

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. )

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MERIT BREIF OF APPELLANT BOARD OF COUNTY  
COMMISSIONERS OF CUYAHOGA COUNTY

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## Statement of 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 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 (BOCC) 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 Sanitary Engineer Division. (hereinafter, the "SED") (Ex. 7)

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. (Tr. p. 110)

As a condition of offering the ERIP each agency of the BOCC was not permitted to replace retiring employees. (Tr. p. 112) A limited number of subordinate agencies were allowed to replace some employees. (Tr. p. 112) The Department of Employment and Family Services

were eligible 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 with approximately 26 employees able to retire 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 added 12 employees and is in the process of adding more. 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 appellee Teamsters nor appellee 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, this 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 trial court issued an order that indicated that the BOCC violated the law but the appellees were not timely and could not participate in the ERIP.

## ARGUMENT

**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.

This appears to be a case of first impression challenging the Board of County Commissioners’ discretion to determine who should be permitted to participate in an ERIP. This has generally been left to the governing authority by the legislator as the governing authority has the sole discretion over its budget and management of funds.

Appellees contend that the 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. Contrary to appellees’ contention, however, they failed to demonstrate their claim.

R.C. 145.297(B) provides as follows, in relevant part:

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 terms of the plan shall be made by the board of county commissioners. \*\*\*

All terms of a retirement plan shall be in writing.

A retirement incentive plan shall provide for purchase by the employing unit of service credit for eligible employees who elect to participate in the plan and for payment by the employing unit of the entire cost of the service credit purchased.

Every retirement incentive plan shall remain in effect for at least one year. The employing unit shall give employees at least thirty days' notice before terminating the plan.

Every retirement incentive plan shall include provisions for the timely and impartial resolution of grievances and disputes arising under the plan.

No employing unit shall have more than one retirement incentive plan in effect at any time.

R.C. 145.297(B).

An "employing unit" means 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)(1). 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).

A classified or unclassified employee of the employing unit who is a member of the public employees' retirement system is eligible to participate in the retirement incentive plan if

the employee meets the criteria set forth in R.C. 145.297(C).

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.

Thus “for all county employees, except those employees described in R.C. 145.297(A)(3)(a) and (b), the decisions as to whether to establish a plan and what the terms of the plan will be are made by the same entity, the board of county commissioners.” 1994 Op. Atty.Gen. No. 94-092, at 2-457. Great discretion is granted to the BOCC.

And as the Ohio Attorney General opined in 1988 Op. Atty.Gen. No. 88-085, the fact that a board of county commissioners designates, pursuant to R.C. 145.297(A)(3)(c), certain offices as an “employing unit” for purposes of a retirement incentive plan, does not make county employees outside of the designated office eligible to participate in the plan.<sup>1</sup>

In that instance, the question was whether the board of county commissioners could identify the employees of one office holder, specifically the County Engineer, as an employing unit for purposes of a retirement incentive plan without such designation making all other employees of the county eligible for the retirement incentive plan. The Ohio Attorney General observed:

[W]ith respect to county employees, other than employees of a community mental health board or county board of mental retardation and developmental disabilities, and regardless of the composition of the employing unit, the board of county commissioners is authorized to determine whether to institute a retirement incentive plan and to prescribe the terms of any such plan. It is significant that the General Assembly has vested in the board of county commissioners authority to decide whether to designate a county agency as a separate employing unit,

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<sup>1</sup> Opinions authored by the Ohio Attorney General, while not binding on Ohio courts, are nevertheless recognized as persuasive authority. See *State ex rel. Van Dyke v. Pub. Emp. Retirement Bd.*, 99 Ohio St.3d 430, 2003-Ohio-4123, 793 N.E.2d 438, at ¶ 40.

R.C. 145.297(A)(3)(c), and further to determine for the county, as well as for any county agency which it has designated as an employing unit, whether to adopt a retirement incentive plan and, if so, to dictate the terms of such plan, R.C. 145.297(B). Pursuant to R.C. 145.297, every employing unit, other than a county or municipal agency, may independently determine whether to establish a retirement incentive plan. As set forth above, however, for all county employees, except those listed in R.C. 145.297(A)(3)(a) and (b), regardless of the department, agency, office, or other county employing entities by which they are employed, the decision as to whether they are entitled to participate in a retirement incentive plan in accordance with R.C. 145.297 is left to the discretion of the board of county commissioners.

Id. at 2-408 (footnotes omitted).

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 retirement incentive plan which would be most beneficial to employees county-wide.

Id. at 2-409. Thus 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 Attorney General declared:

R.C. 145.297(C) establishes eligibility for participation in an early retirement incentive plan, in part, as follows: “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 his employing unit,” if he meets the specified criteria. Thus, pursuant to R.C. 145.297(C), only PERS members employed by the employing unit establishing

the retirement incentive plan are eligible to participate in that plan. In the circumstances [described], therefore, county employees, other than those employed by the county engineer, are not eligible to participate in the plan implemented for the employees of the county engineer's office.

