UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GREAT ELK DANCER FOR HIS ELK NATION, Plaintiff, vs. CITY OF LOGAN, OHIO, et al., Defendants.	)	CASE NO.: 2:13-CV-0565 JUDGE MICHAEL WATSON **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Defendants Mayor J. Martin Irvine, Fire Chief Brian Robertson, Officer Josh Mowery, and Service Director Steve Shaw respectfully request that this Honorable Court grant them summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedures and dismiss all claims against them with prejudice. There are no genuine issues of material fact, and the Defendants are entitled to judgment as a matter of law. A memorandum in support of this Motion follows.

Respectfully submitted,

MAZANEC, RASKIN & RYDER CO., L.P.A.

s/Cara M. Wright

TODD M. RASKIN (0003625)
CARA M. WRIGHT (0084583)
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
(440) 248-8861 – Fax
Email: traskin@mrrlaw.com
cwright@mrrlaw.com

Counsel for Defendants Mayor J. Martin Irvine, Fire Chief Brian Robertson, Officer Josh Mowery, and Service Director Steve Shaw

MEMORANDUM IN SUPPORT

I. Statement of the Case

Plaintiff Great Elk Dancer filed this lawsuit *pro se* on June 12, 2013 and filed a First Amended Complaint on July 17, 2013. ECF1, 5. Pursuant to 28 U.S.C. §1915(e)(2)(B)(ii), the Court reviewed the allegations contained in the First Amended Complaint and issued an order regarding the sufficiency of the allegations on March 28, 2014. ECF 25. After the completion of this review, the following claims remain in this case:

1) Substantive due process, procedural due process and equal protection claims against Mayor J. Martin Irvine and Service Director Steve Shaw;
2) Substantive due process, procedural due process and equal protection claims against Police Officer Joshua Mowery, and;
3) Substantive and equal protection claims against Fire Chief Bryan Robertson.

The Court held a Preliminary Pre-Trial Conference on May 1, 2014. Following that conference the Defendants served Plaintiff with discovery requests, including Requests for Admissions. Plaintiff failed to respond to any of the discovery requests and Defendants requested that the Court deem the facts stated in the Requests for Admissions to be deemed admitted (ECF 32). Plaintiff did not oppose this Motion, and on September 9, 2014 the Magistrate Judge granted the Motion. Plaintiff had the opportunity to object to this order pursuant to 28 U.S.C. §636(b)(1)(A) and Rule 72(a) of the Federal Rules of Civil Procedure and did not file any objections. As a result, all of the facts and legal conclusions contained within the Requests for Admissions are conclusively determined as a matter of law.

II. Statement of the Facts

This lawsuit arises from three isolated incidents involving Plaintiff and four City of Logan officials. The undisputed facts relevant to the claims are as follows:

A. Mayor Irvine and Service Director Shaw

Plaintiff Great Elk Dancer owned and operated two businesses within the City of Logan, the Mingo Trading Company and the Red Door, a sweepstakes parlor. Ex. A, Requests for Admissions, see ECF 5, First Amended Complaint ¶2, ¶16, and ¶24. The City of Logan Codified Ordinances requires that "Any person displaying for public patronage or keeping for operation any mechanical amusement device, skee ball bowling alley, or shuffle board shall be required to obtain a license from the city upon payment of a license fee." *See* Ex. B-1, City of Logan Code of Ordinances 118.02.

The ordinances define the term "mechanical amusement device" as "any machine or device by which the payment of moneys or other things of value or by the insertion of a coin, slug, token plate or disc operates or may be operated as a game, contest or amusement." *Id.* at 118.01, *see also* Ex. A, Requests for Admissions No. 2. The ordinance continues to state that the term "mechanical amusement device" includes, but is not limited to, "pinball games, mechanical bowling games, electrically operated target games, mechanical baseball, mechanical football and other similar types of mechanical amusement devices or games of skill or chance." *Id.* It is undisputed that both the Mingo Trading Company and the Red Door contained mechanical amusement devices. *See* Ex. A, Requests for Admissions No. 3 and 4.

