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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**



ASSOCIATION OF CLEVELAND FIRE. LOCAL 93
Plaintiff

Case No: CV-10-733069

Judge: BRENDAN J SHEEHAN

CITY OF CLEVELAND, OHIO ETAL
Defendant

JOURNAL ENTRY

OPINION AND JUDGMENT ENTRY. O.S.J.

Judge Signature

Date

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ASSOCIATION OF CLEVELAND FIRE)	CASE NO. CV 10 733069
FIGHTERS, LOCAL 93 OF THE)	
INTERNATIONAL ASSOCIATION OF)	
FIRE FIGHTERS,)	JUDGE BRENDAN J. SHEEHAN
)	
Plaintiff,)	
)	
v.)	OPINION AND JUDGMENT
)	ENTRY
THE CITY OF CLEVELAND, OHIO, <i>et</i>)	
<i>al.</i> ,)	
)	
Defendants.)	

This matter is before the Court on Defendants the City of Cleveland's and the City of Cleveland Civil Service Commission's (collectively "City's") Motion for Summary Judgment. The issues have been fully briefed to the Court.

Plaintiff Association Of Cleveland Fire Fighters, Local 93 of the International Association of Fire Fighters ("Local 93") filed its Complaint for Declaratory Judgment and Injunctive Relief challenging the City's policy of awarding preference points to graduates of the Cleveland Municipal School District's Martin Luther King, Jr. High School's fire career track on their civil service examination scores. The Local 93 contends that the "award of additional preference points on the basis of race or other suspect classification, directly or indirectly, is in violation of Ohio law and the City's Charter" and seeks to enjoin the City "from awarding preference points on the basis of race or other suspect classification, directly or indirectly."

The City seeks summary judgment on several grounds: that the preference points are permissible as based on merit or fitness; that necessary parties have not been joined in this action; and that the Local 93 has not suffered irreparable harm.

Under Civ.R. 56, summary judgment is appropriate when, (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can only reach one conclusion which is adverse to the non-moving party. *Holliman v. Allstate Ins. Co.* (1999), 86 Ohio St.3d 414; *Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327. When a motion for summary judgment is properly made and supported, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial and may not merely rest on allegations or denials in the pleadings. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. The nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio St.3d 108, 111. Further, to survive summary judgment, a plaintiff must produce more than a scintilla of evidence in support of her position. *Markle v. Cement Transit Co., Inc.* (1997), 1997 WL 578940, 2, citing *Redd v. Springfield Twp. School District* (1993), 91 Ohio App.3d 88, 92.

The City maintains that the preference points for completion of the Cleveland Municipal School District's Martin Luther King, Jr. High School's fire career track program is permissible under the holding in *Int'l. Assn. Firefighters, Loc. 136 v. City of Dayton* (2005), 107 Ohio St.3d 10, 2005-Ohio-5826 ("*IAFF*"). In *IAFF*, the court upheld an award of preference points to individuals who completed a fire apprentice program. The court found that successful completion of the fire apprentice program was indicative of merit, fitness, efficiency, character and industry so that it could form the basis for an award of preference points.

However, unlike the fire career track program at issue in the instant case, the fire apprentice program in *IAFF* was conducted at a community college. Community colleges by their very nature draw students from the general community, tending to ensure at least some

level of diversity. The fire career track program currently at issue is offered by the Cleveland Public Schools thereby limiting the pool of potential participants certainly by age and residence and possibly by race as well. Because the restricted access to the fire career track program may act as a direct or indirect method of skewing the composition of applicant pools, it may violate the Ohio Constitution and the City Charter.

Based on this critical difference between the program at issue in *IAFF* and the one at bar, the Court finds that genuine issues of material fact exist which preclude summary judgment.

The City also argues that individuals who were awarded points as graduates of the program are necessary parties to this action. Under the City's analysis, all applicants must also be necessary parties since their relative position on the eligibility lists is affected by the preference points at issue.

This is a declaratory judgment action seeking a determination under constitutional and municipal law. Whether a nonparty is a necessary party to a declaratory-judgment action depends upon whether that nonparty has a *legally protectable* interest in rights that are the subject matter of the action. *Rumpke Sanitary Landfill, Inc. v. State* (2010), 128 Ohio St.3d 41, 44, 2010-Ohio-6037. Applicants to a position have no legally protectable interests in the position. Accordingly, no applicants--including those who received preference points under the program at issue--are necessary parties to this action.

Lastly, the City contends that Plaintiff has not suffered harm sufficient to sustain this action. The City's arguments are reiterations of arguments previously presented and determined by this Court in its Opinion and Judgment Entry dated November 4, 2010. The City has offered no factual or legal issues to cause the Court to revisit its earlier determination.

For the foregoing reasons, DEFENDANTS THE CITY OF CLEVELAND'S AND THE CITY OF CLEVELAND CIVIL SERVICE COMMISSION'S MOTION FOR SUMMARY JUDGMENT IS DENIED.

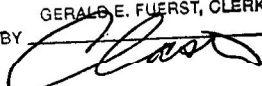
IT IS SO ORDERED.

Dated: 8/3/11


JUDGE BRENDAN J. SHEEHAN

RECEIVED FOR FILING

AUG 05 2011

GERALD E. FUERST, CLERK
BY  DEP.

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 3rd day of August, 2011:

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