

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., DOUGLAS :
D. BYERS :

CASE NO. 11-2069

APPELLANT,

V.

ON APPEAL FROM THE SECOND
DISTRICT COURT OF APPEALS

MIAMI COUNTY SHERIFF'S OFFICE :
AND CHARLES A. COX, SHERIFF :

CASE NO. CA 09-CA-42

APPELLEES.

**APPELLANT'S MOTION TO STAY APPEAL AND FOR REMAND TO THE COURT
OF APPEALS FOR CONSIDERATION OF APPELLANT'S MOTION FOR RELIEF
FROM JUDGMENT**

COUNSEL FOR APPELLANT:

Dwight D. Brannon
David D. Brannon
BRANNON & ASSOCIATES
130 West Second Street, Suite 900
Dayton, Ohio 45402
Telephone: (937) 228-2306
Facsimile: (937) 228-8475
E-Mail: davidbrannon@branlaw.com

COUNSEL FOR APPELLEE:

Eugene P. Nevada
Clemans, Nelson and Associates, Inc
6500 Emerald Parkway, Suite 100
Dublin, Ohio 43016

COUNSEL FOR APPELLEE:

Gary Nasal
201 W. Main Street – Safety Building
Troy, Ohio 45373

FILED
DEC 12 2011
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
DEC 12 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Now comes Relator-Appellant Douglas Byers, and respectfully requests this Honorable Supreme Court to stay the appeal at bar and remand this case to the Second District Court of Appeals so that the Court of Appeals may have jurisdiction to consider Relator-Appellant's Motion for Relief from Judgment filed pursuant to Ohio Rule of Civil Procedure 60(B). A memorandum in support follows.

Respectfully submitted,



David D. Brannon (0079755)
130 West Second Street, Suite 900
Dayton, Ohio 45402
Telephone: (937) 228-2306
Facsimile: (937) 228-8475
E-Mail: davidbrannon@branlaw.com
Attorneys for Appellants

MEMORANDUM

The Second District Court of Appeals in the case at bar granted Respondents the Miami County Sheriff's Office and Sheriff Charles A. Cox summary judgment on Plaintiff's Petition for a Writ of Mandamus in its Decision, Order and Entry dated November 15, 2011. Relator-Appellant timely filed a Notice of Appeal to this Supreme Court on December 12, 2011. On or about December 9, 2011 Relator-Appellant filed a Motion for Relief from Judgment with the Court of Appeals pursuant to Civil Rule 60(B). See Relator's Motion for Relief from Judgment attached as Exhibit 1. Because the Court of Appeals lacks jurisdiction to consider this motion while the case remains on appeal, Relator-Appellant respectfully requests this Honorable Supreme Court to stay the progress of this appeal and to remand this case to the Second District Court of Appeals for consideration of Relator-Appellant's motion.

I. The Court of Appeals lacks jurisdiction to consider Relator's 60(B) motion while the case is on appeal before this Supreme Court.

This Supreme Court has stated that “[w]hen a case has been appealed, the trial court retains all jurisdiction not inconsistent with the reviewing court’s jurisdiction to reverse, modify, or affirm the judgment.” *Howard v. Catholic Social Services of Cuyahoga County, Inc.*, 70 Ohio St.3d 141, 146, 1994-Ohio-219, 637 N.E.2d 890; *State ex rel. Rock v. School Employees Retirement Board*, 96 Ohio St.3d 206, 207, 2002-Ohio-3957, 772 N.E.2d 1197, ¶8. The Supreme Court has also stated “we have expressly held that an appeal divests trial courts of jurisdiction to consider Civ.R. 60(B) motions for relief from judgment.” *Howard*, 70 Ohio St.3d at 147; citing *State ex rel. East Manufacturing Corp. v. Ohio Civil Rights Commission* (1992), 63 Ohio St.3d 179, 181, 586 N.E.2d 105, 107. See also *Johnson v. Eversole Builders, Inc.* (1996), 5th Dist. No. 96 CA 13, 1996 Ohio App. LEXIS 3761. Thus it is clear that the Court of Appeals lacks jurisdiction to consider Relator-Appellant’s Civ.R. 60(B) motion while the case remains on appeal.