On December 12, 2011 former City of Logan Mayor Michael Walsh (who is not a party to this lawsuit) issued a letter to all amusement and game machine businesses, including

Plaintiff's businesses, stating that Amusement Permit fees were due. *See* Ex. B-2, Dec. 12, 2011 Letter, *see also* Request for Admission No. 6. This form letter was sent to all business believed to operate mechanical amusement devices within the City of Logan. *See* Ex. B.

Mayor J. Martin Irvine was elected mayor of the City of Logan and took office in January 2012. *See* Ex. B, Affidavit of Mayor Irvine. Steve Shaw was appointed Service Director at that time. *Id*. These officials assumed responsibility for issuing amusement licenses and collecting the applicable fee.

Plaintiff did not contest the applicability of the Mechanical Amusement License requirement. *See*. Ex. A, Request for Admission No. 8. Instead, on January 31, 2012 Plaintiff voluntarily paid the amusement permit fee and was issued a license to operate 35 game machines at the Red Door. *See* Ex. A, Requests for Admission No. 7 and 10, Ex.B-3, Receipt for License Fee and Ex. B-4, Mechanical Amusement License.

On December 28, 2012 Mayor Irvine again sent a form letter to all amusement and game machine businesses informing them that the amusement permit fee was due for the 2013 calendar year. Ex. A, Requests for Admissions 11, *see also* Ex. B-4, December 28, 2012 letter. Again, this letter was sent to all business owners believed to operate mechanical amusement devices within the City of Logan. Ex. A, Requests for Admission No. 12, Ex. B, Affidavit of Mayor Irvine. Plaintiff did not submit payment to renew his Mechanical Amusement License. Ex. A, Request for Admission No. 13. Plaintiff did not obtain a Mechanical Amusement License for the calendar year 2013, and did not receive any additional communication from Mayor Irvine regarding renewing his license. Ex. A, Request for Admission No. 15. Plaintiff has not paid the mechanical amusement permit fee since January 31, 2012. Despite his non-compliance with the city's ordinance, no criminal or administrative charges were filed against the Plaintiff for his

failure to renew the Mechanical Amusement License. Ex. A, Request for Admission No. 16 and 17.

B. Officer Mowery

Joshua Mowery is employed as a K-9 officer for the City of Logan Police Department. *See* Ex. C, Affidavit of Officer Joshua Mowery. The allegations against Officer Mowery are not supported by any evidence.

Plaintiff alleges that around 10:00 am on December 9, 2011 Officer Mowery was "asking around" and spoke to an individual named Mr. Haddix. Plaintiff has admitted that he has no personal knowledge of the alleged conversation between Mr. Haddix and Officer Mowery. Ex. A, Request for Admission No. 22. Indeed, there is no evidence that this conversation occurred at all.

The undisputed evidence produced in this case demonstrates that Officer Mowery was sick on December 9, 2011 and utilized sick time in lieu of working that day. *See* Ex. C-1, Attendance records. Officer Mowery did not have any conversations with Mr. Haddix on this date – in fact, Officer Mowery has never met or heard of Mr. Haddix. *See* Ex. C, Affidavit of Officer Joshua Mowery. This conversation did not occur.

Plaintiff also complains about a traffic stop that was conducted by Officer Mowery on February 20, 2010. Ex. A, Request for Admission No. 23. Plaintiff has no personal knowledge regarding the interaction between Officer Mowery and the subject of the traffic stop. *See.* Ex. A, Request for Admission No. 24. The undisputed evidence in this case demonstrates that Officer Mowery conducted the traffic stop after observing the subject fail to stop for a stop bar at the intersection of Second and Market St. Officer Mowery's canine partner performed a drug sniff

and alerted on the driver's door, indicating the presence of an illegal substance. The subject then admitted to having a baggie of marijuana in her pocket. *Id.*

Officer Mowery suspected that an employee of the Mingo Trading Company – not the Plaintiff – was selling marijuana from the store. He asked the subject if she would agree to come to the police station and provide him with information to utilize to obtain a search warrant. The subject did not wish to provide him with any additional information. A citation was issued to the subject and the citation was promptly paid without being challenged. *Id.*

No criminal charges were filed against the Plaintiff by Officer Mowery following the traffic stop on February 20, 2010. Ex. A, Request for Admission No. 25. There is no evidence that Officer Mowery selectively enforced laws against the Plaintiff based upon his national origin. Ex. A, Request for Admission No. 26. Similarly, there is no evidence that Officer Mowery attempted to coerce individuals to testify against him based upon his national origin. Ex. A, Request for Admission No.27.

