

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.  
TEAMSTERS LOCAL UNION  
NO. 436, ET AL.,

CASE NO. 11-0569

Plaintiff -Appellee,

On Appeal from The Cuyahoga County  
Court of Appeals, Eighth Appellate  
District

-vs-

Court of Appeals Case No. 94703

BOARD OF COUNTY  
COMMISSIONERS, CUYAHOGA  
COUNTY, OHIO,

Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT  
BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY

DALE PELSOZY (0020653)  
Assistant Prosecuting Attorney  
Justice Center - Courts Tower  
1200 Ontario Street, 8<sup>th</sup> Floor  
Cleveland, Ohio 44113  
*Attorney for Appellant*

Basil W. Mangano  
Joseph J. Guarino III  
2245 Warrensville Ctr. Rd, Ste. 213  
Cleveland, Ohio 44118  
*Counsel for Appellees*

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## **EXPLANATION OF WHY THIS IS A CASE OF GENERAL OR GREAT PUBLIC PURPOSE**

This is a case of first impression before this Honorable Court and involves the rights thousands of public workers through out the State of Ohio and the obligations of every state employer. While there are some additional errors that will be discussed this case mainly involves the question as to what discretion a Board of County Commissioners (BOCC) have in offering an Early Retirement Incentive Plan (ERIP) to public employees in order to secure early retirement.

In this case Cuyahoga County offered an ERIP across the entire county, leaving it to specific separately elected officials as to whether or not to offer it to their departments or agencies. For example, the Clerk of Courts offered the minimum of 5% of his employees, the Engineer offered it after an agreement with the BOCC that they could replace up to 30% and the Prosecuting Attorney declined to offer an ERIP. There is no dispute that this was proper.

However, the BOCC offered the ERIP to every agency under its umbrella except the Sanitary Engineer Division (SED). The reason for this was purely economic. The SED is an enterprise fund that does not receive general fund money. It maintains its budget by offering sewer cleaning and maintenance services to the various communities of Cuyahoga County. The SED can be competitive with private contractors and must operate in a fiscally responsible manner.

Approximately 27 employees would have been eligible to retire under the ERIP. Because of the obligations under the contracts with the various municipalities every one of these employees would have had to be replaced. The net result is that there would be a cost to the county in excess of \$2,200,000.00 to buy the retirement time and then the payroll would not have

changed. To absorb these costs rates would necessarily have been raised thus making the Sanitary Engineer less competitive. Therefore the reason for excluding the SED is that it generated no cost savings to the county by buying retirement time and then immediately replacing these employees.

Traditionally, and as verified by testimony of OPERS officials, boards of county commissioners throughout the state have offered ERIPs to single agencies under their auspices to the exclusion of the rest of the county OPERS has approved these plans that leave the decision to the fiscal discretion of the governing body. In many instances the offer of an ERIP would go, for example, to a Department of Job and Family Services and no other agency according to OPERS.

The Eighth District Court of Appeals, citing no case law, has declared that such a practice cannot continue. According to the Eighth District Court of Appeals any ERIP offered to one county agency must now be offered to all county agencies. Some agencies would not need an ERIP as they are appropriately staffed while others would need to reduce personnel.

The Eighth District Court of Appeals' decision improperly displaces the fiscal discretion vested in county boards of commissioners. In effect, the budgetary discretion has been determined by judicial decree. If there is no guidance from this Court, there will be two choices for the other 87 counties in this state. One, they could continue to operate as they have by choosing the agencies directly under their control and risk challenges. The second choice, is to follow the guidance of this decision and if they determined that they cannot offer the ERIP county wide then they would be faced with the specter of laying off employees rather incenting them to retire.

## STATEMENT OF THE CASE AND FACTS

This case involves a request for injunctive relief, mandamus, and declaratory judgment filed by appellee on December 30, 2009. An ex parte temporary restraining order was issued the same day but docketed on December 31, 2009.

On January 4, 2010 a pre-trial hearing was held and the matter was set for a hearing on a preliminary injunction on January 11, 2010.

Appellee filed an amended complaint on January 7, 2010. The case proceeded to hearing on January 11 and 12, 2010. Following the hearing both parties filed proposed findings of fact and conclusions of law together with proposed journal entries.

The trial court journalized its entry on January 22, 2010 granting a declaratory judgment in favor of appellees. Appellant filed its notice of appeal to this court on February 19, 2010.

The Board of County Commissioners adopted resolutions offering Early Retirement Incentive Plans (ERIP) to various agencies of the county as subordinate employing units and allowing each subordinate unit to determine whether or not to offer an ERIP. Included was a resolution passed on November 6, 2008 offering an ERIP to each separate agency of the county except the SED.

An ERIP is a budgetary tool authorized by the Ohio Revised Code that allows a BOCC to buy additional years of retirement for county employees on the condition that they retire. It is offered as an incentive to induce employees to retire enabling the BOCC to reduce the number of employees without having to resort to layoffs. It is voluntary on the part of employees and results in a significant cost savings to the county.

The BOCC decided to offer the program county wide with the BOCC purchasing three (3) years of service credit for each eligible employee. This was done by resolution of the Board

which stated:

\* \* \*

WHEREAS the Cuyahoga County Board of County Commissioners has determined to designate the Board of County Commissioners, **excluding Sanitary Engineering Division** as a separate employing unit in accordance Ohio Revised Code Section 145.

AND, WHEREAS the Board of County Commissioners, **excluding Sanitary Engineering Division** has determined to establish Early Retirement Incentive plan for its employees to be conducted in accordance with the requirements recorded below.