II. It is within the authority of the Appellate Courts to remand an issue to the Trial Court for consideration of a Civ. R. 60(B) motion.

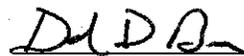
This Supreme Court has also stated that while a Trial Court lacks jurisdiction to consider a Civ.R. 60(B) motion while the claim to which that motion pertains is on appeal, the Courts of Appeals possess the power and authority to remand a claim to the Trial Court for consideration of such a motion. The Court stated “[j]urisdiction may be conferred on the trial court only through an order by the reviewing court remanding the matter for consideration of the Civ.R. 60(B) motion.” *Howard*, 70 Ohio St.3d at 147. Indeed, the Ohio Courts of Appeals have done exactly this. *Johnson v. Eversole Builders, Inc.*, supra, *1, *Sony Electronics, Inc. v. Grass Valley Group, Inc.*, 1st Dist. No. C-010133, C-010423; 2002-Ohio-1614. As stated by the Tenth

District Court of Appeals, “the Ohio Supreme Court recognized as appropriate the procedure followed in *Sony Electronics* when it stated that ‘ * * * an appeal divests trial courts of jurisdiction to consider Civ.R. 60(B) motions * * *. Jurisdiction may be conferred on the trial court only through an order by the reviewing court remanding the matter for consideration of the Civ.R. 60(B) motion.”” *Stuller v. Price*, 10th Dist. No. 02AP-29, No. 02AP-267, 2003-Ohio-583, ¶10, quoting *Howard, supra*.

III. Conclusion.

The Second District Court of Appeals was divested of jurisdiction to consider Relator-Appellant’s Motion for Relief from Judgment pursuant to Civ.R. 60(B) by Relator-Appellant’s appeal of this matter; but under this Supreme Court’s decision in *Howard v. Catholic Social Services*, this Supreme Court possesses the authority to remand Relator-Appellant’s case to the Court of Appeals for consideration of Relator-Appellant’s Civ.R. 60(B) motion. Thus Relator-Appellant respectfully requests this Honorable Supreme Court to stay this appeal and to remand Relator-Appellant’s case to the Second District Court of Appeals for consideration of Relator-Appellant’s Motion for Relief from Judgment pursuant to Civ.R. 60(B).

Respectfully submitted,



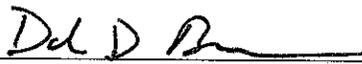
David D. Brannon (0079755)
130 West Second Street, Suite 900
Dayton, Ohio 45402
Telephone: (937) 228-2306
Facsimile: (937) 228-8475
E-Mail: davidbrannon@branlaw.com
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following this 9th day of December, 2011, by regular U.S. Mail.

Eugene P. Nevada
Clemans, Nelson and Associates, Inc
6500 Emerald Parkway, Suite 100
Dublin, Ohio 43016

Gary Nasal
201 W. Main Street – Safety Building
Troy, Ohio 45373



David D. Brammon (0079755)

IN THE COURT OF APPEALS
SECOND APPELLATE DISTRICT OF OHIO
MIAMI COUNTY

STATE OF OHIO ex rel.,
DOUGLAS D. BYERS,

*

Case No. 09-CA-42

Relator,

*

MOTION FOR RELIEF FROM
JUDGMENT PURSUANT TO
CIV.R. 60(B)

*

vs.

*

MIAMI COUNTY SHERIFF'S
OFFICE, et al.,

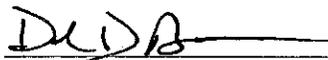
*

Respondents.

*

Relator, Douglas D. Byers, by and through counsel, hereby submits his Motion for Relief from Judgment Pursuant to Civ.R. 60(B) regarding this Court's Decision and Final Judgment Entry dated November 15, 2011. A memorandum in support follows.