Id. at 2-410 (emphasis in original).

The Attorney General thus concluded:

Based on the foregoing, it is my opinion, and you are hereby advised that, pursuant to R.C. 145.297(A)(3)(c), the board of county commissioners may designate the office of the county engineer as an employing unit, for purposes of a retirement incentive plan established under R.C. 145.297; county employees, other than those employed by the county engineer, are not eligible to participate in the plan established for the office of the county engineer.

Id. at 2-410. See, also, *State ex rel. Gallagher v. Cuy. Cty. Bd. of Commrs.*, Cuyahoga App. No. 81161, 2002-Ohio-4440 (BOCC's ERIP for county employees did not entitle Cuyahoga County Juvenile Court employee to participate).

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”. (Findings and Conclusions p. 9) It is uncontroverted that the SED is an agency of the county. However, the trial court took a narrow approach defining county agency as only those supervised by separate elected officials. The revised code does not define an employing unit that narrowly. Had the legislature chosen to do so, it could have included a limited definition.

Certainly, OPERS does not take this narrow approach. (Tr. p. 58) Michael Denny, Director of the Early Retirement Incentive from OPERS testified that designating the SED as an employing unit complied with OPERS regulations. (Tr. Denny p. 9, 12) In fact, Mr. Denny testified that the county is permitted to determine what a subordinate employing unit is. (Tr. Denny p. 11) Had Cuyahoga County’s ERIP not complied with the OPERS regulations, OPERS would not have approved it. (Tr. Denny p. 13)

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. (Tr. Denny p. 17) In fact, Mr. Denny indicated that the BOCC of other counties were permitted to distill an ERIP to even finer distinctions. 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. Mr. Denny testified that this met the criteria established by the legislature and that has been implemented since 1986. (Tr. Denny p. 18, 20)

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. (Ex. 6 at p. 3) This was done with the guidance and approval of OPERS. (Tr. p. 58) If this

Court were to affirm that decision it would remove that 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. This Court would be creating a definition of agency that the State legislature declined to do. This Court would be substituting its judgment for that of county's legislative branch in matters of budget.

The BOCC carved out other exceptions to the ERIP. They allowed separate terms for other subordinate employing units. (Tr. p. 62) This was all within their discretion in handling the budgetary concerns for Cuyahoga County. The BOCC is the overall employing unit for the entire county. (Tr. p. 108) Each department, including other elected officials, has its budget set by the BOCC and has no separate authority to do so. (Tr. p. 107) No other agency, elected official or department could offer an ERIP, it must come from the BOCC. (Tr. p. 108)

Further authority is contained in section 145-2-42 of the Ohio Administrative Code, which specifically provides that the BOCC may designate any subordinate employing unit within its authority and either offer a plan to that subordinate employing unit or specifically exclude them from the plan. The BOCC is given broad discretion in designating which department, division or agency constitutes a subordinate employing unit. Neither the Revised Code nor the Administrative Code limit subordinate employing units to separate elected officials nor does the code prohibit designation of separate units within the purview of an elected official.

Appellees rely on R.C. 145.297(C)(3) to contend that participation in the plan shall be available to all eligible employees subject to certain qualifications. But as the Ohio Attorney General explained in 1988 Op.Atty.Gen. No. 88-085, that provision applies only to employees within the employing unit designated to participate in the plan. In the instant case, the BOCC excluded the SED employing unit from participating in this ERIP. Consequently, appellees

would not qualify as eligible employees under R.C. 145.297(C) (3) as a matter of law.

Based on the foregoing, appellees have not met their burden of proof on their first cause of action which contends that the ERIP contracts with all county employees who were eligible to participate in the plan are illegal because the SED employees did not participate.

Appellees have not succeeded on their third cause of action which seeks a legal declaration that that the exclusion of the SED employees from participating in the plan violated R.C. 145.297.

And to the extent that appellees asked the Court to compel the BOCC to permit their participation in the plan, they are essentially asking the Court to re-write the proposal that was submitted to OPERS for its approval in a manner that is contrary to Ohio law.

In either case, granting appellee the relief they seek would cause harm to other third parties.

Moreover, the rules and regulations that have guided OPERS in approving ERIPs since 1986 would be impacted. According to the testimony of Michael Denny, Supervisor of ERIP Service Assessments for OPERS, 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. (Tr. Denny p. 18) It would have the effect of determining that hundreds of such plans were illegally carried out affecting thousands of employees. Particularly, Mr. Denny testified that it would affect the Departments of Job and Family Services statewide since they seem to be the agency most often offered ERIPs statewide. In many of these instances they

are the only subordinate employing unit offered an ERIP even though they are under the jurisdiction of the BOCC.

**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' first cause of action purports to be a taxpayer suit under R.C. 309.13 and contends that ERIP contracts with eligible employees would be unlawful, void, and result in an alleged misapplication of public funds because the SED employees were not included in the ERIP. Appellees' second cause of action seeks a writ of mandamus to compel the BOCC to include the SED employees in the ERIP. Appellees' third cause of action requests a declaration that the exclusion of the SED employees from the ERIP was unlawful under R.C. 145.297.