C. Fire Chief Brian Robertson

Brian Robertson is the chief of the City of Logan Fire Department. *See* Ex. D, Affidavit of Chief Robertson. Under Ohio law, the fire chief is charged with preserving the peace, protecting persons and property and obeying and enforcing all ordinances of legislative authorities. *Id. see also* R.C. §737.11. Pursuant to R.C. §3781.03, the fire chief of a municipal corporation, such as Chief Robertson, is responsible for enforcing the provisions of the Ohio Building Code that relate to fire prevention.

Plaintiff's claims against Chief Robertson stem from enforcement of the Ohio Building Code by Chief Robertson and the Ohio Department of Commerce at a property located at 54 E. Main St. It is undisputed that the Plaintiff does not own the property located at 54 E. Main St.

and that this property is, in fact, owned by an individual named Michael Nihiser. *See* Ex. A, Requests for Admissions No. 28 and 29. Mr. Nihiser leased the property located at 54 E. Main St. to a man named David Weber. The property was subsequently subleased by Plaintiff sometime after September 19, 2012. *See* Ex. A, Requests for Admissions No. 36. Chief Robertson's involvement with the enforcement of the Ohio Building Code at 54 E. Main St was concluded before Plaintiff ever even gained an interest in this property.

On April 12, 2012 Chief Robertson applied for a search warrant to inspect 54 E. Main St. for violations of the Ohio Building Code. *See* Ex. D, Affidavit of Chief Robertson, Ex. D-1. Chief Robertson conducted an inspection of this property and determined that there were multiple violations of the Ohio Building Code. He sent a letter to Mr. Nihiser informing him of the violations. *Id. see also* Ex. D-2. The property was re-inspected by the Ohio Department of Commerce on May 14, 2012. A second re-inspection by the Ohio Department of Commerce occurred on May 22, 2012. *Id. see also* Ex. D-3, D-4.

On August 7, 2012 the Department of Commerce sent a letter to Mr. Nihiser on August 7, 2012 regarding his failure to report a Change of Occupancy for the building located at 54 E. Main St., Logan, Ohio. *See* Ex. D-5. A Notice of Violation was issued to Michael Nihiser on August 13, 2012 for failing to comply with Section 111.1.3 and 102.1.3 of the Ohio Fire Code. *See* Ex. D-6. A second Notice of Violation was sent to Michael Nihiser on August 28, 2012. *See* Ex. A, Requests for Admissions No. 30-35, Ex. D-7.

On September 19, 2012 Chief Robertson issued a stop work order based upon the violations found by the Ohio Department of Commerce. *See* Ex. A, Requests for Admissions No. 44, Ex. D-8. The stop work order was issued as an effort to prevent any additional violations

from occurring. *See* Ex. D, Affidavit of Chief Robertson, Ex. A, Requests for Admissions No. 44.

While it is true that the Plaintiff eventually subleased the property located at 54 E. Main St. from Mr. Weber, he had not subleased the property at the time of the April 2012 inspection, nor had he subleased the property when the second Notice of Violation was issued by the Ohio Department of Commerce. In fact, the Plaintiff did not sublease this property until after September 19, 2012 and after Chief Robertson had already issued the stop work order for the property. *See* Ex. A, Requests for Admission Nos. 38. On October 1, 2012 the Ohio Department of Commerce issued an adjudication order finding 54 E. Main St. to be non-compliant with the Ohio Building Code. The Ohio Board of Building Appeals subsequently upheld the determination that 54 E. Main St. did not comply with the Ohio Building Code.