NOW, THEREFORE, BE I RESOLVED by the Board of County Commissioners of Cuyahoga County, Ohio that the Cuyahoga Early Retirement Incentive Plan for the Board of County Commissioners, **excluding Sanitary Engineering Division...***(emphasis added)*

\* \* \*

The only authority in the county who is able to offer an ERIP is the BOCC under §145.297 of the Ohio Revised Code which further allows the BOCC to designate which agencies of the county are eligible to participate. That authority rests solely with the BOCC and is not even vested in separately elected officials in the county. Other office holders must obtain permission from the BOCC who can place limits on the offering of an ERIP for budgetary purposes.

The purpose of adopting the ERIP was to stem a financial crisis in the county and to avoid the necessity of laying off employees. The ERIP is a cost cutting move which allows employees to retire early. As a condition of offering the ERIP each participating agency of the BOCC agreed to not replace retiring employees. A limited number of subordinate agencies were allowed to replace some employees. For example, the Department of Employment and Family Services was allowed to replace up to 20% of its employees. Subordinate agencies allowed to replace employees would still realize an overall savings to the county.

At the time the ERIP was offered, the SED had approximately 100 employees. Had the

ERIP included the SED approximately 26 employees could have retired under the ERIP. The SED has sewer maintenance contracts with approximately 31 communities and has committed to a level of service to these communities that it cannot meet with a reduction of employees. In fact, since the ERIP was offered the SED has added 18 employees. If the SED were to offer an ERIP as a subordinate employing unit and then replace the retired employees in order to fulfill its contracts, it would not only fail to save money but would incur an additional expense to the BOCC of approximately \$2,200,000.

The SED was designated as a subordinate employing unit of the county and was not offered the ERIP as it would realize no cost savings to the county.

The ERIP was presented to the Ohio Public Employees Retirement System (OPERS) on or about November 6, 2008. After some required modifications to OPERS Form F 111A, OPERS deemed that the plan complied with its rules and regulations, including Chapter 145 of the Ohio Revised Code and Ohio Administrative Code Section 145-2-42 and approved the plan.

The plan included a grievance procedure as required by law and 13 employees of the SED filed a written grievance as required by the plan. No member of plaintiff Teamsters nor plaintiff Kevin Lesh filed a written grievance.

The grievance was heard by County Administrator James McCafferty on January 9, 2009. After hearing evidence and arguments Mr. McCafferty denied the grievance. No grievant filed an appeal of Mr. McCafferty's decision.

No action was taken until December 30, 2009, when appellees Teamsters Local Union No. 436 and Kevin Lash (hereafter "appellees") filed their Verified Complaint for Preliminary and Permanent Injunctive and Declaratory Relief and motion for a temporary restraining order against respondent Board of County Commissioners, Cuyahoga County, Ohio (hereafter

“BOCC”). That same day, the Common Pleas Court drafted an order, which was journalized on December 31, 2009, that reads: “Motion for Temporary Restraining Order is granted. Hearing set for 1/4/10 at 10:00 a.m.”

On January 4, 2010, the Court held a hearing and issued an order scheduling the preliminary injunction hearing for January 11, 2010 at 1:00 p.m.

On January 6, 2010, appellees filed their First Amended complaint for Preliminary and Permanent Injunctive and Declaratory Relief adding a count for Mandamus.

The case proceeded to trial before the lower court. On its behalf, appellants called members of the county human resources department, the county administrator and the SED including the chief fiscal officer. These witnesses testified regarding the procedure for implementing the ERIP as well as to the economic impact offering the ERIP to the SED would have. It was their testimony that it would negate the cost savings leaving the BOCC no other choice but to consider layoffs.

Appellants also called Michael Denny Supervisor of ERIP Service Assessments for OPERS who is in charge of overseeing and implementing ERIP’s state wide. Mr. Denny testified that to uphold appellee’s position would alter the implementation of ERIP’s across the state with the possibility of making them prohibitive. The lower court determined that the BOCC unlawfully excluded the SED from the ERIP but that appellees waited too long to challenge the exclusion and were not able to be added to the plan as the enrollment period had expired.

## ARGUMENT IN SUPPORT OF PROPOSITONS OF LAW

**Proposition of Law No. 1:** A Board of County Commissioners has budgetary discretion to designate any single county agency as a subordinate employing unit for purposes of offering an Early Retirement Incentive Plan, and may exclude one or more of its divisions from an Early Retirement Incentive Plan.

The crux of this case is determining what limits, if any, are placed upon a BOCC to designate employing units in the county. No case has been decided in this state that offers guidance in such a decision. Under R.C. 145.297(C) an “employing unit” means “the county or any county agency designated by the board of county commissioners or by an employer described in R.C. 145.297(A), including but not limited to a political subdivision or unit of local government. See R.C. 145.297(A)(3)(c). With respect to county employees other than employees of a board of alcohol, drug addiction, and mental health services or a county board of developmental disabilities, the “employing unit” is “the county or any county agency designated by the board of county commissioners.” R.C. 145.297(A)(3)(c). In the case of an employee whose employing unit is in question, the employing unit is the unit through whose payroll the employee is paid. See R.C. 145.397(A)(4).

The Ohio General Assembly granted public employers “the discretion to designate ‘employing units’ in order to enable the [public] employer to provide the greatest flexibility in designing retirement incentive plans for the benefit of its employees.” *State ex rel. Edgeworth v. Univ. of Toledo*, Lucas App. No. L-09-1161, 2009-Ohio-5727, at ¶ 18. The Court of Appeals has negated that discretion and its decision has statewide implications.

Specific authority to designate less than the entire is granted to the BOCC under R.C. 145.397(B) which states:

(B) An employing unit may establish a retirement incentive plan for its eligible employees. In the case of a county or county agency, decisions on whether to

establish a retirement incentive plan for any employees other than employees of a board of alcohol, drug addiction, and mental health services or county board of developmental disabilities and on the terms of the plan shall be made by the board of county commissioners. In the case of a municipal corporation or an agency of a municipal corporation, decisions on whether to establish a retirement incentive plan and on the terms of the plan shall be made by the legislative authority.