Appellees do not have standing to bring this action as a taxpayer's suit. R.C. 309.12 provides that the prosecuting attorney may bring an action if public funds are being misapplied or illegally spent. A taxpayer may act only if the prosecuting attorney refuses to do so.

Appellees' capacity to maintain this action is also improperly predicated on his 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 appellees 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].

As a general taxpayer, appellees must show the action complained of has affected the plaintiff's pecuniary interests differently than the interests of the general taxpaying public. Hence, appellees 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. Appellees have 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.

To maintain such an action, the taxpayer's aim must be to enforce a public right, regardless of any personal or private motive or advantage. *State ex rel. White v. Cleveland* (1973) 34 Ohio St.2d 37 Appellees' action to compel an ERIP for their own benefit does not represent such an aim. Nor is appellees' right to participate in an ERIP a "public" right. This cause, however, is not a "taxpayer action" as this Court described it in *White*, see also *State ex rel. Caspar v. City of Dayton* (1990) 53 Ohio St.3d 16.

When the taxpayer's aim is merely for his own benefit, no public right exists, and a taxpayer action cannot be maintained. See *State ex rel. Caspar v. Dayton* (1990), 53 Ohio St.3d 16, 558 N.E.2d 49 (where the court held that police union members lacked standing in a taxpayer action seeking fringe benefits from the city.) *Cleveland ex rel. O'Malley v. White* 148 Ohio App.3d 564, 572, 774 N.E.2d 337, 343 (Ohio App. 8 Dist.,2002)

It is clear that appellees are seeking what they consider a benefit solely for themselves. They are not seeking a benefit for the public at large.

**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 denied representation. 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, 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.” *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 an analogous situation this Court has determined that where there was an administrative avenue that it must be pursued. The findings in this regard could have been appealed pursuant to R.C. 2506.01. When, as in this case, the affirmative defense of failure to exhaust administrative remedies is applicable and has been timely raised and maintained, a court

will deny declaratory and injunctive relief. See, e.g., *Haught v. Dayton* (1973), 34 Ohio St.2d 32, 35-36, 63 O.O.2d 49, 51, 295 N.E.2d 404, 406. Thus, the court of appeals and the trial court erred by allowing relief to appellants because they failed to avail themselves of their legal remedies through the appeal provisions of R.C. 2506.01. *Clagg v. Baycliffs Corp.* (1998) 82 Ohio St.3d 277

“It is a well-established principle of Ohio law 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, 17 O.O.3d 16, 18, 406 N.E.2d 1095, 1097 (citing *State, ex rel. Lieux v. Westlake* [1951], 154 Ohio St. 412, 43 O.O. 343, 96 N.E.2d 414.) In Ohio, the exhaustion-of-administrative-remedies doctrine is a court-made rule of judicial economy. See *G.S.T. v. Avon Lake* (1976), 48 Ohio St.2d 63, 65, 2 O.O.3d 217, 218, 357 N.E.2d 38, 40. As the United States Supreme Court has stated, “[e]xhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.” *Weinberger v. Salfi* (1975), 422 U.S. 749, 765, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522. The purpose of the doctrine “ \* \* \* is to permit an administrative agency to apply its special expertise \* \* \* and in developing a factual record without premature judicial intervention.” *Southern Ohio Coal Co. v. Donovan* (C.A. 6, 1985), 774 F.2d 693, 702. The judicial deference afforded administrative agencies is to \* “ \* \* \* ‘prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court \* \* \*.’ ” *Ricci v. Chicago Mercantile Exchange* (1973),

409 U.S. 289, 306, 93 S.Ct. 573, 582, 34 L.Ed.2d 525. *Nemazee v. Mt. Sinai Medical Center* (1990) 56 Ohio St.3d 109.

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 even though they did not file a formal grievance but merely appeared when the non-collective bargaining employees were heard. (Findings and Conclusions p. 5) The trial court further found that employees of the SED would not be permitted to participate in the ERIP. (Findings and Conclusions p. 5) (Ex. 13)

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 (Findings and Conclusions p. 5), then on the other hand concluded that they were excluded from the grievance procedure. (Findings and Conclusions p. 7) The court determined that there were no administrative remedies to be exhausted after finding that appellees grieved according to the plan. (Findings and Conclusions p. 7) In fact, the court did so in the same paragraph. (Findings and Conclusions p. 7 paragraph 6)

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.

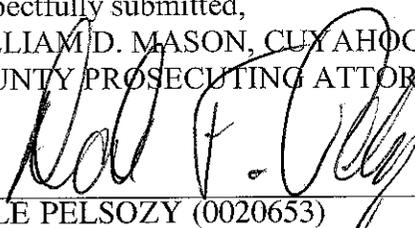
Moreover, appellees waived any complaint under the contract by waiting until the deadlines for inclusion had passed. The establishment of the January 14, 2010 date set the

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 the suit. There is no rational explanation for the delay.