A competitor of the Plaintiff's operates a business called "Logan Games of Skill." The owner of the Logan Games of Skill obtained a Certificate of Occupancy prior to opening the business. *See* Ex. A, Request for Admission No. 45, Ex. D, Affidavit of Chief Robertson. Logan Games of Skill has never received a Notice of Violation from the Ohio Department of Commerce and Chief Robertson has never been advised that Logan Games of Skill is in violation of the Ohio Building Code. *See* Ex. A, Request for Admission No. 46, Ex. D, Affidavit of Chief Robertson.

III. Law and Argument

A. Plaintiff's claims arising from the February 20, 2010 traffic stop are barred by the applicable statute of limitations.

Plaintiff has asserted equal protection, substantive due process and procedural due process claims against Officer Mowery based upon a February 20, 2010 traffic stop. These claims are barred by the statute of limitations.

It is well established that the appropriate statute of limitations for 42 U.S.C. §1983 civil rights actions arising in Ohio is contained in R.C. §2304.10, which requires that actions for bodily injury be filed within two years after their accrual. *Browning v. Pendleton*, 869 F. 2d 989, 992 (6th Cir., 1989)(en banc). The undisputed evidence in this case demonstrates that the traffic stop involving Officer Mowery and "Liz" occurred on February 20, 2010. Plaintiff did not file his Complaint until June 12, 2013. Accordingly, these claims are barred by the statute of limitations and Officer Mowery is entitled to dismissal of these claims with prejudice.

B. Plaintiff's official capacity claims against Service Director Steve Shaw should be dismissed.

Plaintiff's First Amended Complaint names Steve Shaw as a defendant in this lawsuit in his official capacity only. The United States Supreme Court has held that official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 164 (1985). In this case, Steve Shaw is an agent of the City of Logan and, as a result, the claim against Steve Shaw in his official capacity is actually a claim against the City of Logan itself.

Claims against municipalities, such as the City of Logan, challenging the municipality's policies, procedures and training practices cannot stand if the plaintiff's constitutional rights were not violated. *Wilson v. Morgan*, 477 F.3d 326, 340 (6th Cir., 2007). Indeed, the United

States Supreme Court has held that "if a person suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the [alleged constitutional violation] is quite beside the point." *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). As this brief will demonstrate, the Plaintiff's constitutional rights were not violated. As a result, the official capacity claims against Service Director Shaw should be dismissed.

Assuming that a constitutional violation occurred, a municipality, like the City of Logan, cannot be held liable *solely* because it employs a tortfeaser. *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 691 (1978) (original emphasis). In other words, a municipality cannot be held liable under §1983 on a respondeat superior theory. *Id.* Instead, a plaintiff may only hold a government entity liable under §1983 where its official policy or custom actually serves to deprive an individual of his or her constitutional rights. *Gregory v. City of Louisville*, 444 F.3d 725, 752 (6th Cir., 2006).

As the Magistrate correctly recognized, s*ee* ECF 17, Second Initial Screening, p. 17, Plaintiff in this case has not alleged any facts that would support a *Monell* claim against the City of Logan. Similarly, now that discovery is concluded, there is no evidence that any City of Logan policies or procedures were the cause of the alleged constitutional violations. Plaintiff's claims against Steve Shaw, in his official capacity, should be dismissed with prejudice.

C. Plaintiff's equal protection claims fail as a matter of law.

Plaintiff's equal protection claims arise from his allegation that laws are being selectively enforced against him. The requirements for a selective prosecution claim draw on ordinary equal protection standards. *United States v. Armstrong*, 517 U.S. 456, 466 (1996). In order to prevail on a selective enforcement claim, a plaintiff must demonstrate: 1) that an official singled out the

plaintiff for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations, 2) the official must initiate the prosecution with a discriminatory purpose, and 3) the prosecution must have a discriminatory effect on the group that the defendant belongs. *United State v. Anderson*, 923 F. 2d 450, 453 (6th Cir., 1991).