In 1994 Op. Atty.Gen. No. 94-092, at 2-457 determined that there is great discretion granted to a BOCC in determining what constitutes a subordinate employing unit for purposes of participation in an ERIP. After recognizing that the broad discretion granted to the board of county commissioners under R.C. 145.297 was apparently intended to afford the board the greatest flexibility in designating a retirement incentive plan within the structure and limitation imposed by R.C. 145.297 and other statutory procedures, the Ohio Attorney General stated:

It appears that the legislature intended to allow the board of county commissioners as much flexibility as possible in determining the composition of county employing units, by allowing certain county agencies to be designated as separate employing units, in order to offer a retirement incentive plan which would be most beneficial to employees county-wide. 1988 Op.Atty.Gen. No. 88-085 at 2-409

In that opinion, the Ohio Attorney General confirmed that the board of county commissioners could lawfully designate the office of the county engineer as an employing unit. *Id.*

And as is particularly relevant here, the Attorney General further concluded that the availability of a retirement incentive plan to county employees in a designated employing unit did not entitle county employees outside the designated employing unit to participate in the plan.

The circumstances of the instant case are nearly the mirror image of the issue addressed by the Ohio Attorney General in 1988 Op.Atty.Gen. No. 88-085. Just as the board of commissioners there could designate the County Engineer as the only employing entity for which the ERIP would be available, nothing in Ohio law prohibited the BOCC here from designating some but not all county offices as being the employing entities participating in the

plan. Likewise, the offer of the plan to only certain designated county employing entities did not entitle other county employing entities to participate in the plan. Thus contrary to appellees contention, the exclusion of the SED employees from the ERIP did not violate R.C. 145.297 as a matter of law because R.C. 145.297(A)(3)(c) expressly permits the board of county commissioners to designate subordinate county agencies and offices as separate and distinct employing units, just as the Ohio Attorney General has previously determined.

The trial court specifically concluded that the BOCC was permitted to designate any county agency as an “employing unit”. It is uncontroverted that the SED is an agency of the county. Had the legislature chosen to do so, it could have included a limited definition.

Moreover, the Eighth District Court of Appeals concluded that “ As the statute reads the employing unit is the county or any county agency designated by the board of county commissioners”. The BOCC in this case designated all agencies under the BOCC ‘except the sanitary engineer”. It is this distinction of subordinate employing units that is critical.

Certainly, OPERS does not take this narrow approach. Michael Denny, Director of the Early Retirement Incentive from OPERS testified that designating the SED as an employing unit complied with OPERS regulations. In fact, Mr. Denny testified that the county is permitted to determine what a subordinate employing unit is

This has been the policy and practice of OPERS for all 88 Ohio counties. Mr. Denny gave examples including Belmont County. In that county, the Department of Job and Family Services was offered an ERIP to the exclusion of all other agencies under Belmont’s BOCC. Mr. Denny testified that in at least one instance, the support staff of the Coshocton BOCC were offered an ERIP and no other county employees were afforded the same opportunity.

The BOCC exercised its discretion by designating the SED as a subordinate employing

unit and by excluding them from the ERIP. In the definition section of the ERIP the BOCC specifically defined the employing unit and excluded the SED as a subordinate employing unit. This was done with the guidance and approval of OPERS. The trial court and court of appeals overturned that decision removing the discretion by declaring that the BOCC could not have subordinate employing units in any of its agencies under its payroll and would always have to offer an ERIP county wide.

Moreover, the rules and regulations that have guided OPERS in approving ERIPs since 1986 would be impacted. According to the testimony of Michael Denny, they routinely allow for the BOCC's statewide to exclude agencies and departments under the umbrella of the BOCC. Mr. Denny was clear that if there were an order of this Court indicating that an agency of the county could not be excluded from an ERIP plan by the BOCC, then it would have an impact on the other 87 counties in the state as well, some of which are in the middle of implementation of ERIP plans currently.

**Proposition of Law No. 2** Employees of a county agency do not have standing to challenge the discretion of the BOCC in a taxpayer's suit as no public rights are at risk.

Appellees First Amended Complaint alleges that the Early Retirement Incentive Plan (hereafter "ERIP") offered to all departments under the BOCC except for the SED was unlawful and violated R.C. 145.297 because it excluded the SED employees

Appellees' capacity to maintain this action is also improperly predicated on their status as a taxpayer. In order to maintain a taxpayer's action to either enjoin illegal conduct or compel legal conduct, two prerequisites must be established. First, the funds involved must have been derived from some type of taxation and, second, if such funds are found to be tax funds, the appellee must have a special interest therein. *State ex rel. Masterson v. Ohio State Racing*

*Comm.* (1954), 162 Ohio St. 366, 123 N.E.2d 1 [55 O.O. 215], *see also Caspar v. Dayton*, (1990) 53 Ohio St.3d 16. In *Caspar, supra* this Court found that police officers' action to compel fringe benefits and the right to vacation pay does not involve enforcement of a public right.

As a general taxpayer, appellee must show the action complained of has affected the plaintiff's pecuniary interests differently than the interests of the general taxpaying public. Hence, appellee must show that "he has some special interest \* \* \* by reason of which his own property rights are put in jeopardy." *State ex re. Snyder v. State Controlling Board*, 11 Ohio App.3d 270(1983) *State ex rel. Masterson*, at 368, 123 N.E.2d 1. Appellee failed to present any evidence that they have a special interest different from the taxpaying public. Their complaint is that they have not been allowed to participate in the expenditure of tax funds for this ERIP. Moreover, they have not demonstrated an unlawful expenditure of funds. It is completely lawful for the BOCC to create an ERIP.