**Conclusion**

It is for the above reasons that that appellants pray that this Court reverse the findings of the lower courts and enter judgment in appellant's favor.

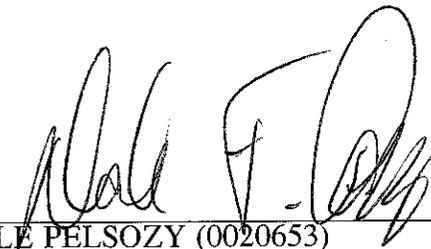
Respectfully submitted,  
WILLIAM D. MASON, CUYAHOGA  
COUNTY PROSECUTING ATTORNEY

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

CERTIFICATE OF SERVICE

A copy of the foregoing Answer Brief has been sent by Ordinary U. S. Mail pre-paid postage on this 7<sup>th</sup> day of September, 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 Appellee*

# **APPENDIX**

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 form 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. )

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NOTICE OF APPEAL DEFENDANT-APPELLANT  
BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY

---

WILLIAM D. MASON (037540)  
Prosecuting Attorney of Cuyahoga County  
BY: DALE PELSOZY (0020653)  
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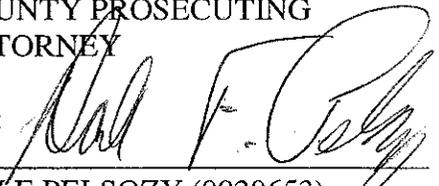
**FILED**  
APR 08 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

**NOTICE OF APPEAL DEFENDANT-APPELLANT BOARD OF COUNTY  
COMMISSIONERS OF CUYAHOGA COUNTY**

Defendant-Appellant Board of County Commissioners of Cuyahoga County hereby gives Notice of Appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District entered in Court of Appeals case No. 94703 on February 24, 2011, a copy of which is attached hereto.

This case is one of public interest.

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 Answer Brief has been sent by Ordinary U. S. Mail pre-paid postage on this 7<sup>th</sup> day of April, 2010 to:

Basil W. Mangano  
Joseph J. Guarino III  
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By 

DALE PELSOZY (0020653)  
Assistant Prosecuting Attorney

[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

---

**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  
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Cleveland, Ohio 44113

## **ATTORNEYS FOR APPELLEES**

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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.



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

**State of Ohio ex rel Teamsters Local  
Union No. 436, et al.**

Relators,

v.

**Board of County Commissioners,  
Cuyahoga County, Ohio**

Respondents.

) Case No. 09 CV 714389

) Judge Michael P. Donnelly

) **Order**



On December 30, 2009, Relators filed a verified complaint for Preliminary and Permanent Injunctive and Declaratory Relief and motion for temporary restraining order, which this Court granted in part thru the issuance of a Temporary Restraining Order. Relators amended their complaint on January 6, 2010 and added a cause of action for Preemptory Mandamus. This Court heard and submitted evidence on January 11<sup>th</sup> and 12<sup>th</sup>, 2010.

In deciding whether to grant a preliminary injunction, the court must look at four factors: (1) whether there is a substantial likelihood that the realtors will prevail on the merits; (2) whether realtors will suffer irreparable injury if the injunction is not granted; (3) whether third parties will be unjustifiably harmed if the injunction is granted; and (4) whether the public interest will be served by the injunction. *KLN Logistics Corp. v. Norton*, 174 Ohio App.3d 712.

In view of the time in which this action was brought, days before the ERIP in question was set to terminate, the court specifically finds that third parties will be unjustifiably harmed if the injunction is granted. Accordingly, this court hereby denies Relators motions for Preliminary and Permanent Injunctive Relief as well as their cause of action for Preemptory Writ of Mandamus. Nonetheless, this court finds in favor of Relators on their prayer for Declaratory Relief. Based on the foregoing, this court finds that Respondents Board of County Commissioners, Cuyahoga County, Ohio acted unlawfully and in violation of R.C. 145.297 when they excluded Realtor Kevin Lesh, as well as Richard Dryer, James Ezzo, Arthur Russell, Jerry Tharp and Robert Tomba on whose behalf the Teamsters Local Union No. 436 brought this action, from participation in the Early Retirement Incentive Program, which terminated January 14, 2010. See attached findings of fact and conclusions of law.

OSJ.

IT IS SO ORDERED.

  
JUDGE MICHAEL P. DONNELLY

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9. The Board maintains its principal place of business at 1219 Ontario Street, 4th Floor, Cleveland, Ohio 44113 and is the policy-determining body of the county, which is a political subdivision of the State of Ohio. (Stip.)

10. The Board employees working within SED are paid through the Board's Office payroll. (Southerington Tr. 13, 33-34; Rel. Ex. 15.)

11. The Department of Human Resources recommends personnel actions to the Board for its employees working within SED. (Southerington Tr. 11.)

12. The Board approves personnel actions, including suspensions and discharges, of its employees working within SED in the form of a resolution. (Southerington Tr. 11-13.)

