

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

CITY OF AKRON,	:	
Appellant,	:	CASE NOs. 10CV-11258
	:	10CV-11426
	:	10CV-11513
vs.	:	
OHIO STATE DEPARTMENT OF	:	JUDGE BROWN
INSURANCE ET AL.,	:	
Appellees,	:	

**FINAL JUDGMENT ENTRY DISMISSING ADMINISTRATIVE
APPEALS FOR LACK OF SUBJECT MATTER JURISDICTION**

The Ohio Department of Insurance (hereinafter “Department”) issued Cease and Desist Orders against Appellants Medical Mutual of Ohio (Administrator of plans for both other appellants), the City of Akron, and the Ohio Police & Pension Fund (“hereinafter OP&F”). Those Orders, issued in their case No. LGL-0001900-H on July 10, 2010, were issued pursuant to an Order of Reference from Case No. 2005-11-6527 which was then pending in the Court of Common Pleas of Summit County Ohio.

The Department’s Orders directed: “IT IS FURTHER ORDERED that this Order is directed to the Summit County Court of Common Pleas for further application in the case of *Metcalfe, et al. v City of Akron et al.*, Case No. 2005-11-6527.” (P. 12, emphasis in original).

That part of the Order comported with the first paragraph which states, “An Order of Reference was issued by Judge Marvin Shapiro of the Summit County Court of Common

Pleas dated February 7, 2006, in the case of *Metcalfe, et al. v City of Akron et al.*, Case No. 2005-11-6527, asking the Superintendent of the Department of Insurance (“Department”) to assert jurisdiction of the coordination of benefits issues that were before the Court, or to decline jurisdiction.”

The Department asserted jurisdiction. The City of Akron filed a Motion to Dismiss on the basis that the Department did not have subject matter jurisdiction. The attorney for the Department filed a Memorandum Contra on its behalf and on behalf of Mr. Metcalfe and Mr. Biasella. At the administrative level neither the OP&F nor the plans administrator, Medical Mutual of Ohio, filed a brief concerning subject matter jurisdiction.

On April 28, 2009, Hearing Officer Louis E. Gerber denied the Motion to Dismiss for lack of jurisdiction.

The five parties to the present appeal are now aligned as follows: the City of Akron has renewed its motion to dismiss for lack of subject matter jurisdiction; the OP&F has filed its own motion to dismiss for lack of subject matter jurisdiction; Medical Mutual of Ohio now argues the Department has no jurisdiction in this matter; the Department filed a brief in support of their assertion of jurisdiction; and Mr. Metcalfe and Mr. Biasella urge the Department has jurisdiction in this matter.

The City of Akron, the OP&F, and Medical Mutual of Ohio base their argument on Ohio jurisprudence holding that health benefits provided pursuant to contract (a self-funded plan) are not insurance, but are the antithesis of insurance.

Conversely, the Department and complainants Mr. Metcalfe and Mr. Biasella argue the Department has jurisdiction in this matter and, by extension, before this Court. They contend the Department is merely regulating market-place conduct of organizations whose plans provide health care benefits.

All parties agree that both the City of Akron's plan and OP&F's plan do not offer "insurance" but are retention funds in which the risk of loss is directly imposed by law or contract. *Physicians Insurances Company of Ohio v. Grandview Hospital and Medical Center*, 44 Ohio App.3d 157 (1988). Thus, such funding mechanisms are not insurance, they are the antithesis of insurance. *Id.*

Because the plans are not insurance, the City of Akron, the OP&F and their administrator, Medical Mutual of Ohio, move this Court to dismiss these cases for lack of subject matter jurisdiction. They reason the Department has power to regulate insurance providers only.

The Department and Summit County Plaintiffs Metcalfe and Biasella argue the Department is regulating marketplace conduct of a plan of health coverage under R.C. 3902.11(B). That argument has superficial appeal. The basic problem with that argument, however, is that the Hearing Officer's decision overruling Akron's Motion to Dismiss for lack of subject matter jurisdiction bases that decision on the legal misunderstanding that "The City of Akron self-funded insurance fund provided for its policemen and firemen retirees as operated by the City of Akron is insurance provided within the State of Ohio and is subject to the insurance laws of this state pursuant to Ohio Revised Code § 3901.20." (sic). (This decision is found in Volume 1 (about 100 pages from the end of that volume, unfortunately the record is not numbered) of the certified record on page 7 at numbered paragraph 25 of the Hearing Officer's Ruling on the Motion to Dismiss filed April 28, 2009.) This is not the law in the State of Ohio. *Physicians Insurance Company of Ohio*, supra.