**Proposition of Law No. 3** County employees are required to exhaust their administrative remedies concerning participation in an Early Retirement Incentive Plan prior to filing suit.

The ERIP contained, as required by law, a grievance procedure for all employees who were denied participation in the plan. Appellees, by their own admission, failed to file a written grievance with the BOCC. Thirteen employees of the SED, none of which are collective bargaining employees of appellee, filed a written grievance and were given a hearing. None of them determined to appeal the decision of the BOCC.

The exhaustion of administrative remedies doctrine applies "where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course." *Clagg v. Baycliffs Corp.* 82 Ohio St.3d 277; *The Salvation Army v. Blue Cross Blue Shield*, 92 Ohio App.3d 571 (8<sup>th</sup> Dist. 1993); *W. Pacific*,

*supra*, 352 U.S. at 63, 77 S.Ct. at 164-165, 1 L.Ed.2d at 131-132. The doctrine is a court-made rule of judicial economy that allows the agency to function efficiently and to afford it an opportunity to correct its own errors while benefitting the parties and the courts by virtue of the agency's experience and expertise. In this way, a record adequate for judicial review will be compiled. *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 111, 564 N.E.2d 477, 479. Failure to exhaust administrative remedies is not a jurisdictional defect, and such a failure will not justify a collateral attack on an otherwise valid and final judgment; it is an affirmative defense which must be timely asserted in an action or it will be considered waived. *Gannon v. Perk* (1976), 46 Ohio St.2d 301, 309-310, 75 O.O.2d 358, 363-364, 348 N.E.2d 342, 347-348.

In *Salvation Army, supra*, the Court found that appellant failed to exhaust remedies provided by contract. The ERIP is nothing more than a contract and by law must contain administrative remedies. Appellees failed to avail themselves of these remedies.

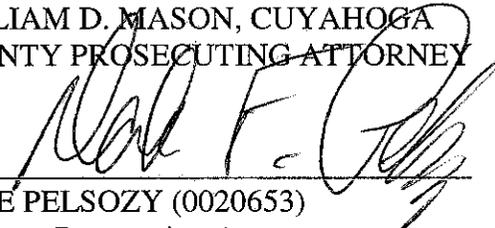
The trial court specifically found that members of the SED were given an opportunity to present their grievance to the BOCC under the grievance procedure set forth in the ERIP. The trial court further found that employees of the SED would not be permitted to participate in the ERIP. The trial court's conclusions are irreconcilable with its findings of fact. On the one hand, the court found that appellees were permitted to participate in the grievance procedure and were given the hearing then on the other hand concluded that they were excluded from the grievance procedure. The court determined that there were no administrative remedies to be exhausted after finding that appellees grieved according to the plan. In fact, the court did so in the same paragraph. Therefore, having availed themselves of the administrative process voluntarily, appellees were required to conclude that process. That would have required an appeal under R.C. §2506. They failed to do so and their claims have thus been fully adjudicated.

Moreover, appellees waived complaint under the contract and waited until the deadlines for inclusion have passed. The establishment of the January 14, 2010 date set the parameters for inclusion of qualified employees. Specifically, the dates under which people would have reached the appropriate age and years of service. Applications were due by November 2009. That is, if your eligibility date fell on January 2, 2010 the employee needed to apply by November of 2009 but could not retire until he reached his eligibility date. Appellees time expired before the filing of this suit.

### **Conclusion**

It is for the above reasons that that appellants pray that this Court accept this case for review.

Respectfully submitted,  
WILLIAM D. MASON, CUYAHOGA  
COUNTY PROSECUTING ATTORNEY

By   
DALE PELSOZY (0020653)  
Assistant Prosecuting Attorney  
*Attorney for Appellant*

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support has been sent by Ordinary U. S. Mail pre-paid postage on this 7<sup>th</sup> day of April, 2011 to:

Basil W. Mangano  
Joseph J. Guarino III  
2245 Warrensville Center Road, Ste. 213  
Cleveland, Ohio 44118  
*Counsel for Appellees*

By   
\_\_\_\_\_  
DALE PELSOZY (0020653)  
Assistant Prosecuting Attorney  
*Attorney for Appellant*

[Cite as *State ex rel. Teamsters Local Union No. 436 v. Cuyahoga Cty. Bd. of Commrs.*, 2011-Ohio-820.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 94703

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**S/O EX REL., TEAMSTERS LOCAL  
UNION NO. 436, ET AL.**

PLAINTIFFS-APPELLEES

VS.

**BOARD OF COUNTY COMMISSIONERS,  
CUYAHOGA COUNTY**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-714389

**BEFORE:** Jones, J., Kilbane, A.J., and Cooney, J.

**RELEASED AND JOURNALIZED:** February 24, 2011

## **ATTORNEYS FOR APPELLANT**

William D. Mason  
Cuyahoga County Prosecutor

BY: Dale F. Pelsozy  
Assistant County Prosecutor  
8<sup>th</sup> Floor, Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113

## **ATTORNEYS FOR APPELLEES**

Basil William Mangano  
Joseph J. Guarino, III  
Mangano Law Offices Co., L.P.A.  
2245 Warrensville Center Road, Suite 213  
Cleveland, Ohio 44118

LARRY A. JONES, J.:

{¶ 1} Respondent-appellant, the Board of County Commissioners, Cuyahoga County, Ohio (“BOCC”), appeals from the trial court’s decision to grant declaratory judgment in favor of relators-appellees, state of Ohio, ex rel. Teamsters Local Union No. 436, et al. (“relators”). Finding no merit to the appeal, we affirm.