To satisfy the first and third elements of a selective enforcement claim, a plaintiff must make a prima facie showing that similarly situated persons outside of his race were not prosecuted. As the Sixth Circuit has recognized, "it is an absolute requirement that the plaintiff make at least a prima facie showing that similarly situated persons outside his or her category were not prosecuted." *Gardenshire . Schubert*, 204 F. 3d 303, 318 (6th Cir., 2000). There is a strong presumption that state actors have properly discharged their official duties and to overcome that presumption the plaintiff must present clear evidence to the contract, the standard is a demanding one. *Stemler v. City of Florence*, 126 F. 3d 856, 873 (6th Cir., 1997).

It is the Plaintiff, and not the Defendants, who have the burden of producing evidence to support his claim of selective enforcement. In *Rowe v. City of Elyria*, 38 Fed. Appx. 277, 281 (6th Cir., June 6, 2002) the plaintiff asserted that the city selectively enforced an ordinance requiring property owners to mow grass that exceeded twelve inches in length. In support of that claim, the plaintiff produced a list of people that he believed were not prosecuted under the mowing ordinance. The appellate court held that the production of the list was insufficient to state a claim for selective enforcement and that the trial court had properly granted summary judgment in favor of the plaintiffs. *Id.*

To prevail on a selective enforcement claim the Plaintiff must prove that the Defendants acted with discriminatory purpose. Discriminatory purpose… implies that the decision-maker selected or reaffirmed a particular course of action at least in part 'because of" and not merely 'in

spite of' its adverse effects upon an identifiable group." *Wayte v. U.S.*, 470 U.S. 598, 609 (1985). Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 564 (1977). Departures from the normal procedural sequence might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached. *Id.* Applying this standard, it is clear that Plaintiff's equal protection claims fail.

1. Mayor Irvine and Service Director Shaw (in his official capacity only)

Plaintiff has admitted that the form letter that was issued by non-party Mayor Walsh in 2011 and by Mayor Irvine in 2012 was sent to all business owners believed to operate mechanical amusement devices within the City of Logan. *See* Ex. A, Requests for Admission No. 6 and 12. There is no evidence that this ordinance was selectively enforced against the Plaintiff. In truth, there is no evidence that this ordinance was "enforced" against the Plaintiff at all. On January 31, 2012 Plaintiff voluntarily paid the license fee and obtained the requisite license. *See* Ex. A, Requests for Admission No. 7, 8 and 9. While the Plaintiff received a letter requesting that he renew his license for the 2013 calendar year, the undisputed evidence demonstrates that the Plaintiff did not submit payment and the City of Logan did not take any further action to enforce its ordinance. *See* Ex. A, Requests for Admission No. 15, 16, and 17.

Moreover, the Plaintiff has wholly failed to produce any evidence of discriminatory purpose. Indeed, the undisputed evidence in this case documents that all business owners

believed to operate mechanical amusements received the request to obtain a license from the city. Plaintiff's equal protection claim against Mayor Irvine and Service Director Shaw fails.

2. Officer Mowery

Similarly, there is no evidence that Officer Mowery enforced any laws against the Plaintiff. Plaintiff has admitted that no charges were filed against him based upon the incident that he describes in his complaint. *See* Ex. A, Request for Admission No. 25. Plaintiff has further admitted that he has no evidence that Officer Mowery selectively enforced laws against him based upon his nation origin or that he attempted to coerce individuals to testify against you based upon your national origin. *See* Ex. A, Request for Admission No. 26 and 27. There is no evidence that Officer Mowery unfairly or unreasonably targeted the Plaintiff due to his race, ethnicity or national origin. Plaintiff's equal protection claim against Officer Mowery fails.

3. Fire Chief Robertson

Plaintiff's claim against Fire Chief Robertson arises from enforcement of the Ohio Building Code at the property located at 54 E. Main St. Logan, Ohio. The undisputed evidence in this case demonstrates that the Ohio Department of Commerce – and not Fire Chief Robertson – enforced the Ohio Building Code at that property. Moreover, the Ohio Building Code was not enforced against the Plaintiff, but instead against the property's owner, Michael Nihiser. For these reasons alone Plaintiff's equal protection claim must fail.

