

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

The Fraternal Order of Police,	:	
Capital City Lodge #9,	:	Judge
6800 Schrock Hill Court	:	
Columbus, Ohio 43229,	:	Case No.
	:	
-and-	:	(Jury Demand Endorsed Hereon)
	:	
Dale Surbaugh,	:	
120 Marconi Boulevard	:	
Columbus, Ohio 43235,	:	
	:	
Plaintiffs,	:	
	:	
-vs-	:	
	:	
The City of Columbus,	:	
77 North Front Street	:	
Columbus, Ohio 43215,	:	
	:	
Defendant.	:	

Complaint

Now come Plaintiffs, the Fraternal Order of Police, Capital City, Lodge #9 (the “FOP”) and Dale Surbaugh, by and through the undersigned counsel, and for its Complaint against the City of Columbus (“City”) state as follows:

I. Nature of the Action

1. This is an action for damages, or, in the alternative, specific performance, for breach of contract and denial of an employee benefit in violation of public policy. Specifically, the City breached its agreement with the FOP due to Officer Surbaugh’s report of another officer’s suspected misconduct, thereby depriving Officer Surbaugh of his contractually entitled participation in the Retirement Incentive Program.

II. Jurisdiction and Venue

2. This Court has jurisdiction over this matter pursuant to O.R.C. § 2305.01.
3. Venue is proper in Franklin County, Ohio under Ohio Civ. R. 3(C)(3) and 3(C)(6) since Defendant conducted activity that gave rise to the claim of relief in Franklin County; the collective bargaining agreement and the Retirement Incentive Program between the FOP and the Defendant were negotiated in, and pertains to employees employed in, Franklin County, Ohio; Defendant maintains its principal office in Franklin County; and the entire claim for relief arose in Franklin County.

III. Parties

4. Plaintiff FOP is an “employee organization” as defined by Ohio Revised Code Section 4117.01(D). The FOP represents a bargaining unit comprised of full-time sworn police officers below the rank of sergeant employed by the City of Columbus, Division of Police (“CPD”) and all full-time sworn police officers holding the rank of sergeant and above (but excluding the Chief of Police, Assistant Chiefs, and Deputy Chiefs).
5. Dale Surbaugh is employed with Defendant City as an officer within CPD. He has been employed there for over 32 years. Officer Surbaugh is also a member of the FOP and a bargaining unit member and covered by the collective bargaining agreement between the City and FOP.
6. Defendant City is a “public employer” as defined by Ohio Revised Code Section 4117.01(B). The City is a municipal entity capable of suing and being sued, and it is a party to the current collective bargaining agreement between the City and the FOP, which became effective pursuant to O.R.C. Chapter 4117.

IV. Factual Allegations

The Retirement Incentive Program

7. The City and FOP are currently parties to a collective bargaining agreement (“CBA”) with effective dates of December 9, 2020 – December 8, 2023.
8. As part of negotiations for that CBA, the City and FOP agreed to a Retirement Incentive Program (“RIP”).
9. Under the RIP, eligible members could voluntarily opt-in to retire in exchange for \$200,000.00. To be eligible to participate, a bargaining unit member had to meet three criteria:
 - A. The member had to voluntarily opt-in during the established election period;
 - B. The member needed twenty-five or more years of continuous service as a sworn member of CPD as of December 31, 2021; and
 - C. The member could have “no pending administrative investigations (other than for minor misconduct) or criminal investigations as of the election date and through the date of termination.”
10. The RIP was limited to 100 or fewer participants (though the City later set the number at 100 participants). If more than 100 eligible members opted-in to the RIP, then participation would be decided by seniority and rank.
11. The election period for the RIP ran from January 31, 2022 – February 6, 2022.
12. Officer Surbaugh timely elected to participate in the RIP.
13. Additionally, well over one-hundred members also opted-in to the RIP during the election period.

14. After the election period, but before the City finalized the list of one-hundred eligible members, several members who had opted-in voluntarily decided to opt-out of the RIP. Additionally, several members who had opted-in were deemed ineligible by the City due to a pending administrative or criminal investigation. Finally, numerous other members were deemed ineligible by virtue of their rank and/or seniority.
15. The City finalized the list of one hundred participants in the RIP on or about June 7, 2022.