{¶ 2} In November 2008, the BOCC passed a resolution authorizing eligible county employees to participate in an Employee Retirement Incentive Plan (“ERIP”) in an

effort to combat budgetary concerns. As written, the ERIP excluded only one county agency, the Sanitary Engineering Division (“SED”). The SED is a subdivision of the BOCC, created and maintained by the BOCC as an operating division of the County Engineer’s Office. But the BOCC created a separate employing unit called the “BOCC, excluding the SED” specially for the ERIP.

{¶ 3} Pursuant to the ERIP’s grievance procedure, SED employees filed a grievance challenging the BOCC’s decision to exclude the SED from participation in the ERIP. The county administrator held a hearing on the grievance and subsequently issued a decision denying the grievance request and concluding that the SED would not be allowed to participate in the ERIP.

{¶ 4} In December 2009, the relators filed the following actions in Cuyahoga County Common Pleas Court. First, the relators filed for preliminary and permanent injunctive relief against the BOCC. The relators also filed a taxpayer action pursuant to R.C. 309.13, seeking to force the BOCC to include SED employees in ERIP. The relators filed for declaratory judgment, seeking a declaration that the BOCC violated R.C. 145.297 when it authorized an ERIP for the employing unit of the BOCC but excluded SED employees from the group of employees permitted to participate in the ERIP. The relators further sought a temporary restraining order to enjoin the BOCC from continuing to violate R.C. 145.297.

{¶ 5} The trial court granted the temporary restraining order. In January 2010, the relators filed an amended complaint with the trial court to bring a writ of mandamus,

asking the trial court to compel the BOCC to allow SED employees eligible for early retirement into the ERIP.

{¶ 6} The matter proceeded to a hearing before the trial court. The trial court denied the relators' motions for preliminary and permanent injunctive relief and the writ of mandamus but granted declaratory judgment in favor of the relators, finding that the BOCC acted unlawfully and violated R.C. 145.297 when it excluded SED employees from participating in the ERIP.

{¶ 7} The BOCC appealed and raises the following four assignments of error for our review:

“I. The court erred in finding that relators had standing for a taxpayers suit.

“II. The court erred in granting a temporary restraining order.

“III. The court erred in finding that appellants illegally excluded relators from the early retirement incentive plan.

“IV. Relators failed to exhaust their administrative remedies.”<sup>1</sup>

#### Standing

{¶ 8} In the first assignment of error, the BOCC argues that the trial court erred in finding that the relators had standing to bring a taxpayer action. R.C. 309.12 provides that the county prosecutor may bring suit on behalf of the public to prevent the execution of a contract entered in contravention of the law. R.C. 309.13 provides that a taxpayer has standing to pursue the same action when the taxpayer's aim is to benefit the county

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<sup>1</sup>The relators filed a notice of cross-appeal, but we dismissed the cross-appeal as untimely filed.

public as if the suit had been brought by the prosecuting attorney. Standing to bring the lawsuit, however, is not conferred under R.C. 309.13 until and unless the taxpayer can demonstrate that the prosecuting attorney has been contacted in writing, has been requested to act on the public's behalf, and has failed to act.

{¶ 9} In this case, the relators' attorney sent a taxpayer demand letter to the Cuyahoga County Prosecutor, requesting that he "apply to a court of competent jurisdiction to recover, for the use of the County, all public moneys misapplied or illegally drawn or withheld from the County treasury to fund the [BOCC's ERIP], or in the alternative, compel the Commissioners to extend the ERIP to employees of the [SED], and further require the Commissioners to allow ample time for any of those employees to apply for and receive benefits of the ERIP." The prosecutor responded, declining to file suit, stating that "all actions associated with the ERIP have been done in accordance with law." The relators then filed their lawsuit.

{¶ 10} The BOCC argues that the relators do not have standing to bring a taxpayers lawsuit because they are unable to show that the action complained of has affected the relators' pecuniary interests differently than the interests of the general taxpaying public. To support its position, the BOCC cites *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 366, 123 N.E.2d 1. In *Masterson*, the Ohio Supreme Court held that "[i]n the absence of statutory authority, a taxpayer lacks legal capacity to institute an action to enjoin the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy." *Id.* at

paragraph one of the syllabus. The BOCC maintains that the relators failed to present any evidence that they have a special interest different from the taxpaying public. We find that BOCC's reliance on *Masterson* is misplaced. More recently, the Ohio Supreme Court has held that "[a] taxpayer action is properly brought only when the right under review in the action is one benefitting the public." *State ex rel. White v. Cleveland* (1973), 34 Ohio St.2d 37, 63 O.O.2d 79, 295 N.E.2d 665, paragraph one of the syllabus; *State ex rel. Caspar v. Dayton* (1990), 53 Ohio St.3d 16, 20, 558 N.E.2d 49.

{¶ 11} "[A] taxpayer has standing to enforce a public right, regardless of private or personal benefit." *Cleveland ex rel. O'Malley v. White*, 148 Ohio App.3d 564, 2002-Ohio-3633, 774 N.E.2d 337, ¶45; *Cater* at 322-333. That being said, when the taxpayer's aim is merely for his own benefit, no public right exists, and a taxpayer action cannot be maintained. *O'Malley* at ¶46. See, also, *State ex rel. Fisher v. Cleveland*, Cuyahoga App. No. 83945, 2004-Ohio-4345, affirmed by 109 Ohio St.3d 33, 2006-Ohio-1827, 845 N.E.2d 500.