13. When the Board approves personnel actions, such as a suspension or discharge, it approves changes in the Board's Office payroll. (Southerington Tr. 13; Rel. Ex. 15.)

14. The Board is required to provide suitable facilities for use of the SED and shall provide for and pay the compensation of the county sanitary engineer. (R.C. 6117.01(C).)

15. The County Engineer, subject to formal approval of the Board, may appoint necessary assistants and clerks in order to assist the County Engineer in discharging the duties of the county sanitary engineer. R.C. 6117.01(C).

16. The Board and Cuyahoga County Engineer entered into an agreement pursuant to R.C. 315.14. (Stip.)

17. Under the Agreement, the compensation of "... assistants and clerks [in the SED] shall be determined by and provided for by the Board." (Stip.; R.C. 6117.01(C).)

18. The Board approves, on behalf of the County, the Collective Bargaining Agreement with Local 436. (Stip.)

19. On November 6, 2008, the Board passed a resolution approving an agreement for the Early Retirement Incentive Program ("ERIP") participation for all departments under the

Board of County Commissioners, excluding the Sanitary Engineering Division. (Resolution No. 084649; Stip.)

20. That resolution was subsequently corrected to authorize participation in the ERIP for all departments under the Board of County Commissioners, excluding Sanitary Engineering Division ("SED"). (Rel. Ex. 1.)

21. On November 6, 2008 the Board passed a resolution establishing the ERIP for Employees of the Board of County Commissioners, excluding SED. (Rel. Ex. 2.)

22. Two Employer Notices of Adoption of a Voluntary Retirement Incentive Plan, Form 111a, were presented by the Board to the Ohio Public Employee Retirement System in which the Board certified that it had established an ERIP, but one form designated the Board, excluding Sanitary Engineer as subordinate employing unit and one form designated the County, excluding Sanitary Engineering as a subordinate employing unit. (Rel. Exs. 7 and 8; Southerington Tr. 8.)

23. These forms are dated November 6, 2008 and December 2, 2008, respectively. (Rel. Exs. 7 and 8; Southerington Tr. 8.)

24. In the ERIP, the Board did not exclude from the definition of "employee" its employees working within the SED. (Rel. Ex. 6 at 3.)

25. The ERIP defines employing unit as the Office of the Cuyahoga County Board of Commissioners, excluding the division of the Office of the County Sanitary Engineer. (Rel. Ex. 6 at 3.)

26. The effective date of the ERIP is January 15, 2009. (Stip.; Rel. Ex. 6 at 3.)

27. The ERIP terminates on January 14, 2010. (Stip.; Rel. Ex. 6 at 4.)

28. The enrollment period for the ERIP is January 15, 2009 through January 14, 2010. (Rel. x. at 4.)

29. The "employing unit" for Board employees working within the SED is the Board. (Southerington Tr. 7, 33; Ex. 17.)

30. Had the County not excluded its employees working within SED from participating in the ERIP, employees working within SED would have been eligible to participate in the ERIP. (Southerington Tr. 14.)

31. The County did not limit the number of participants in the ERIP by limiting it to a specified percentage of its employees who are members of the public employees retirement system on the date the ERIP went into effect. (Rel. Ex. 6.)

32. A grievance was filed on behalf of "the employees of the Cuyahoga County Sanitary Engineer's Office pursuant to the ERIP's grievance procedure on or about November 3, 2008, regarding the decision to exclude the Sanitary Engineer's Office from participation in the ERIP. (Rel. Ex. 12; Test. of Lesh.)

33. On or about January 9, 2009, a hearing was held in the County Commissioner Chambers. (Stip.)

34. Approximately 15 employees working within the SED attended the hearing. The County Administrator, James McCafferty, gave all those in attendance an opportunity to be heard, and in fact, "heard them out." (Test. of McCafferty.)

35. At least four bargaining unit members attended the hearing: Kevin Lesh, Jerry Tharp, Richard Dryer and Thomas Spracale. (Test. of Lesh.)

36. In the hearing, management was represented and presented its side of the case. At the hearing, management did not assert that SED was a separate employing unit or that the Board was not the employing unit for employees working within the SED. (Test. of McCafferty.)

37. On January 20, 2009, a decision was issued by the County Administrator, James McCafferty, indicating that employees working within the SED will not be able to participate in

the ERIP. The decision does not assert as a reason for denying the employees eligibility that SED was a separate employing unit or that the Board was not the the employing unit for employees working within the SED. (Rel. Exs. 13-a-13-o.)

38. The reasons for denying the grievance are set forth in the decision. (Test. of McCafferty; Rel. Exs. 13-a-13-o.)

39. The County Administrator addressed and mailed his decision to each employee in attendance at the hearing, including Kevin Lesh, Jerry Tharp, Richard Dryer and Thomas Spracale. (Test. of McCafferty.)

40. The decision states, among other things, “[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.” (Rel. Ex. 13a-13-o.)