Moreover, Plaintiff has failed to demonstrate that any similarly situated individuals were treated differently. Indeed, the only comparator that the Plaintiff has identified is Logan Games of Skill. The undisputed evidence in this case demonstrates that Logan Games of Skill never violated the Ohio Building Code and, as a result, is not similarly situated to the property at 54 E. Main St. There is no evidence that similarly situated individuals have been treated differently,

nor is there any evidence that Chief Robertson acted with discriminatory purpose. Plaintiff's claims should be dismissed.

D. Plaintiff's substantive due process claims fail as a matter of law.

Substantive due process protects against "certain government actions regardless of the fairness of the procedures used to implement them." *Range v. Douglas*, 878 F. Supp. 2d 869, 877 (S.D. Ohio, 2012), *citing Daniels v. Williams*, 474 U.S. 327, 331 (1986). Substantive due process serves as a check on official misconduct which infringes upon a fundamental right or as a limitation on official misconduct, which, although not infringing on a fundamental right, is so literally conscience shocking as to rise to the level of a substantive due process violation. *Howard v. Grinage*, 82 F. 3d 13433, 1349 (6th Cir., 1996).

The standard for establishing that government officials violated an individual's substantive due process rights is not an easy one to satisfy. *Mitchell v. McNeil*, 487 F. 3d 374, 376 (6th Cir., 2007). Concerned that the Due Process Clause of the Fourteenth Amendment not become a font of tort law to be superimposed upon whatever systems may already be administered by the States, the Supreme Court has made it clear that mere negligence on the part of governments and their agents does not provide plaintiffs with a ticket to federal court to seek substantive due process relief. *Id.*, citing *Paul v. Davis*, 424 U.S. 693, 701 (1976). Instead, substantive due process has been limited to "the right to be free from state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning and harmful as literally to shock the conscience of a court or a trier of fact. *Lillard v. Shelby County Bd. of Educ.*, 76 F. 3d 716, 725 (6th Cir., 1996).

A government body violates substantive due process if it enforces ordinances in an arbitrary or discriminatory manner. *Magnum Towing & Recovery, LLC v. City of Toledo*, 430 F.

Supp. 2d 689, 697 (N.D. Ohio, 2006), *citing Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Where a substantive due process attack is made on state administrative action, the scope of review by the federal courts is extremely narrow. *Pearson v. City of Grand Blanc*, 961 F. 2d 1211, 1221 (6th Cir., 1992). To prevail, a plaintiff must show that the state administrative agency has been guilty of "arbitrary and capricious action" in the strict sense, meaning that there is no rational basis for the administrative decision." *Id.*

1. Mayor Irvine or Service Director Shaw (in his official capacity only).

Plaintiff in this case has admitted that his businesses contained mechanical amusements and, as a result, the ordinance requiring businesses to pay a fee to obtain a mechanical amusement license applied to him. There is no evidence that the ordinance was enforced in an arbitrary or capricious manner. In fact, the Plaintiff has admitted that Mayor Irvine and Service Director Shaw did not act arbitrarily or capriciously in attempting to enforce the city's ordinance. Ex. A, Requests for Admissions No. 19 and 20. The undisputed evidence in this case demonstrates that the letter seeking payment for the mechanical amusement fee was sent to all business owners believed to possess mechanical amusements, regardless of their national origin. Plaintiff's substantive due process claim fails as a matter of law.

2. Officer Mowery.

There is similarly no evidence that Officer Mowery engaged in conscious-shocking, arbitrary or capricious conduct. The alleged conversation between Officer Mowery and "Mr. Haddix" did not occur. As a result, any claims based upon this alleged conversation must fail as a matter of law. Similarly, the evidence of the interaction between Officer Mowery and the subject of the February 20, 2010 traffic stop demonstrates that Officer Mowery was merely attempting to enforce the laws of the city of Logan and the State of Ohio and not improperly

targeting the Plaintiff for some nefarious purpose. Indeed, Plaintiff has admitted that he has no evidence that Officer Mowery selectively enforced laws against him based upon his national origin and that he has no evidence that Officer Mowery attempted to coerce individuals to testify against him based upon his national origin. This claim fails as a matter of law.