In *O'Malley*, a union sued to enjoin the city from using non-electricians to perform work on a construction project. We found that since there was full compliance with the bid procedures and public safety was not a true concern, no public right was at issue; at most, the union was protecting its members' interests in performing the work themselves. Thus, the plaintiff union lacked standing to pursue the action. But in *Fisher*, we found that city firefighters had standing to bring a taxpayer action challenging the city's requirement that firefighters submit income tax returns as an initial part of residency investigations. We held that despite the firefighters private interests in the outcome of the litigation, the relief they sought inured to the benefit of the public. "[B]ecause employees of the city must be residents, a requirement that employees submit tax returns as proof of their residency directly affects a substantial class of city residents [and] the city's blanket requirement that employees disclose private personal and financial information in order to continue employment must be deemed an abuse of corporate power, not

merely a violation of individual rights.” Id. at ¶20. In affirming *Fisher*, the Ohio Supreme Court held that “[a] taxpayer action may exist when the ability to obtain or continue public employment is implicated by the alleged abuse of the municipal corporate power.” Id. at paragraph one of the syllabus. The Court noted:

“the interests of the people of Cleveland are implicated because they are voters. Relators’ action has the potential (if the city appellants are believed) to eviscerate the ability of the commission to effectively investigate employee-residency issues. Second, residency is a threshold issue for municipal employment by Cleveland. As potential employees, the public is directly affected by the rule itself.

“Additionally, the records sought are being used as part of a civil-service-residency-examination process for which mandatory compliance is required to continue employment. A failure to successfully complete the process (for which the tax returns at issue are sought) can result in a termination of public employment. The public has an interest in seeing the continued employment of firefighters and police officers whom it has trained with taxpayer dollars and who have gained invaluable experience in their community.” Id. at ¶¶16-17.

{¶ 12} In *Fisher*, supra, the challenged practice affected all existing firefighters’ ability to continue their employment with the city as well as all potential citizens who may seek such employment. Cf. *State ex rel. Simeone v. Niles*, Trumbull App. No. 2008-T-0059, 2008-Ohio-7000.

{¶ 13} In the case at bar, we find that notwithstanding any personal benefit to the relators, their lawsuit benefits the public. The interests of the citizens of Cuyahoga County are implicated because they are voters and the BOCC’s action in excluding the SED from the ERIP, according to the BOCC, was to offer early retirement instead of laying off employees and eliminating jobs. Savings to county taxpayers is something that

affects the entire county, not just the relators. And, as in *Fisher*, the challenged practice affected all county employees, present and future, because it allowed the BOCC to choose which employees it was going to offer the early retirement benefits.

{¶ 14} Moreover, the BOCC itself admitted to the trial court that the lawsuit benefitted more than just the relators. During the January 2010 hearing, counsel for the BOCC stated that, “this is an issue [affecting] all employees throughout Cuyahoga County, not just the Teamsters. \* \* \* All taxpayers in Cuyahoga County are funding their ERIP, \* \* \* their ERIP was originally instituted to save the taxpayers of Cuyahoga County money.” Thus, based on the BOCC’s own admission, the taxpayer lawsuit benefits more than just the relators.

{¶ 15} Therefore, the trial court did not err when it determined that relators had standing to bring this taxpayer action. The first assignment of error is overruled.

#### Temporary Restraining Order

{¶ 16} In the second assignment of error, the BOCC argues that the trial court erred in granting the relators’ temporary restraining order because the court failed to comply with Civ.R. 65(D). Civ.R. 65(D) provides that “every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding upon the parties to the action, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of the order whether by personal service or otherwise.” *Id.*

{¶ 17} The BOCC claims that the trial court's order did not properly set forth the reasons for its issuance, was not specific in its terms, and did not describe in any detail the acts sought to be restrained. But the temporary restraining order expired when the trial court granted the relators' declaratory relief. Consequently, there is no longer a controversy in dispute and the BOCC's argument relating to the temporary restraining order is moot. As we stated in *Bambeck v. Catholic Diocese of Cleveland*, Cuyahoga App. No. 86894, 2006-Ohio-4883, "[a]n appellate court is not required to render an advisory opinion on a moot question or abstract proposition or to rule on a question of law that cannot affect matters at issue in a case." *Id.* at ¶20, citing *State v. Bistricky* (1990), 66 Ohio App.3d 395, 584 N.E.2d 75.

{¶ 18} Therefore, the second assignment of error is overruled.

#### The BOCC's ERIP

{¶ 19} In the third assignment of error, the BOCC argues that the trial court erred in finding that the BOCC violated R.C. 145.297 when it excluded relators from the ERIP.

{¶ 20} Since we are asked to review interpretation of a statute, which is a question of law, we employ a de novo review. *Riedel v. Consol. Rail Corp.*, 125 Ohio St.3d 358, 2010-Ohio-1926, 928 N.E.2d 448, ¶6, citing *State ex rel. Cleveland v. Cornell*, Cuyahoga App. No. 84679, 2005-Ohio-1977.

{¶ 21} It is axiomatic that if the language of a statute is plain and unambiguous and conveys a clear and definite meaning, a reviewing court cannot resort to the rules of statutory interpretation. *Riedel*, citing *Ohio Dental Hygienists Assn. v. Ohio State Dental*

*Bd.* (1986), 21 Ohio St.3d 21, 487 N.E.2d 301.

{¶ 22} R.C.145.297 governs retirement incentive plans for individuals in the Public Employees Retirement System. The statute provides, in pertinent part:

“(A) As used in this section, ‘employing unit’ means: \* \* \*

“(3)(a) With respect to employees of a board of alcohol, drug addiction, and mental health services, that board.

“(b) With respect to employees of a county board of developmental disabilities, that board.

“(c) With respect to other county employees, the county or any county agency designated by the board of county commissioners.

“(4) In the case of an employee whose employing unit is in question, the employing unit is the unit through whose payroll the employee is paid.

