

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO**FILED**

SEP 10 2001

Kenneth J. Murphy, Clerk  
Columbus, OhioCaptain Mark Sweeney,  
Plaintiff,

v.

City of Steubenville, et al.  
Defendants.**JUDGMENT IN A CIVIL CASE**Case No: C2-01-322  
C2-97-966 (Consolidated)  
Judge Sargus  
Magistrate Judge King☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.☒ **Decision by Court.** A decision has been rendered by the Court without a hearing or trial.**IT IS ORDERED AND ADJUDGED** that pursuant to September 7, 2001 OPINION AND ORDER the Defendants motions for summary judgment is **GRANTED**. This action is hereby **DISMISSED**.

Date: September 10, 2001

KENNETH J. MURPHY, CLERK

(By) Deputy Clerk  
Spencer D. Harris

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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
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U.S. DISTRICT COURT  
SOUTHERN DIST. OHIO  
EAST COLUMBUS

CAPTAIN MARK SWEENEY,

Plaintiff,

v.

CITY OF STEUBENVILLE, et al.,

Defendants.

CASE NO. C2-01-322

CASE NO. C2-97-966 (Consolidated)

JUDGE EDMUND A. SARGUS, JR.

MAGISTRATE JUDGE NORAH MCCANN KING

OPINION AND ORDER

This matter is before the Court for consideration of cross Motions for Summary Judgment filed by Plaintiff, Captain Mark Sweeney (Doc. #24), Defendants, City of Steubenville, et al. (Doc. #22), and Intervenor, United States Department of Justice (Doc. #23). Following oral argument on the motions, the Court ruled from the bench that the motion of Captain Mark Sweeney is DENIED, while the motions of the Defendants and Intervenor are GRANTED. This Opinion and Order memorializes the decision rendered from the bench on the various motions.

I.

The procedural posture of this case is fully set forth in the Court's previous Opinion and Order of June 15, 2001. In summary, the Plaintiff, Captain Mark Sweeney, a member of the Steubenville Police Department, initiated this action in the Jefferson County Court of Common Pleas. Plaintiff challenges the procedure undertaken by the City of Steubenville for consideration of applicants for the position of Chief of Police. Plaintiff alleges that the consideration given to applicants who are not current members of the Steubenville Police

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Department, is contrary to Ohio law. The Defendants, City of Steubenville, et al., removed the case to this Court claiming that the relief sought by the Plaintiff is in direct contradiction of the provisions of the Consent Decree entered by this Court in 1997.

In its June 15, 2001 Opinion, this Court determined that it had jurisdiction to hear the case, while at the same time finding that Captain Mark Sweeney was not bound by the terms of the Consent Decree. Captain Sweeney was not a party to the prior action which resulted in the Consent Decree, nor was the Fraternal Order of Police of Steubenville, of which Sweeney is a member. Following this decision, the parties stipulated to the relevant facts not in dispute. The Court then directed the parties to file cross Motions for Summary Judgment as to whether Paragraph 80 of the Consent Decree was valid and enforceable under either federal or Ohio law.

The undisputed facts presented to the Court are as follows:

1. Defendant City of Steubenville is a charter city located in southeast Ohio. The City Charter for the City of Steubenville subjects the City and its Civil Service Commission to the requirements of the Ohio Revised Code as set out in O.R.C. Chapter 124 with regards to the Civil Service.
2. Defendant Dominic Mucci is an elected official as provided for by O.R.C. § 705.78.
3. Defendant Steubenville Civil Service Commission is charged with enforcing civil service law in the city of Steubenville, Ohio.
4. Defendants Robert D'Annabelle, Delores Wiggins, and Pana Mastros are Civil Service Commissioners for the City of Steubenville and are required to follow civil service law of the City of Steubenville.

