E.2d 353, the Supreme Court of Ohio dealt with a nearly identical case. When the Ashtabula County Sheriff William Johnson was accused of illegally using county and jail resources for his golf outing, the Ashtabula County Prosecutor sought and obtained to have Leo Talikka appointed special prosecutor because of conflict-of-interest problems. After Talikka had obtained an indictment against the Sheriff, Johnson was granted leave to file a quo warranto action to remove Talikka as special prosecutor because the county commissioners did not participate in Talikka's appointment. The Supreme Court affirmed the court of appeals' decision denying the writ because Johnson had an adequate remedy at law by filing a motion to dismiss the indictment with an appeal if the motion was overruled and the defendant convicted.

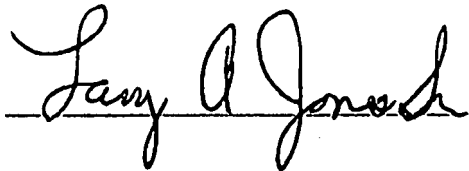
{¶ 14} Similarly, in *State ex rel. Jackson v. Allen*, 65 Ohio St.3d 37, 1992-Ohio-27, 599 N.E.2d 696, the Supreme Court of Ohio denied the extraordinary writ of quo warranto because the defendant in the criminal action had the adequate remedy at law by appealing the denial of his motion to dismiss the indictments. In this case, the former Hancock County prosecutor appointed John Allen to investigate and, if appropriate, to prosecute an attorney, inter alia, for perjury. The prosecutor thought he might be called as a witness. When the prosecutor left the

office, the new prosecutor did not apply to have Allen reappointed as special prosecutor. The attorney then moved to dismiss the indictment alleging that Allen's authority as special prosecutor had lapsed. The trial court denied the motion. Reginald Jackson, acting in place of the prosecutor, then sought the writ of quo warranto to remove Allen as a usurper in the office of special prosecutor. The Supreme Court denied the writ: "We conclude that [the defendant] is trying to quash the indictments through this proceeding rather than appeal the trial court's denial of his motion to dismiss. Since [the defendant] has an available appeal remedy, we grant Allen's motion for summary judgment and deny the writ for quo warranto." 65 Ohio St.3d at 39.

{¶ 15} When citizens of the city of Euclid made complaints that a Euclid police office used excessive force in effecting an arrest, the Euclid prosecutor appointed Dominic Vitantonio special prosecutor to investigate and prosecute. Vitantonio filed multiple charges against the officer, including interference with civil rights. Pursuant to R.C. 2733.07, the officer's defense attorney sought leave to file a quo warranto action to remove Vitantonio, inter alia, because Euclid City Council did not appoint him as required by the Euclid Municipal Ordinances. This court denied the motion for leave because, inter alia, there were adequate remedies at law in the trial court to contest the appointment. *In rel. of Ohio v. Vitantonio*, 8th Dist. Cuyahoga No. 108880, 2020-Ohio-36. The court rules that the procedural posture of a taxpayer's mandamus action is not a distinguishable factor; relator Burkons has an adequate remedy at law to contest the appointment.

{¶ 16} Accordingly, this court grants the motion to dismiss and dismisses this mandamus action. Relator to pay costs. The court instructs the clerk to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

{¶ 17} Writ dismissed.



LARRY A. JONES, SR., JUDGE

ANITA LASTER MAYS, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)

MAR 24 2021

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Greg Marcia Deputy