“(B) An employing unit may establish a retirement incentive plan for its eligible employees. In the case of a county or county agency, decisions on whether to establish a retirement incentive plan for any employees \* \* \* shall be made by the board of county commissioners. \* \* \*

{¶ 23} “(C) Any classified or unclassified employee of the employing unit who is a member of the public employees retirement system shall be eligible to participate in the retirement incentive plan established by the employee’s employing unit[.]

“\* \* \*

“(3) Participation in the plan shall be available to all eligible employees except that the employing unit may limit the number of participants in the plan to a specified percentage of its employees who are members of the public employees retirement system on the date the plan goes into effect.” *Id.*

{¶ 24} The BOCC argues that R.C. 145.297(A)(3)(c) gives it the authority to designate subordinate county agencies and offices as separate and distinct employing units.

In other words, the BOCC claims that the statute allows it to classify the SED as a separate employing unit and therefore to separate it from other units in determining which units to offer the ERIP option. As the trial court noted: “The issue \* \* \* centers on whether [the BOCC] could lawfully exclude a group of employees from participating in its ERIP outside of the express procedures for restricting participation in an ERIP contained in R.C. 145.297(C)(3) by defining ‘employing unit’ in conflict with the definition of ‘employing unit’ announced in R.C. 145.297(A).”

{¶ 25} As stated above, R.C. 145.297(B) provides that “[a]n employing unit may establish a retirement incentive plan for its eligible employees.” As the statute reads, the employing unit is the county or any county agency designated by the board of county commissioners. R.C. 145.297(A)(3)(a)-(c). “In the case of an employee whose employing unit is in question, the employing unit is the unit through whose payroll the employee is paid.” R.C. 145.297(A)(4).

{¶ 26} In this case, the BOCC offered the ERIP to all eligible county employees, except SED employees. In fact, the BOCC named the subordinate employing unit the “BOCC, excluding the SED.” But we find merit to the SED’s claim that the “BOCC, excluding the SED” is not a county or a county agency. And in order for the BOCC to enter into a lawful ERIP, there must be an employing unit that is either a county or a county agency.

{¶ 27} By operation of law, the SED is a department created and supervised by the BOCC. See R.C. 6117.01(C). SED employees are paid through the BOCC’s payroll,

and the BOCC approves collective bargaining agreements and other personnel actions, including suspensions and discharges of SED employees. Moreover, the trial court record shows an email sent from the county's director of human resources opining that the SED is a subdivision of the BOCC, and indicating that the SED would be required to follow whatever plan the BOCC implemented.

{¶ 28} As noted by the relators, if the BOCC had wanted to limit the number of participants in the ERIP, the Board could have done so by limiting the number of participants to a specified percentage of its employees who are members of the public employees retirement system on the date the ERIP went into effect. See R.C. 145.297(C)(3).

{¶ 29} Thus, we find that the BOCC failed to comply with R.C. 145.297 when it designated "Cuyahoga County, excluding Sanitary Engineering" as the subordinate employing unit. Pursuant to R.C. 145.297(A)(3)(c), the BOCC should have designated the entire BOCC as the employing unit and included the SED in the ERIP. See R.C. 145.297(C).

{¶ 30} Therefore, we conclude that the trial court correctly granted declaratory judgment in favor of the relators. Accordingly, the third assignment of error is overruled.

#### Exhaustion of Administrative Remedies

{¶ 31} In the fourth assignment of error, the BOCC argues that relators should

{¶ 32} have exhausted their administrative remedies by filing an administrative appeal under R.C. Chapter 2506 before initiating the underlying action.

{¶ 33} The Ohio Supreme Court has established that “prior to seeking court action in an administrative matter, the party must exhaust the available avenues of administrative relief through administrative appeal.” *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26, 29, 406 N.E.2d 1095, citing *State ex rel. Lieux v. Westlake* (1951), 154 Ohio St. 412, 96 N.E.2d 414. In *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 17, 526 N.E.2d 1350, the Ohio Supreme Court noted that two exceptions to the exhaustion of administrative remedies rule exist. Those exceptions apply: “First, if there is no administrative remedy available which can provide the relief sought, or if resort to administrative remedies would be wholly futile, exhaustion is not required; Second, exhaustion of remedies is unnecessary when the available remedy is onerous or unusually expensive.” (Internal citations omitted.)

{¶ 34} In this case, we find that the relators were not required to exhaust administrative remedies because the relators were excluded from participating in the ERIP; thus, any attempt to go through an administrative remedy process would have been futile. Moreover, the relators filed a taxpayer action pursuant to R.C. 309.13.

{¶ 35} Therefore, the fourth assignment of error is overruled.

{¶ 36} Accordingly, judgment is affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, A.J., CONCURS;  
COLLEEN CONWAY COONEY, J., DISSENTS  
WITH SEPARATE OPINION

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶ 37} I respectfully dissent. As the majority correctly states, when “there is no longer a controversy in dispute” the matter is moot. I find the fourth assignment of error dispositive because relators’ failure to exhaust administrative remedies in a timely manner has rendered this appeal an academic exercise and seeks an advisory opinion. Therefore, I would reverse the trial court’s decision.

{¶ 38} The record reflects that the ERIP was announced by BOCC resolution in November 2008. The enrollment period was set from January 15, 2009 to January 14, 2010.

{¶ 39} In November 2008, shortly after the ERIP was announced, a grievance was filed on behalf of “the employees of the Cuyahoga County Sanitary Engineer’s Office” pursuant to the ERIP’s grievance procedure. The grievance challenged the BOCC’s decision to exclude the SED from participating in the ERIP. A hearing was held before the County Administrator, James McCafferty (“McCafferty”). Fifteen SED employees attended the hearing. Four bargaining unit members attended the hearing, including

Lesh, one of the relators in the instant case. McCafferty issued a decision stating, “[b]ased on the grievance request and subsequent proceedings held on January 9, 2009, I have denied the grievance request. Therefore, the County Sanitary Engineer’s agency will not be able to participate in the ERIP.” No R.C. Chapter 2506 appeal was pursued to challenge this decision.