3. Fire Chief Robertson.

There is no evidence that Fire Chief Robertson acted arbitrarily or capriciously toward the Plaintiff with respect to the enforcement of the Ohio Building Code at 54 E. Main St. In fact, the undisputed evidence demonstrates that all enforcement of the Ohio Building Code was conducted by the Ohio Department of Commerce and was directed to the property's owner, Michael Nihiser, and not the Plaintiff. Fire Chief Robertson's actions regarding this property were limited to performing an inspection in April 2012 and issuing a stop work order on September 19, 2014. These actions all occurred before the Plaintiff had acquired an interest in the property located at 54 E. Main St. and as a result could not have been the result of animus against the Plaintiff based upon his national origin. *See* Ex. A, Request for Admissions No. 35-36.

Moreover, there is no evidence that the property located at 54 E. Main St. was in compliance with the Ohio Building Code or that the enforcement of that code (albeit by the Ohio Department of Commerce and not Fire Chief Robertson) was arbitrary or capricious. Indeed, the matter was the subject of an adjudication hearing before the Department of Commerce and an appeal to the Board of Building Appeals. Each of these tribunals affirmed that the building did not comply with the building code.

Plaintiff's substantive due process claim fails.

E. Plaintiff's procedural due process claims fail as a matter of law.

A procedural due process limitation, unlike its substantive counterpart, does not require that the government refrain from making a substantive choice to infringe upon a person's life, liberty or property interest, it simply requires that the government provide "due process" before making such a decision. *Howard*, 82 F. 3d at 1349. In order to establish a procedural due process claim, plaintiffs must show that 1) they had a life, liberty, or property interest protected by the Due Process Clause, 2) they were deprived of this interest, and 3) the means for redress for property deprivations provided by the state of Ohio fail to satisfy the requirements of procedural due process. *Brotherton v. Cleveland*, 923 F. 2d 477, 479 (6th Cir., 1991). A plaintiff may only recover for an alleged due process violation under §1983 if he can demonstrate that the constitutional right was not adequately vindicated by state-law post-deprivation remedies. *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981).

The first step in a procedural due process analysis is the determination of whether the interest at stake is within the Fourteenth Amendment's protection of liberty and property. *Hamilton v. Myers*, 281 F. 3d 520, 529 (6th Cir., 2002). Only after reaching a conclusion that the interest claimed is within that protection does this court consider the form and nature of the process that is due. *Id. Citing Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). Thus, in a §1983 due process claim for deprivation of a property interest, a plaintiff must first show a protected property interest, and only after satisfying this first requirement, can a plaintiff prevail by showing that 'such interest was abridged without appropriate process.' *Id., quoting LRL Properties v. Portage Metro. Hous. Auth.*, 55 F. 3d 1097, 1108 (6th Cir., 1995).

1. Mayor Irvine and Service Director Shaw (in his official capacity only)

Plaintiff has failed to produce any evidence that he was deprived of a property interest that is protected by the Fourteenth Amendment. It is undisputed that on January 31, 2012 Plaintiff voluntarily paid the amusement license fee and a license was issued to his business. An individual's voluntary surrender of property to the government precludes a due process claim because, in such cases, there has been no governmental interference with the individual's property interest. *Silvernail v. County of Kent*, Case No. 1:02-CV-559, 2003 WL 1869206 (W.D.Mich, 2003), *citing Herrada v. City of Detroit*, 275 F. 3d 553 (6th Cir., 2001). *See also Yearous v. Niobrara County Memorial Hospital*, 128 F. 3d 1351, 1356 (10th Cir., 1997) ("If Plaintiffs resigned of their own free will, even as a result of Defendant's actions, then they voluntarily relinquished their property interest and, thus, Defendant did not deprive them of property without due process of law.")

Similarly, it is undisputed that Plaintiff did not submit payment to renew his Mechanical Amusement license in 2013 and, as a result, the Plaintiff undisputedly was not deprived of a property interest. Plaintiff's procedural due process claims against Mayor Irvine and Service Director Shaw fail as a matter of law.