Ohio Revised Code 3901.20 prohibits unfair and/or deceptive acts or practices in the business of insurance. It does not reach beyond persons engaged in the business of

insurance. Because Akron and the OP&F are engaged in conduct that is the antithesis of insurance, this code section does not regulate their conduct. The regulation of such conduct does not fall within the Department's purview.

The OP&F's brief correctly points out that Ohio Revised Code Title 39 regulates Insurance. No code section in Title 39 regulates self-funded plans. Title 39 regulates insurance companies and third-party administrators.

The Court finds their brief correctly sets forth the law in Ohio concerning powers and duties of State Agencies created by statute, stating:

"The Supreme Court of Ohio has long held that administrative agencies may not expand their own jurisdiction. *See Davis v. State*, 127 Ohio St. 261, paragraph one of the syllabus (1933). *See also D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-172, paragraph 2 of the syllabus (2002) ("Administrative regulations cannot dictate public policy but rather can only develop and administer policy already established by the General Assembly."). In *D.A.B.E.*, the Court found that an administrative agency has only the regulatory power expressly delegated to it by the General Assembly or that which could be reasonably implied from an express grant. An "implied power is only incidental or ancillary to an express power." *Id.* citing *Burger Brewing Co. v. Thomas*, 42 Ohio St.2d 377, 379, 329 N.E.2d 693 (1975). If there is no express grant of authority from the General Assembly, "there can be no implied grant." *Id.* The law is well settled that a grant of regulatory power must be clear and "in case of doubt that doubt is to be resolved * * * against [the grant of regulatory authority]." *Id.* citing *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917). Ohio's insurance laws do not give the Department of Insurance an express grant of jurisdiction over public self-funded plans like OP&F and the Department cannot expand its jurisdiction. If there is any doubt about whether the Department of Insurance has jurisdiction over Ohio Police and Fire Pension Fund, this Court must resolve that doubt against the Department of Insurance.

Moreover, public policy does not require that OP&F's self-funded plan be regulated by the Ohio Department of Insurance. The Ohio Supreme Court has long held that "[the insurance laws] are reasonable and just, and were adopted for the laudable purpose of protecting the public against imposition by unreliable and untrustworthy companies and associations." *State ex rel. Richards v. Ackerman*, 51 Ohio St. 163, 193 (1894). *See also Robbins v. Hennessey*, 86 Ohio St. 181, 197 (1912) ("The statutes of the state now require compliance with certain conditions designed for the security and protection of the public."). Because OP&F is an agency, authority, or

instrumentality of the state of Ohio, OP&F is already charged with acting in the interest of the public. Indeed, Ohio's insurance laws recognize that government-sponsored plans protect the public by exempting government plans from regulation. *See* R.C. 3901.19(I) and R.C. 3901.32(D). This Court should vacate the cease and desist order against Ohio Police and Fire Pension Fund."

The Court agrees. The Orders issued by the Department are void for lack of subject matter jurisdiction. The Department is hereby **ORDERED** to vacate its decision in Case No. LGL-0001900-H in its entirety.

IT IS SO ORDERED.

Judge Kim J. Brown

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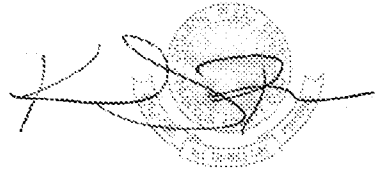
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Franklin County Court of Common Pleas

Date: 05-09-2013
Case Title: OHIO POLICE & FIRE PENSION FUND -VS- OHIO STATE
DEPARTMENT INSURANCE
Case Number: 10CV011426
Type: JUDGMENT ENTRY

It Is So Ordered.

A handwritten signature in black ink is written over a circular official seal. The signature is cursive and appears to read 'Kim Brown'. The seal is a circular emblem with a textured, dotted background and a central design that is partially obscured by the signature.

/s/ Judge Kim Brown

Court Disposition

Case Number: 10CV011426

Case Style: OHIO POLICE & FIRE PENSION FUND -VS- OHIO
STATE DEPARTMENT INSURANCE

Case Terminated: 18 - Other Terminations