Former CPD Officer and Convicted Drug Trafficker John Kotchkoski's Scheme to Defame and Discredit Officer Surbaugh after He Reported Mr. Kotchkoski's Misconduct

16. In September of 2021, CPD Officer John Kotchkoski and another former CPD officer, Marco Merino, were arrested by the Federal Bureau of Investigation and charged with the trafficking of almost 8 kilograms of fentanyl—enough to kill upwards of 2,000,000 million people.
17. Shortly after he was arrested, Mr. Kotchkoski allegedly threatened to kill (or have killed) Mr. Merino's wife and children if Mr. Merino cooperated with law enforcement.
18. In April of 2021, Mr. Kotchkoski plead guilty to conspiracy to distribute and to possess with intent to distribute 400 grams or more of fentanyl. He faces a potential life sentence for his crimes.
19. Prior to his arrest and incarceration, Mr. Kotchkoski worked within the Drug Cartel Unit ("DCU") within CPD, and while there, he engaged in an elaborate scheme to discredit Officer Surbaugh and others after Mr. Kotchkoski became aware of their attempts to shed light on his many misdeeds.
20. For several years leading up to this scheme, Mr. Kotchkoski and Officer Surbaugh worked closely together in the DCU and even considered themselves friends.

21. That began to change, however, in the spring of 2021 when Mr. Kotchkoski began growing increasingly agitated at his lieutenant's efforts to hold him accountable.
22. In an effort to become "untouchable" and "operate with impunity," Mr. Kotchkoski filed an Equal Employment Opportunity ("EEO") complaint his lieutenant, Aimee Haley in April of 2021. He also intimidated several other members of the DCU into joining the complaint as well. And in fact, shortly after that EEO complaint was filed, several of those members sought out the former EEO Director and recanted their complaint and confessed that Mr. Kotchkoski had bullied them into complying with his scheme.
23. After that EEO complaint was filed, Lt. Haley began documenting her actions in her private notes as they pertained to Mr. Kotchkoski.
24. Mr. Kotchkoski was interviewed by the City concerning his EEO complaint against Lt. Haley in August of 2021. At no time during that interview did he raise any allegation(s) against Officer Surbaugh, and he even went so far as to tell the investigator that "he did not have any additional complaints."
25. Following that interview, on September 3, 2021, Mr. Kotchkoski confessed to another CPD officer that he had impermissibly and surreptitiously logged into Lt. Haley's computer files and accessed her personal notes. Those notes documented numerous conversations Lt. Haley had with Officer Surbaugh in recent months:
 - A. Officer Surbaugh had reported to Lt. Haley in April of 2021 that a DEA agent suspected Mr. Kotchkoski was using a "dirty" confidential informant (i.e., that the informant was engaging in illegal activity); and
 - B. In June of 2021, Officer Surbaugh had reported to Lt. Haley that an officer had complained to Officer Surbaugh that Mr. Kotchkoski had not trained him as required.

In response, Officer Surbaugh offered to train that officer as well as another officer Mr. Kotchkoski had failed to train.

26. Officer Surbaugh was required by Division/City policy to report the information he learned about Mr. Kotchkoski's use of a "dirty" confidential informant. Likewise, he ensured that other officers in the DCU were properly trained as required by City/Division policies.
27. During that September 3rd meeting, Mr. Kotchkoski informed the CPD officer that he needed to "discredit" Lt. Haley and Officer Surbaugh.
28. *The same day Mr. Kotchkoski confessed of his scheme to discredit Lt. Haley and Officer Surbaugh*, he sat for another interview with the City concerning his initial EEO complaint. There, he levelled allegations against Officer Surbaugh for the first time. Specifically, he alleged that several years prior, Officer Surbaugh had made insensitive comments based on Mr. Kotchkoski's ethnicity. In an attempt to substantiate the allegations, he provided text messages purportedly between himself and Officer Surbaugh from several years prior that the City later concluded had been doctored. At no time did Mr. Kotchkoski even attempt to explain why he waited several years to raise such allegations. Of course, there is no explanation other than Mr. Kotchkoski's professed scheme to discredit Officer Surbaugh to protect himself and his illicit activities.
29. As a result of Mr. Kotchkoski's fabricated claims, Officer Surbaugh was relieved of duty and had his gun and badge confiscated.
30. Days after that interview, the officer Mr. Kotchkoski confessed to contacted Lt. Haley to report that Mr. Kotchkoski had secretly accessed her computer files and personal notes and had concocted a scheme to discredit her and Officer Surbaugh.