Respectfully submitted,



Dwight D. Brannon (0021657)
David D. Brannon (0079755)
Attorney for Relator
BRANNON & ASSOCIATES
130 W. Second St. Suite 900
Dayton, OH 45402
Telephone: (937) 228-2306
Facsimile: (937) 228-8475
dbrannon@branlaw.com

EXHIBIT

tabbies®

MEMORANDUM

I. INTRODUCTION AND FACTS

This action arises from Realtor Douglas Byers' petition for writ of mandamus seeking reinstatement to his position as a Deputy Sheriff with the Miami County Sheriff's Office ("MCSO"), filed on November 10, 2009. After Respondents filed an answer, Realtor filed a Motion for Summary Judgment on or about July 9, 2010. Respondents Miami County Sheriff's Office, et al. Respondents filed a Memorandum in Opposition to Realtor's Motion for Summary Judgment and Memorandum in Support of Respondents' Cross Motion for Summary Judgment on April 19, 2011. Respondents also filed a Cross Motion for Summary Judgment on April 19, 2011, which was identical to their Memorandum in Opposition to Relator's Motion for Summary Judgment. The parties stipulated that discovery closed on April 1, 2011. Depo. Doug Byers, p. 69 (Mar. 15, 2011).

On November 15, 2011, this Court issued a Decision and Final Judgment Entry ("Decision") indicating that Relator had an adequate legal remedy at law and therefore denied Relator's Motion for Summary Judgment while granting MCSO's Cross-Motion for Summary Judgment.

It is evident that this Court misinterpreted the facts and law placed before it; and admittedly, the presentation of Relator's case was somewhat convoluted because of the length of time from the filing of Relator's initial Petition for a writ of mandamus to the time at which MCSO finally responded. In that period (over 1.5 years), Relator was actually "reinstated as a deputy sheriff in December 2010, starting a new seniority date." Decision, p. 2. Although Byers' original purpose in filing his writ of mandamus was reinstatement and Byers was reinstated, he was not "made whole" by Defendant MCSO and sought "backpay and benefits for

the time he was not permitted to work, attorney fees, and costs.” *Id.* at 3. This Court determined that Byers had a plain and adequate remedy in the ordinary course of law pursuant to R.C. 2731.05 because he could have pursued his claims with the State Personnel Board of Review (“SPBR”). *Id.* at 4.

The evidence before this Court specifically states that Byers has no right to pursue his claim(s) with the SPBR. In fact, Byers specifically waived his right to pursue claims with the SPBR. The Collective Bargaining Agreement between MCSO and the Federal Order of Police, Elliott/Morris Lodge No. 154, Ohio Labor Council, Inc, which governed Byers’ agreement with the MCSO, is attached as Exhibit 2 to Respondent’s Appendix filed April 19, 2011). That Agreement states:

ARTICLE 33
APPLICABILITY OF OHIO REVISED CODE

Section 33.1. The parties hereby agree that any subject or benefit addressed specifically, in whole or in part, in this Agreement shall supersede and replace any provisions contained in Ohio Civil Service laws to the contrary.

Section 33.2. It is expressly understood that The Ohio Department of Administrative Services and *The Ohio State Personnel Board of Review shall have no authority or jurisdiction as it relates to any matter addressed in whole or in part in this Agreement. Furthermore, the Parties hereby declare that it is their intent to waive the applicability of Sections 124.01 through 124.56 and Sections 325.19, 9.44 and 4111.03 of the Ohio Revised Code to the provisions contained herein. Emphasis added.*

This Court based its entire decision (that Byers failed to exhaust his remedies) on R.C. 124.34 because the Ohio Revised Code gives a classified civil servant the right to appeal an employment matter to the SPBR. Byers, and the other union members waived this right per the CBA. As discussed below, Byers asks this Court to reconsider its decision because (1) he has no right to appeal to the SPBR and (2) his writ of mandamus is precisely the appropriate vehicle for seeking back pay and other benefits despite his “reinstatement.”