5. Plaintiff Captain Mark Sweeney is a civil service employee in a police department as defined by O.R.C. § 124.01(A).
6. On September 3, 1997, Judge George C. Smith of the United States District Court for the Southern District of Ohio entered a Consent Decree in United States v. City of Steubenville, resolving the United States' claims pursuant to 42 U.S.C. § 14141 that officers of the Steubenville Police Department ("SPD") have engaged in a pattern or practice of conduct that deprives persons of rights, privileges, or immunities secured and protected by the Constitution and the laws of the United States.
7. The defendants in United States v. Steubenville are the City of Steubenville, the Steubenville Police Department, the Steubenville City Manager (in his capacity as Director of Public Safety), and the Steubenville Civil Service Commission, and are referred to collectively in the Consent Decree as "the City."
8. This Court retains jurisdiction of United States v. Steubenville for all purposes during the term of the Consent Decree. The City may move to dismiss the Consent Decree at any time after five years have elapsed since the date of entry of the Decree, and substantial compliance has been maintained for no less than two years. (Consent Decree para. 96).
9. Paragraph 8 of the Consent Decree provides: "This Decree is binding upon the United States and on the City, by and through their officials, agents, employees, and successors."
10. The City and the United States have selected an Independent Auditor, whose responsibility is to report on a quarterly basis the City's compliance with each provision of the Consent Decree during its term. (Consent Decree para 82).
11. Each calendar quarter since the effective date of the Consent Decree, the Independent Auditor has filed with this Court a report reviewing and evaluating the City's compliance with the Consent Decree during the previous quarter.
12. Paragraph 80 of the Consent Decree provides: Because peculiar and exceptional qualifications of a managerial and professional character are required, and because competition in such case is impracticable and the position can best be filled by selection of a person of high and recognized attainments, pursuant to the provisions of Ohio law, when a vacancy occurs in the

position of Chief of Police, the City shall suspend the provisions of Ohio Revised Code §§ 124.01 to 124.64. Selection of a new Chief of Police shall be conducted in accordance with the following provisions:

- a. A written and/or oral competitive examination may be part of the selection process. The search and selection process proposed by the City, including any competitive exam, must be reviewed by the independent auditor and approved by the United States.
- b. The City shall search (or shall contract with a qualified search organization) for a Chief who is qualified to implement this Decree and its objectives, and shall select a Chief with sufficient expertise. Candidates who are already employed by the SPD at the time of the search shall receive preference in the hiring process for Chief of Police. The degree of preference will be one provision of the selection process developed as set out in paragraph a.
- c. Officers who are employed by the SPD on the effective date of this decree and who would otherwise be eligible to sit for a competitive exam for the position of Chief of Police, at the time of selection, need not meet the education qualification set out in paragraph d, below, in order to be eligible for selection.
- d. Mandatory qualifications, except as set out in subparagraph c, shall include a four year college degree, appropriate administrative experience, and a demonstrated commitment to police excellence.
- e. The salary offered to any new Chief of Police shall be commensurate to his or her experience and qualifications.

10. Captain Mark Sweeney received a copy of the Consent Decree in September of 1997. Captain Mark Sweeney signed an acknowledgment on September 17, 1997, stating that he understood the Consent Decree.

11. Captain Mark Sweeney was aware that O.R.C. Section 124.44 would not be followed and that there was a possibility that the Chief's position could be filled by a person from outside the Steubenville Police Department.
12. In September of 2000 Chief Jerry McCartney retired as the Chief of Police for the Steubenville Police Department.
13. In October 2000, the City of Steubenville began searching for a replacement for Chief McCartney.
14. At the time that the City began its search for a permanent chief, the Independent Auditor's Quarterly Reports reflected a lack of substantial compliance with the Consent Decree, which continues to this day.
15. The City conducted its search for a permanent police chief according to the requirements of paragraph 80 of the Consent Decree.
16. In January, 2001, the City contracted with the Ohio Association of Chiefs of Police ("OACP") to conduct a candidate search and assessment center for the chief of police position.
17. Based on a preliminary evaluation of the written applications by the OACP Assessment Team, one applicant from within the Steubenville Police Department was rated among the top six of all applicants. This applicant was invited to participate in the Assessment Center, but declined. Captain Sweeney, as the next highest ranking applicant from within the Steubenville Police Department, was then invited to participate in the Assessment Center.
18. Captain Sweeney participated in the OACP Assessment Center on February 24, 2001 with four other applicants.
19. On March 8, 2001, the OACP completed the search process for the Chief of Police for the City of Steubenville and issued its final recommendation to City Manager Gary DuFour recommending two candidates as being qualified. Both candidates were not member of the City of Steubenville Police Department.
20. On or about March 29, 2001, the City of Steubenville announced that the new police chief would not be promoted from the ranks of the Steubenville Police Department.