31. That officer went on to draft a formal Letter of Information to Chief of Police Elaine Bryant documenting his interactions with Mr. Kotchkoski. In it, that officer explained in detail Mr. Kotchkoski's confession of secretly accessing Lt. Haley's files, and that Mr. Kotchkoski learned of Officer Surbaugh's report to Lt. Haley of his misconduct by accessing those files. Specifically, that officer noted that after speaking with Mr. Kotchkoski, "it became apparent to me that Kotchkoski was targeting individuals mentioned in [Lt. Haley's files] that had provided information to supervisors against him." That officer documented that Mr. Kotchkoski called him a few days later and reiterated that he needed to "discredit" Lt. Haley and Officer Surbaugh and "strike first." That officer noted "that it was evident" based on the conversations with Mr. Kotchkoski that "he was using the EEO in an attempt to attack individuals who were reporting alleged misconduct."

32. In that same Letter of Information, that officer relayed that he had notified Mr. Kotchkoski on September 19 or 20 that he had informed Lt. Haley of Mr. Kotchkoski's actions of accessing her files. A day or so later, Mr. Kotchkoski called that officer. Fearing Mr. Kotchkoski might retaliate against him for reporting their conversation to Lt. Haley, he recorded the conversation. During that recorded call, Mr. Kotchkoski pressured that officer to lie to the Division of Police regarding the reason he reported Mr. Kotchkoski's conduct. Those lies, argued Mr. Kotchkoski, would help him prosecute his fraudulent EEO claims against Lt. Haley and others. That officer refused to lie, however.

The City's Investigation of Mr. Kotchkoski's Fraudulent EEO Claim

33. As noted above, Mr. Kotchkoski first levelled accusations against Officer Surbaugh on September 3, 2021.

34. Under the terms of the CBA, an investigation is deemed concluded “on the date [the investigative packet] is initially forwarded to the chain of command.” Moreover, the FOP and the City have an unequivocal past practice of treating the transmission of the investigative packet to the chain of command as the date the investigation is completed.
35. Here, the investigation was essentially completed, and the City knew Officer Surbaugh had not committed any misconduct—which is *less* than minor misconduct—as of December 13, 2021, as the City put Officer Surbaugh back to duty on that day. Nor did the City’s EEO Director conduct any additional interviews after that date.
36. The City had five months to investigate the obviously phony EEO claim before the January 31, 2022 RIP election date—the date that a member could not be under any administrative investigation (with the exception of minor misconduct); however, the City sat on the investigation and waited to formally clear Officer Surbaugh until that date came and passed. Even though the City knew as of December 13, 2021 (the day they put Officer Surbaugh back to duty and returned his gun and badge) that he had committed absolutely no misconduct.
37. Following the completion of the EEO investigation by the City, one of the principal investigators concluded that Mr. Kotchkoski’s motives for filing the EEO stemmed from his “criminal activities,” as well as Lt. Haley’s personal notes that he had illicitly accessed. Filing the EEO was part of Mr. Kotchkoski’s scheme of “discredit[ing] officers that opposed him,” that investigator concluded.
38. That investigator also noted that Mr. Kotchkoski’s failure to report Officer Surbaugh’s alleged disparaging remarks from several year’s past violated Division policy. Of course, that assumed Officer Surbaugh had actually done what was alleged. Instead, that

investigator found that Mr. Kotchkoski lacked credibility, and that he had many opportunities to report Officer Surbaugh, including his initial interview with the City. The timing of the complaint was found to be “suspiciously convenient” for Mr. Kotchkoski.

39. That investigator added that “some, if not all” of the text messages provided by Mr.

Kotchkoski were “fabricated and/or edited.” The investigator also questioned why Mr. Kotchkoski had text messages saved from several years prior to the complaint.

40. According to that investigator, Mr. Kotchkoski had a “desperation” of finding out what other witnesses as well as Lt. Haley and Officer Surbaugh had said during their interviews.

41. Had Mr. Kotchkoski not been arrested, the investigator noted he would have likely been investigated by the Division for his actions during the EEO investigation.

42. Finally, that investigator concluded that several other members of the DCU of Hispanic descent were interviewed and none could corroborate Mr. Kotchkoski’s claims. To the contrary, those witnesses refuted Mr. Kotchkoski’s claims.

43. Neither that investigator nor the Assistant Director and EEO Compliance Officer for the City found any merit to Mr. Kotchkoski’s allegations against Officer Surbaugh.

Accordingly, the EEO Compliance Officer determined the allegations as not sustained on April 13, 2022, and Officer Surbaugh was cleared of any wrongdoing.

Officer Surbaugh’s Exclusion from the RIP

44. The City deemed Officer Surbaugh ineligible from participating in the RIP on or about April 1, 2022, due to the pending administrative investigation of Mr. Kotchkoski’s fraudulent EEO claim.