II. LAW & ARGUMENT

A. General law regarding Civ.R. 60(B) motions.

In mandamus actions, appellate courts that are asked to reconsider issues may treat such requests as Civ.R. 60(B) motions for relief from judgment. *State ex. Re. Albourque v. Terry* (2011), 128 Ohio St.3d 505, 947 N.E.2d 169. In the case at bar, Relator Douglas Byers is entitled to relief from judgment pursuant to Civ. R. 60(B). The rule provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect...(5) any other reason justifying relief from judgment...The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.

The Ohio Supreme Court has set out three elements essential to prevail on a motion made under Civ. R. 60(B). First, the movant must demonstrate that the motion was made within a reasonable time, or where grounds for relief are under Civ. R. 60(B)(1-3), within one year of the judgment, order, or proceeding. *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, (1976), 47 Ohio St.2d 146. Second, the movant must demonstrate that he is entitled to relief under one of the grounds stated in Civ. R. 60(B). *Id.* Lastly, the movant must have a meritorious claim to present if relief is granted. *Id.*

Relator satisfies all elements of the Rule. First, this motion was filed well within a year of the judgment at issue in this Motion. Additionally, Relator is entitled to relief under Civ. R. 60(B)(1), as this Court inadvertently or mistakenly failed take the CBA into account, as it expressly prohibits Relator from seeking relief through the SPBR. Finally, Relator does in fact have a meritorious claim through his writ of mandamus as discussed *infra*.

B. Relator exhausted his remedies, as the State Personnel Board of Review was not an option for his claims, thus the Court's decision is based on a mistake under Civ.R. 60(B)(1).

This Court held that an appeal was required to the SPBR before filing a writ of mandamus action, therefore, Relator failed to exhaust his remedies. Decision, p. 4. However, as evidenced by Relator's CBA, Relator expressly waived his right to appeal any issues to the SPBR. See Sections 33.1 and 33.2, attached to Exhibit 2 of Respondent's Appendix, filed April 19, 2011. The CBA states, "[t]he Ohio State Personnel Board of Review shall have no authority or jurisdiction as it relates to any matter addressed in whole or in part in this Agreement. Furthermore, the Parties hereby declare that it is their intent to waive the applicability of Sections 124.01 through 124.56 and Sections 325.19, 9.44 and 4111.03 of the Ohio Revised Code."

The Ohio Revised Code expressly states that the SPBR has no jurisdiction where an agreement is made to "grieve" matters in other venues. R.C. 4117.10 states:

An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement. If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure.

As has been explained in Section II(D)(3) immediately below, Relator exhausted his remedies through his grievance procedure, the result of which he had no right of appeal to the SPBR, as this Court mistakenly held. This Court, under Civ.R. 60(B) failed to recognize that the SPBR had no jurisdiction in this matter per the CBA. Relator is entitled to relief from the judgment dismissing his mandamus action because this provision was ignored.

C. Relator's writ of mandamus is a "meritorious" claim.

The final element under Civ.R. 60(B) is to show that Relator has a "meritorious" claim if relief is granted. As Relator explained in his Summary Judgment Motion and subsequent Reply incorporated herein, Relator has a meritorious claim for his writ of mandamus. The criteria for issuing a writ of mandamus are well-established. To prevail, the petitioner must demonstrate: (1) that he has a clear legal right to the relief prayed for; (2) that Respondents are under a clear legal duty to perform the act requested; and, (3) that he has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.*, 117 Ohio St.3d 441, 2008-Ohio-1261, 884 N.E.2d 589, ¶ 11, citing *State ex rel. Westbrook v. Ohio Civ. Rights Comm.* (1985), 17 Ohio St.3d 215, 17 OBR 449, 478 N.E. 2d 799.

1. Relator had a clear statutory right to back pay.

"It is axiomatic that a '[a] wrongfully excluded public employee may obtain back pay and related benefits in a mandamus action following reinstatement or, in some cases, may obtain reinstatement and back pay and related benefits in the same mandamus action.'" *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.* (2002), 97 Ohio St.3d 269 quoting *Boggs* (2001), 93 Ohio St.3d 558, 563, 775 N.E.2d 339.