21. The City of Steubenville has not adopted a charter modifying local civil service law in a manner inconsistent with O.R.C. § 124.44.

22. The Civil Service Commission for the City of Steubenville has taken no action to invoke its power under O.R.C. § 124.30(A)(2) to suspend the requirements of the O.R.C. requiring competitive examination.

23. The Civil Service Commission has held no evidentiary hearings regarding the need for a suspension of O.R.C. § 124.01-124.64.

24. Since November of 2000, the City of Steubenville has expended approximately \$15,000.00 of expenses related to the chief selection process as outlined in paragraph 80 of the Consent Decree.

## II.

Plaintiff Sweeney contends that the City of Steubenville failed to follow Ohio law in suspending the provisions of R.C. §124.44, which states, in part:

No person above the rank of patrolman in the police department shall be filled by original appointment. Vacancies in positions above the rank of patrolman in a police department shall be filled by promotion from among persons holding positions in a rank lower than the position to be filled.

An exception to this provision is found in R.C. §124.30(B), which provides for a waiver of promotion from within a police department "[i]n case of a vacancy in a position in the classified service where peculiar and exceptional qualifications of a scientific, managerial, professional or educational character are required . . ." This precise language is incorporated in Paragraph 80 of the Consent Decree. The City of Steubenville argues that a selection process for a new chief of police which allows the City to undertake a search outside of the members of its current police department, comports with R.C. §124.30(B). The Plaintiff nonetheless contends that the City did not act in accordance with Ohio law because it failed to make a specific finding

of the need to waive the requirements of R.C. §124.44. Further, the Plaintiff contends that the Steubenville Civil Service Commission never exercised its discretion to determine whether a waiver of the hire from within policy was appropriate.

In response, the City of Steubenville and the Department of Justice argue that the relief sought by the Plaintiff is barred by the doctrine of *laches*. Further, the Defendants and the Intervenor assert that the City of Steubenville, including the Steubenville Civil Service Commission which is a Party-Defendant in both of the consolidated cases herein, agreed to the terms of the Consent Decree which became binding upon all parties to the original action.<sup>1</sup>

#### A. *LACHES*

The Court first considers whether the Plaintiff should be bound by the doctrine of *laches*. In Bylinski v. City of Allen Park, 169 F.3d 1001, 1003 (6th Cir. 1999), the Court held:

The doctrine of *laches* is an equitable principle that bars recovery in circumstances in which a plaintiff's delay in seeking a judicial remedy prejudices a defendant. To prevail, a party invoking this equitable principle "must show that plaintiffs unreasonably delayed in bringing suit and that defendants were prejudiced by this delay." Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164, 1182 (6th Cir. 1972).

The Consent Decree at issue was originally filed with this Court on September 3, 1997. As noted above, the Steubenville Fraternal Order of Police filed a Motion to Intervene on September 3, 1997. On July 23, 1998, Magistrate Judge Norah McCann King issued an Opinion

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<sup>1</sup>The parties agree that this case does not present the Court with the question of whether federal law may override the Civil Service Law of Ohio. While relief which otherwise overrides state law may be appropriate in limited circumstances, this is generally true only in cases involving a finding of a clear violation of federal law by a defendant, e.g., Youngblood v. Palzell, 568 F.2d 506 (6th Cir. 1978). In this case, the very terms of the Consent Decree note that the City of Steubenville does not admit liability or violations of federal law.



and Order denying intervention as to the Fraternal Order of Police. No appeal was taken from her decision.

It is also undisputed that Plaintiff Sweeney received a copy of the Consent Decree in September of 1997 and signed a receipt acknowledging that he understood the terms of the document. Consequently, he was on actual notice of Paragraph 80 of the Consent Decree in 1997.