2. Officer Mowery

The undisputed evidence in this case demonstrates that the Plaintiff was not deprived of any property interest as a result of the two instances involving Officer Mowery that were described in the Complaint. The undisputed evidence demonstrates that no criminal proceedings were initiated against the Plaintiff following the February 20, 2010 traffic stop. Similarly, the undisputed evidence demonstrates that the alleged conversation with "Mr. Haddix" did not

happen. Plaintiff was not deprived of any property rights by Officer Mowery and, as a result, Plaintiff's procedural due process claim against Officer Mowery fails as a matter of law.

F. Defendants are entitled to qualified immunity.

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1982). Qualified immunity is an immunity from suit rather than a mere defense to liability. *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009), *citing Mitchell v. Forsythe*, 472 U.S. 511 (1985). Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful action generally turns on the "objective legal reasonableness of the action." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

When a defendant officer raises qualified immunity as an affirmative defense, the plaintiff bears the burden of demonstrating that the officer is not entitled to that defense. *Moldowan v. City of Warren*, 578 F. 3d 351, 375 (6th Cir., 2009). Qualified immunity shields federal and state officials from liability unless the plaintiff can prove 1) that the official violated a statutory or constitutional right and 2) that the right was 'clearly established' at the time of the challenged conduct. *Pearson v. Callahan*, 555 U.S. 223 (2009).

Plaintiff in this case cannot meet his burden prove that the Defendants not entitled to qualified immunity. As this brief has already demonstrated, the Plaintiff's constitutional rights have not been violated. The second prong of this test also cannot be satisfied, as it was not clearly established that the individually named Defendants' conduct violated his constitutional rights.

To defeat qualified immunity, the plaintiff must not only prove that a constitutional violation occurred, but also that the constitutional right that was violated was clearly established at the time that the violation occurred. *Pearson*, 555 U.S. at 243-244. The plaintiffs cannot satisfy the second prong of the qualified immunity analysis by simply alleging a violation of extremely abstract rights. *Anderson*, 533 U.S. at 639. Instead, the right that the official is alleged to have violated must be clearly established in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Id.* at 639-640.

While it is incorrect to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, in light of pre-existing law the unlawfulness of the officials' action must be apparent. In fact, reasonable mistakes can be made as to the legal constraints on an official, and when that is the case the official is entitled to the immunity defense. *Id*. If reasonable officials could disagree on the issue, immunity should be recognized." *Key v. Grayson*, 179 F. 3d 996, 1000 (6th Cir., 1999).

There is no evidence that a reasonable official would have believed that he was violating the Plaintiff's constitutional rights by engaging in the conduct that the Plaintiff has alleged. Mayor Irvine and Director Shaw sent a form letter to all business owners, including the Plaintiff, seeking payment for a license fee required by City law. Officer Mowery conducted a traffic stop and inquired about whether the subject of that stop would provide additional information for a search warrant. Chief Robertson performed an inspection of a building and issued a stop work order for a business that the Plaintiff did not have any property interest in at the time of his actions. Clearly, these officials reasonably believed that they were acting in compliance with the constitution.

For these reasons, even if this Court were to determine that these actions violated the Plaintiff's constitutional rights, the Court should nonetheless determine that these officials are entitled to qualified immunity.

IV. Conclusion

For these reasons, Defendants Mayor J. Martin Irvine, Fire Chief Brian Robertson, Officer Josh Mowery, and Service Director Steve Shaw are entitled to summary judgment and all claims against them should be dismissed with prejudice.

Respectfully submitted,

MAZANEC, RASKIN & RYDER CO., L.P.A.

s/Cara M. Wright

TODD M. RASKIN (0003625)
CARA M. WRIGHT (0084583)
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
(440) 248-8861 – Fax
Email: traskin@mrrlaw.com
cwright@mrrlaw.com

Counsel for Defendants Mayor J. Martin Irvine, Fire Chief Brian Robertson, Officer Josh Mowery, and Service Director Steve Shaw

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2014, a copy of the foregoing Defendants' Motion for Summary Judgment was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Cara M. Wright
TODD M. RASKIN (0003625)
CARA M. WRIGHT (0084583)

Counsel for Defendants Mayor J. Martin Irvine, Fire Chief Brian Robertson, Officer Josh Mowery, and Service Director Steve Shaw

SCOT-130143/Motion for Summary Judgment