{¶ 40} The relators’ attorney sent a taxpayer demand letter to the county prosecutor in December 2009, just weeks before the ERIP ended. The BOCC correctly argues that relators should have exhausted their administrative remedies by filing an administrative appeal under R.C. 2506. McCafferty issued his decision denying the grievance request on January 20, 2009, which was at the very beginning of the ERIP enrollment period. Relators did nothing to pursue their grievance/exclusion from ERIP until late December 2009 when they contacted the prosecutor. The ERIP was “closing” on January 14, 2010, one week after relators filed their amended complaint.

{¶ 41} The Ohio Supreme Court has firmly established that “prior to seeking court action in an administrative matter, the party must exhaust the available avenues of administrative relief through administrative appeal.” *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26, 29, 406 N.E.2d 1095, citing *State ex rel. Lieux v. Westlake* (1951), 154 Ohio St. 412, 96 N.E.2d 414. “The purpose of the [exhaustion] doctrine \* \* \* is to permit an administrative agency to apply its special expertise \* \* \* in developing a factual record without premature judicial intervention.” *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 111, 564 N.E.2d 477, quoting *S. Ohio Coal Co. v. Donovan* (C.A. 6,

1985), 774 F.2d 693.

{¶ 42} In the instant case, the BOCC offered the ERIP to all county agencies except the SED. The ERIP contained a grievance procedure for any employee determined ineligible to participate. It provided that ineligible employees may file a grievance in writing within seven days of the employee's receipt of notice of ineligibility. In November 2008, a grievance was filed on behalf of some of the employees of Cuyahoga County's SED pursuant to the ERIP's grievance procedure. A grievance hearing was held on January 9, 2009 before McCafferty. Lesh and three other bargaining unit members attended the hearing. On January 20, 2009, McCafferty issued a decision stating that SED employees are not eligible to participate in the ERIP. No appeal under R.C. Chapter 2506 was pursued to challenge this decision.

{¶ 43} I find the Ohio Supreme Court's reasoning in *Clagg v. Baycliffs Corp.*, 82 Ohio St.3d 277, 1998-Ohio-414, 695 N.E.2d 728, persuasive on this issue. *Clagg* involved the analogous situation in which property owners brought an action for declaratory judgment seeking a definition of their rights in a roadway, and requested a permanent injunction preventing alteration of the road. The trial court determined that the property owners were required to exhaust their administrative remedies by appealing the regional planning commission's decision to approve the replat.

{¶ 44} The Ohio Supreme Court found that the regional planning commission was the appropriate governing body to determine whether a change in the easement is proper under R.C. 711.24. *Id.* at 280. Since the regional planning commission determined

property owners were not injuriously affected by the proposed change to the roadway, the property owners should have appealed under R.C. 2506.01. *Id.* The *Clagg* court further found that when parties fail to exhaust their administrative remedies, declaratory and injunctive relief will be denied. *Id.* at 281. See, also, *Buchholtz v. Childers*, Ottawa App. No. OT-06-016, 2007-Ohio-870 (where the court, relying on *Clagg*, found that appellants should have appealed the regional planning commission's decision under R.C. Chapter 2506).

{¶ 45} Similarly, I would find that relators failed to exhaust their administrative remedies when they did not appeal McCafferty's decision denying their grievance in January 2009. Relators waited until December 30, 2009 to file their declaratory judgment action when they should have pursued a grievance and appealed McCafferty's decision under R.C. Chapter 2506. A timely appeal early in 2009 would have enabled a prompt review of their claim before the ERIP ended in January 2010. It is now 2011, and both the BOCC and ERIP no longer exist.

{¶ 46} Moreover, I would sustain the first assignment of error as well and find that relators have no standing to pursue this case as a taxpayer action. When the taxpayer's aim is merely for his own benefit, no public right exists. *Cleveland ex rel. O'Malley v. White*, 148 Ohio App.3d 564, 2002-Ohio-3633, 774 N.E.2d 337, ¶46, citing *State ex rel. Caspar v. Dayton* (1990), 53 Ohio St.3d 16, 558 N.E.2d 49.<sup>2</sup> In the instant case, there is

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<sup>2</sup>The Ohio Supreme Court in *Caspar* found that police officers' action to compel fringe benefits and the right to vacation pay does not involve enforcement of a public right. *Id.* at 20.

no question that Lesh is an employee of the SED and that the Teamsters represents SED employees. Thus, relators' have a personal and private interest in seeking a determination that SED employees should be allowed to participate in the ERIP. See *O'Malley* (where this court held that electrical workers union lacked standing to bring a taxpayer action when the union members have only a personal interest in the matter and no public rights are being protected). See, also, *State ex rel. Brewer-Garrett Co. v. Metrohealth Systems*, Cuyahoga App. No. 87365, 2006-Ohio-5244, ¶48 (where this court also held that when the taxpayer's goal in filing a lawsuit is for his own benefit, no public rights exist and a taxpayer action cannot be maintained).

{¶ 47} Because no public rights are being protected through this taxpayer suit and relators' only goal is the personal benefit to ERIP-ineligible employees, I would find that relators lack standing to bring this taxpayer action under R.C. 309.13. The goal of the ERIP was to save the County money. Including SED employees in the "eligibility pool" was determined to "cost" the County money, clearly not in the public's best interest. And as I stated earlier, the entire matter is now moot. Therefore, I would reverse the trial court's decision.