While this Court held in its previous Order of June 15, 2001 that the Plaintiff was not bound by the terms of the Consent Decree, the Court did note that the Defendants and Intervenor could still assert the defenses of *laches*. From September of 1997 until April 6, 2001, the Plaintiff did not pursue any legal remedy concerning his objections to the Consent Decree or its implementation by the City of Steubenville. Further, the Plaintiff was aware as early as September of 2000, that the incumbent Chief of Police was retiring. The City began the search for a replacement in October of 2000 and entered into a contract with the Ohio Association of Chiefs of Police to conduct a candidate search and assessment for the Chief of Police position. Plaintiff himself was an applicant for the position and participated in the assessment process in February of 2001. During this time period, the City of Steubenville expended approximately \$15,000.00 in the process of screening applicants for the new position.

As will be more particularly described below, the Plaintiff also contends that the Steubenville Civil Service Commission failed to hold hearings, make findings, and otherwise comply with Ohio law regarding a waiver of the provisions of R.C. §124.44. All of these alleged deficiencies in the implementation of Paragraph 80 of the Consent Decree were, or could have been known, with reasonable diligence, to the Plaintiff as early as 1997. Further, the Court notes that, under Ohio law, specifically R.C. §121.22, any claim that the Civil Service Commission

failed to hold required hearings prior to official action is barred by the two year statute of limitations set forth in R.C. §121.22(I)(1). Consequently, Plaintiff's assertion that the Civil Service Commission failed to conduct public hearings and otherwise comply with Ohio procedural law would be time barred if brought under the same statute which otherwise would require such formality. This fact gives further support to the defense of the City of Steubenville that the Plaintiff has simply waited too long to assert his rights.

This Court finds that the City of Steubenville has been prejudiced by Plaintiff's delay. The City has spent a considerable sum of money to interview prospective candidates who do not work within the department. The Court notes that the position of Chief of Police is one of great importance to a municipality and a delay in filling the position for an extended period of time presents particular prejudice here since the Chief of Police bears a responsibility in implementing the terms of the 1997 Consent Decree. Finally, the funds already expended by the City in conducting a national search would be wasted if the relief requested by the Plaintiff were granted. For these reasons, the Court concludes that the relief sought by the Plaintiff is barred by the doctrine of *laches*.

**B. COMPLIANCE WITH R.C. §124.30(B).**

In addition to finding that the doctrine of *laches* bars relief sought by the Plaintiff, the Court also concludes that the City of Steubenville, and specifically the Civil Service Commission, have, in the unique context of this case, substantially complied with the requirements of R.C. §124.30(B). The claim made by the Plaintiff that the Steubenville Civil Service Commission failed to formally act to waive the requirement that a new Chief of Police be hired from within the department is, at first blush, troubling. The concept of civil service is

enshrined in the Ohio Constitution, Art. XV, § 10,<sup>2</sup> and is an important public policy for the State of Ohio. Ohio law vests within a municipal Civil Service Commission the obligation to ensure that hirings and promotions within the civil service are based on merit, fitness, and with competitive examinations. The elected officials of a municipality serving on the City Council are without authority to determine the qualifications for an employee within the civil service. State ex rel Petit v. Wagner, 170 Ohio St. 297 (1960). In this case, had the City Council simply acted to modify the requirements with regard to applicants for the Chief of Police position without the authority of the Steubenville Civil Service Commission, such action would be null and void under Ohio law. The Steubenville Civil Service Commission, a party to both of the consolidated cases herein, expressly approved and entered into the Consent Decree.

The precise language of Paragraph 80 of the Consent Decree, however, makes clear that all of the policies and purposes of the civil service amendment to the Ohio Constitution are both respected and maintained. First, the paragraph establishes a written and oral competitive examination. Mandatory qualifications for all applicants are also set forth in the provisions of the agreement. In short, Paragraph 80 in no way undercuts the traditional notion of civil service promotions or hires based on merit, fitness, and objective competitive examination. Finally, R.C. §124.30(B) prohibits a "general" waiver of civil service law. Paragraph 80 waives only the specific requirement that the applicants be from within the police department; all other provisions of R.C. Chapter 124 are still applicable.