41. Prior to the implementation of the ERIP, the Board received an email dated September 3, 2008 from Patrick Murphy of the Office of the Prosecuting Attorney, stating, in part, as follows:

- a. “The BOCC can designate any county agency as an “employing unit” for purposes of the ERIP statues. Thus, each County elected official (coroner, auditor, prosecutor, court, etc.) can develop his/her/its own separate ERIP for its employees.”
- b. An “employing unit”, in formulating a plan for its own employees, must follow statutory guidelines for an ERIP. It cannot select particular employees to participate, the plan must be offered to the most senior employees, then down the line . . .”

- c. "The BOCC, or any other "employing unit" cannot offer different plans to its own employees. There cannot be one plan for BOCC employees in HR and a different plan for BOCC employees in Development, DCFS, etc."

42. Michael Denny, Supervisor of the ERI in Service Assessment Department and the Refunds Department of OPERS, has been employed by OPERS for at least nine years. (Denny Tr. 6.)

43. Denny reviews ERIPs submitted to OPERS. (Denny Tr. 7.)

44. His review entails reviewing three (3) documents: Form 111a, the resolution approving the ERIP and the ERIP itself. (Denny Tr. 7.)

45. Denny could not identify any example in which a County had offered an ERIP to all its employees except one group of employees. (Denny Tr. 34-35.)

46. On December 22, 2009, Relator's counsel sent a taxpayer demand letter pursuant to R.C. 309.12 to Cuyahoga County Prosecutor, William Mason, requesting him to "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 Board of Cuyahoga County Commissioner's Employee Retirement Incentive Plan ("ERIP"), or in the alternative, compel the Commissioners to extend the ERIP to employees of the Cuyahoga County Sanitary Engineer, and further require the Commissioners to allow ample time for any of those employees to apply for and receive benefits of the ERIP." (Stip.)

47. On December 23, 2009, Cuyahoga County Prosecutor's Office sent a letter to Relator's counsel asserting the SED employees were lawfully singled-out and excluded for participation in the ERIP, and that it would not initiate the requested action. (Stip.)

## **II. CONCLUSIONS OF LAW**

1. Relators have standing to assert the R.C. 309.13 taxpayer action.

2. Relators have standing to assert claims requesting both a writ of mandamus and a declaratory judgment.

3. Relator Teamsters Local 436 has standing to pursue the writ of mandamus on behalf of themselves and on behalf of all its members who are employees with the Board of Commissioners' Division of Sanitary Engineering.

4. An association has standing on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ohio Contractors Ass'n v. Bicking*, 71 Ohio St. 3d 318, 320 (Ohio 1994) (citing *Hunt v. Washington State Apple Advertising Comm.* (1977), 432 U.S. 333, 343). However, to have standing, the association must establish that its members have suffered actual injury. *Simon v. E. Kentucky Welfare Rights Org.* (1976), 426 U.S. 26, 40.

5. Teamster's Local 436's members who were denied their statutory right to be eligible to participate in the ERIP would otherwise have standing to sue in their own right. The interests Teamsters Local 436 seeks to protect related to terms and conditions of its members' employment, and therefore are germane to the organization's purpose. And, neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. That is, the Board's decision to deny members the in the ERIP and this court's determination as to whether such action is lawful is a legal issue impacting each of the members equally.

6. Relators were not required to exhaust administrative remedies. First, the ERIP grievance procedure excluded Relator Lesh, and all members of Relator Local 436. Therefore, there were no administrative remedies to be exhausted. Besides, "[i]f resort to administrative

remedies would be wholly futile, exhaustion is not required.” *Karches v. Cincinnati*, 38 Ohio St. 3d 12, 17, (citing *Glover v. St. Louis-San Francisco Ry. Co.* (1969), 393 U.S. 324; *Driscoll v. Austintown Assoc.*, 42 Ohio St. 2d 263, 275. Nevertheless, a grievance was filed on behalf of all Board employees working within SED. Respondents held a hearing on that grievance and provided those individuals in attendance at the hearing, which included four bargaining unit members, an opportunity to be heard, “heard them out” and answered the grievance by addressing and mailing an answer to each individual in attendance. The answer unquestionably refuses to permit Board employees working within SED to participate in the ERIP.

7. The issue before this Court centers on whether Respondents 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 the “employing unit” in conflict with the definition of “employing unit” announced in R.C. 145.297(A).

8. In analyzing a statute or regulation, “the paramount goal is to ascertain and give effect to the legislature’s intent in enacting the statute.” *Brooks v. Ohio State Univ.* (1996), 111 Ohio App. 3d 342, 349. “Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation.” *Storer Communications, Inc. v. Limbach* (1988), 37 Ohio St. 3d 193, 194, quoting *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus. If it is ambiguous, then the court interprets the statute to determine the legislature's intent. *State v. Hairston*, 101 Ohio St. 3d 308, 2004 Ohio 969, ¶13.

9. R.C. 145.297(B) provides, “[a]n *employing unit* may establish a retirement incentive plan for *its eligible employees*.”

10. With regard to county employees, R.C. 145.297(A)(3)(c) explicitly provides that the “employing unit” is “the county or any county agency designated by the board of county commissioners.”