45. The City in fact followed through and rejected Officer Surbaugh from the final RIP list of one hundred members despite (i) the self-professed retaliatory motive for the filing of the EEO complaint by Mr. Kotchkoski, a self-professed motive the City was expressly made aware of and that the City has acknowledged; (ii) Mr. Kotchkoski's allegations not being sustained; and (iii) the fact the investigation had been completed many months before the dates of the election and finalization of the RIP.
46. There is no question that Officer Surbaugh otherwise met the RIP eligibility criteria.
47. There is no dispute that but for the fraudulent, retaliatory EEO claim, Officer Surbaugh would have been included in the final list of one hundred members, given his seniority. Stated differently, there is no question that had Officer Surbaugh shirked his Division/City imposed duty to report Mr. Kotchkoski's illicit activities, he would have made the final RIP list.
48. By excluding Officer Surbaugh from the final RIP list, the City sends an unmistakable message to other would-be whistleblowers and those who abide by their oath to uphold the law and serve and protect the community: those who report misconduct as required by the law and administrative regulations will be denied employee benefits while those who look the other way will be rewarded.

V. Claims for Relief

A. Breach of Contract

49. Plaintiffs reallege and incorporate the allegations set forth in Paragraphs 1 through 48 as if fully restated herein.
50. The CBA and RIP constitute a valid contract. Officer Surbaugh unequivocally met the eligibility criteria to participate in the RIP. The City breached the terms of the RIP by

denying Officer Surbaugh's participation due to his report of Mr. Kotchkoski's misconduct. As a direct and proximate result of that breach, Officer Surbaugh suffered at least \$200,000.00 in damages.

B. Prohibited Retaliation under O.R.C. § 4113.52

51. Plaintiffs reallege and incorporate the allegations set forth in Paragraphs 1 through 50 as if fully restated herein.
52. As noted above, Officer Surbaugh made a report to his supervisor of his good-faith belief that Mr. Kotchkoski may have violated the law and broken City/Division policies and otherwise complied with the requirements as set out in O.R.C. § 4113.52.
53. The City allowed Mr. Kotchkoski to weaponize the EEO process against Lt. Haley and Officer Surbaugh such that he became "untouchable" and could "operate with impunity." Indeed, Mr. Kotchkoski operated with impunity until his arrest by the FBI.
54. The City was aware of Officer Surbaugh's report to his supervisor at the time it denied him participation in the RIP program.
55. The City ultimately denied Officer Surbaugh's participation in the RIP program based on that good-faith report of Mr. Kotchkoski's suspected illicit activities.
56. The act of denying Officer Surbaugh's participation in the employment benefit of the RIP program because of his good-faith report of Mr. Kotchkoski's suspected criminal activities constitutes prohibited retaliation under O.R.C. § 4113.52.

C. Denial of Employment Benefit in Violation of Public Policy

57. Plaintiffs reallege and incorporate the allegations set forth in Paragraphs 1 through 56 as if fully restated herein.

58. As provided for under numerous Division administrative regulations and common law, the State of Ohio has a strong public policy against denying employee benefits because an employee reports serious and potentially criminal actions by another employee.
59. By denying Officer Surbaugh participation in the RIP, the strong public policy referenced in Paragraph 58 would be jeopardized as no employee would risk losing such an attractive benefit by reporting misconduct—even if serious and potentially criminal.
60. But for Officer Surbaugh’s good-faith report of Mr. Kotchkoski’s illicit activities, the City would have included him in the final RIP list.
61. The City had no overriding legitimate justification in denying Officer Surbaugh participation in the RIP, and that action violates Ohio’s strong public policy to the contrary.

WHEREFORE, Plaintiffs demand specific performance by Defendant, judgment against the Defendant in an amount in excess of Twenty-Five Thousand Dollars (\$25,000.00), attorneys’ fees, plus costs herein expended, for interest from the earliest date provided by law, and all other relief appropriate under the facts and circumstances of this case.

Jury Demand

Pursuant to Rule 38 of the Ohio Rules of Civil Procedure, Plaintiffs FOP and Dale Surbaugh demand a trial by jury of all issues so triable.

Respectfully submitted,

By: /s/ Lathan J. Lipperman
Lathan J. Lipperman (0095523)
Nicole Rager Wannemacher (0078095)
Harshman & Wannemacher
3360 Tremont Road, Suite 230
Columbus, Ohio 43221
Telephone: (614) 442-5626

Fax: (614) 442-5625

Emails: lkipperman@hcands.com
nwannemacher@hcands.com

Attorneys for Plaintiffs FOP and Dale Surbaugh