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<sup>2</sup>Art. XV, § 10 states:

Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision.

The Plaintiff also takes issue with the Steubenville Civil Service Commission's failure to hold public hearings to determine if "exceptional circumstances" existed so as to meet the waiver requirement for R.C. §124.44. The Court first notes that, by the very terms of the extensive consent decree filed in this case, major changes in the organization and operation of the Steubenville Police Department are required. The Consent Decree sets forth a new management structure, new reporting requirements, new methods of handling citizen complaints and new training procedures for all officers. Given the major changes in which the police department is to be operated, the Court has no difficulty in concluding that the Defendants, which include the Steubenville Civil Service Commission, had a substantial basis in fact to conclude that "peculiar" and "exceptional circumstances" require at least the consideration of candidates for the Chief of Police position who are not currently employed by the Steubenville Police Department.

While it is undisputed that the Steubenville Civil Service Commission did not hold public hearings, the Court notes that, in the original action herein, the named Defendants included the Steubenville Civil Service Commission. The Commission was represented by the City Attorney, who continues to represent the City in this case. The Consent Decree was signed on behalf of all Defendants, including the Steubenville Civil Service Commission. Thus, there is no indication in this case that the elected branches of government, including the Mayor and City Council, signed an agreement which varied the qualifications for the new Chief of Police of Steubenville in the absence of approval by the Steubenville Civil Service Commission.

While the taking of formal action by the Steubenville Civil Service Commission, i.e. public hearings and a recorded vote, may have been a more prudent route to follow at the conclusion of the Consent Decree, the Court is convinced that, under the circumstances of this

case, the failure of the Civil Service Commission to act publically is not fatal to the enforceability of Paragraph 80 of the Consent Decree. First, Paragraph 80 protects and enhances the policies and purposes of the Civil Service laws of Ohio. Second, Paragraph 80 was specifically approved by the Civil Service Commission -- not simply the elected officials of city government. Third, the Consent Decree, taken as a whole, manifestly demonstrates the need for consideration of qualified candidates who may or may not be current members of the Steubenville Police Department<sup>3</sup>. Fourth, as noted above, any claim that the Civil Service Commission failed to follow provisions of Ohio procedural law, i.e., R.C. §121.22, is now time-barred under state law. For these reasons, the Court finds that the Defendants have complied with the requirements of O.R.C. §124.30(B).

In conclusion, the Court observes that to grant the relief requested by the Plaintiff would undermine the finality of judgments and upset the major changes in the operation of the police department in the City of Steubenville to which it long ago agreed. The Steubenville Civil Service Commission entered into a Consent Decree in 1997 with the United States Department of Justice requiring a new process for the hiring of a future police chief. Four years later, a suit by a party with actual knowledge of the Consent Decree now attempts to overturn the extensive and carefully crafted agreement reached by the parties in the prior litigation. For the reasons stated above, the Court concludes that Plaintiff Sweeney's attempt is without merit.

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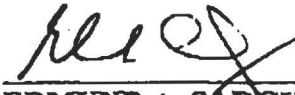
<sup>3</sup>This Court does not intend to imply that only applicants outside of the Steubenville Police Department are qualified to serve as Chief and implement the Consent Decree. The Court is well aware of many dedicated police officers on the department whose commitment to public service should not be minimized. The selection of the new Chief is, however, a decision to be made by the Defendants, consistent with Ohio law and the Consent Decree.

**III.**

Based upon the foregoing, the Motion for Summary Judgment filed by the Plaintiff (Doc. #24) is **DENIED**. The Motions for Summary Judgment filed by the Defendants (Doc. #22) and the Intervenor (Doc. #23) are **GRANTED**. This case is hereby **DISMISSED**. The Clerk is **DIRECTED** to enter judgment accordingly.

**IT IS SO ORDERED.**

9-8-2001  
**DATED**

  
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**EDMUND A. SARGUS, JR.**  
**UNITED STATES DISTRICT JUDGE**