11. “In the case of an employees 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).

12. R.C. 145.297(C)(3) provides “. . . 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. The percentage shall not be less than five per cent of such employees...”

13. R.C. 145.297 is plain and unambiguous and conveys a clear and definite meaning.

14. By “county agency” the General Assembly did not mean a department or subdivision, but rather a division of County government supervised by an elected official, i.e., Prosecuting Attorney, Sheriff, Coroner, Engineer, Recorder, Auditor, Treasurer, Clerk of Courts, Common Pleas, Court of Appeals, and Board of County Commissioners. (*See* Rel. Ex. 11, County Organizational Chart and Rel. Ex. 18, Email of Patrick Murphy.) Under each of these agencies exists departments or divisions.

15. By operation of law, SED is a “sanitary engineering department, which shall be under the [Board’s] supervision.” R.C. 6117.01(C). And it is the Board that is to provide suitable facilities for the use of the SED; it is the Board that shall provide for and pay the compensation of the county sanitary engineer as well as those assistants and clerks appointed by the Board, *id.*; it is the Board that approves collective bargaining agreements between Local 436

and SED; it is the Board that approves increases in wages; and it is the Board that suspends and discharges employees working within SED. And, indisputably, and most significantly, it is the Board whose payroll its employees working within SED are paid.

16. Regardless of whether "county agency" should be interpreted more broadly, the Board of Commissioners excluding the SED is neither a county nor a county agency.

17. Accordingly, Respondents violated R.C. 145.297(A) and (B) by authorizing an ERIP for something less than a county or a county agency.

18. With the lawful employing unit being the Board of Commissioners, in its totality, its employees working within SED must have been permitted to be eligible to participate in the ERIP. R.C. 145.297(C)(3).

19. Here, the Board of Commissioners, in its ERIP, elected to not utilize the sole statutory option of limiting participation to a predetermined percentage of its employees. In doing so, it not only contravened the statute's clear mandate, but entirely undermined the very reason for 145.297(C)(3). R.C. 145,293(C)(3) serves to protect the most senior employees of the employing unit when the employing unit elects to limit participation by percentage.

20. R.C. 145.297(C)(3) clearly provides, in part, as follows: "If participation is limited, employees with more total service credit have the right to elect to participate before employees with less total service credit."

21. Accordingly, pursuant to R.C. 145.207(C), all employees of the Board of Commissioners, including its employees in SED, were required to participate in the ERIP from the outset. This also conforms with the definition of "employee" in the ERIP itself. (Rel. Ex. 6 at 3.)

22. Because Respondents excluded these employees, the ERIP, as drafted and being effectuated, violates R.C. 145.297(C).

23. The Declaratory Judgment Act allows courts of common pleas to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." R.C. 2721.02.

24. IT IS SO ORDERED.



MICHAEL P. DONNELLY, JUDGE

DATE: January 1/21, 2010

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By [Signature] Deputy



Baldwin's Ohio Revised Code Annotated Currentness

Title I. State Government

Chapter 145. Public Employees Retirement System (Refs & Annos)

Service Credit

→ **145.297 Retirement incentive plans; employing unit purchasing service credit for employees**

(A) As used in this section, "employing unit" means:

(1) A municipal corporation, agency of a municipal corporation designated by the legislative authority, park district, conservancy district, sanitary district, health district, township, department of a township designated by the board of township trustees, metropolitan housing authority, public library, county law library, union cemetery, joint hospital, or other political subdivision or unit of local government.

(2) With respect to state employees, any entity of the state including any department, agency, institution of higher education, board, bureau, commission, council, office, or administrative body or any part of such entity that is designated by the entity as an employing unit.

(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 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.

All terms of a retirement incentive plan shall be in writing.

A retirement incentive plan shall provide for purchase by the employing unit of service credit for eligible employees who elect to participate in the plan and for payment by the employing unit of the entire cost of the service credit purchased.

Every retirement incentive plan shall remain in effect for at least one year. The employing unit shall give employees at least thirty days' notice before terminating the plan.

Every retirement incentive plan shall include provisions for the timely and impartial resolution of grievances and disputes arising under the plan.

No employing unit shall have more than one retirement incentive plan in effect at any time.

(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 if the employee meets the following criteria:

(1) The employee is not any of the following:

(a) An elected official;

(b) A member of a board or commission;

(c) A person elected to serve a term of fixed length;

(d) A person appointed to serve a term of fixed length, other than a person appointed and employed by the person's employing unit.

(2) The employee is or will be eligible to retire under section 145.32, 145.34, 145.37, or division (A) of section 145.33 of the Revised Code on or before the date of termination of the retirement incentive plan. Service credit to be purchased for the employee under the retirement incentive plan shall be included in making such determination.

(3) The employee agrees to retire under section 145.32, 145.34, 145.37, or division (A) of section 145.33 of the Revised Code within ninety days after receiving notice from the public employees retirement system that service credit has been purchased for the employee under this section.

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. The percentage shall not be less than five per

cent of such employees. If participation is limited, employees with more total service credit have the right to elect to participate before employees with less total service credit. In the case of employees with the same total service credit, employees with a greater length of service with the employing unit have the right to elect to participate before employees with less service with the employing unit. Employees with less than eighteen months of service with the employing unit have the right to elect to participate only after all other eligible employees have been given the opportunity to elect to participate. For the purpose of determining which employees may participate in a plan, total service credit includes service credit purchased by the employee under this chapter after the date on which the plan is established.

A retirement incentive plan that limits participation may provide that an employee who does not notify the employing unit of the employee's decision to participate in the plan within a specified period of time will lose priority to participate in the plan ahead of other employees with less seniority. The time given to an employee to elect to participate ahead of other employees shall not be less than thirty days after the employee receives written notice that the employee may participate in the plan.

(D) A retirement incentive plan shall provide for purchase of the same amount of service credit for each participating employee, except that the employer may not purchase more service credit for any employee than the lesser of the following:

(1) Five years of service credit;

(2) An amount of service credit equal to one-fifth of the total service credited to the participant under this chapter, exclusive of service credit purchased under this section.

For each year of service credit purchased under this section, the employing unit shall pay an amount equal to the additional liability resulting from the purchase of that year of service credit, as determined by an actuary employed by the public employees retirement board.

(E) Upon the election by an eligible employee to participate in the retirement incentive plan, the employee and the employing unit shall agree upon a date for payment or contracting for payment in installments to the public employees retirement system of the cost of the service credit to be purchased. The employing unit shall submit to the public employees retirement system a written request for a determination of the cost of the service credit, and within forty-five days after receiving the request, the board shall give the employing unit written notice of the cost.

The employing unit shall pay or contract to pay in installments the cost of the service credit to be purchased to the public employees retirement system on the date agreed to by the employee and the employing unit. The payment shall be made in accordance with rules adopted by the public employees retirement board. The rules may provide for payment in installments and for crediting the purchased credit to the employee's account upon the employer's contracting to pay the cost in installments. The board shall notify the member when the member is credited with service purchased under this section. If the employee does not retire within ninety days after re-

ceiving notice that the employee has been credited with the purchased service credit, the system shall refund to the employing unit the amount paid for the service credit.

No payment made to the public employees retirement system under this section shall affect any payment required by section 145.48 of the Revised Code.

(F) For the purpose of determining whether the cost of a retirement incentive plan established by a county or county agency under this section is an allowable cost for the purpose of federal funding for any year, the cost shall be considered abnormal or mass severance pay only if fifteen per cent or more of the county or county agency's employees participate in the plan in that year.

Nothing in this division shall relieve a county or county agency from seeking federal approval for any early retirement incentive plan that uses federal dollars in accordance with federal law.

#### CREDIT(S)

(2009 S 79, eff. 10-6-09; 2008 H 420, eff. 12-30-08; 2001 H 157, eff. 2-1-02; 2000 H 628, eff. 9-21-00; 1989 H 317, eff. 10-10-89; 1986 H 706)

#### OHIO ADMINISTRATIVE CODE REFERENCES

Service credit established under retirement incentive plan, see OAC 145-2-42

#### LIBRARY REFERENCES

Officers and Public Employees  101.5(1).  
Westlaw Topic No. 283.  
C.J.S. Officers and Public Employees § 243-248.

#### RESEARCH REFERENCES

Encyclopedias

OH Jur. 3d Cvl. Servants & Pub. Officers & Employ. § 190, Retirement Incentive Plans.

Treatises and Practice Aids

Princehorn, Ohio Township Law § 12:23, Exceptions.

Princehorn, Ohio Township Law § 12:37, Retirement Incentive Plan.

## R.C. § 2506.01

Baldwin's Ohio Revised Code Annotated Currentness

Title XXV. Courts--Appellate

Chapter 2506. Appeals from Orders of Administrative Officers and Agencies (Refs & Annos)⇒ **2506.01 Appeal from decisions of any agency of any political subdivision**

(A) Except as otherwise provided in sections 2506.05 to 2506.08 of the Revised Code, and except as modified by this section and sections 2506.02 to 2506.04 of the Revised Code, every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code.

(B) The appeal provided in this section is in addition to any other remedy of appeal provided by law.

(C) As used in this chapter, "final order, adjudication, or decision" means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding.

## CREDIT(S)

(2006 H 23, eff. 8-17-06; 1986 H 412, eff. 3-17-87; 127 v 963)

## HISTORICAL AND STATUTORY NOTES

**Amendment Note:** 2006 H 23 rewrote this section, which prior thereto read:

"Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code, except as modified by this chapter.

"The appeal provided in this chapter is in addition to any other remedy of appeal provided by law.

"A 'final order, adjudication, or decision' means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding."

## CROSS REFERENCES

Abandoned service stations, procedures to control, appeals, see 3791.12

Abolition of land registration system, judicial review, see 5310.37

Administrative procedure, appeal by party adversely affected, see 119.12