When a public employee becomes retired due to disability, pursuant to the statutory provisions regulating PERS, that person retains their PERS membership status and "shall be considered on leave of absence from employment for the first five years following the effective date of a disability benefit..." R.C. 145.362. Thus, during this five-year period, the benefit recipient retains nothing less than an entitlement to reinstatement if he is later judged to no longer be disabled. That is, if the PERS Board determines that the individual is no longer physically or mentally incapable of resuming service with the employer, the employer "*shall*

restore the recipient to the recipient's previous position and salary or to a position and salary similar thereto, unless the recipient was dismissed or resigned in lieu of dismissal for dishonesty, misfeasance, malfeasance, or conviction of a felony." R.C. 145.362 (emphasis added). Moreover, if the disability recipient returns to work for two years after his disability is resolved, PERS will award credit to the employee for the duration of his leave. *Id.* Contrary to Respondents' allegations, Relator did not quit, retire or resign, nor has he been terminated from his employment. Rather, according to the PERS statutory framework, Relator was on a leave of absence, effective August 1, 2008, and had a statutorily-guaranteed entitlement to reinstatement upon recovery.

The determination of the Ohio Public Employees Retirement System ("OPERS") of March 18, 2009, directed to Respondents, stating:

Please be advised that the disability benefit for Douglas D. Byers, through the Ohio Public Employees Retirement System will be terminated by the OPERS Board of Trustees, effective June 30, 2009

Section 145.362 of the Ohio Revised Code states that a disability benefit recipient retains membership in the retirement system and shall be considered on leave of absence from his/her position of employment during the first five years following the effective date of the disability benefit, notwithstanding any contrary provisions in Chapter 145. The above-named disability benefit recipient's effective date was August 1, 2008.

Section 145.362 further provides that if the retirement board determines the recipient is no longer physically or mentally incapable of resuming service with the public employer, the payment of the disability allowance shall be terminated not later than three months after the retirement board's determination, or upon the recipient's employment as a public employee. If the disability benefit recipient's leave of absence, as provided in R.C. 145.362, is not expired, the retirement board shall certify to recipient's last employer before the recipient was found disabled that the recipient is no longer physically and mentally incapable of resuming the same or similar service as that service from which the recipient was found disabled. Upon the retirement board providing certification, the public employer shall restore the recipient to the recipient's previous position and salary, or to a similar position and salary similar thereto, unless the recipient was dismissed or

resigned in lieu of dismissal for dishonesty, misfeasance, malfeasance, or a conviction of a felony.

The recipient's leave of absence *has not* expired; therefore, the board is certifying to you, as the last public employer, that the recipient is no longer physically or mentally incapable of resuming the same or similar service...

Ex. 3, attached to Relator's Mtn. for Summ. Judg. Although Relator was actually reinstated as a deputy sheriff in December 2010, as this Court recognizes, he was reinstated without back pay and his original seniority. Decision, p. 2. *State ex rel. Boggs v. Springfield Local School Dist.Bd. of Edn.* (2001), 93 Ohio St.3d 558, 563, 775 N.E.2d 339, holds that even after an employee is reinstated, he or she is entitled to back pay and related benefits in a mandamus action. Respondents, having finally recognized a right to reinstatement (despite a 1.5 year delay), are still required to pay Relator back pay and other damages. See Section II(E) *infra*, discussing damages.

2. Respondents had a clear statutory duty to reinstate Relator *with* back pay.

Pursuant to OAC 123:1-30-04(B), when an employee makes a request for reinstatement from a disability separation, the request must be accompanied by "substantial, credible medical evidence that the employee is once again capable of performing the employee's essential job duties. Upon receiving this evidence, the appointing authority shall either reinstate the employee or require the employee to submit to a medical or psychological examination in accordance with rule 123:1-30-03 of the Administrative Code."

Here, Relator and PERS provided Respondents with "credible medical evidence" of Relator's fitness to return to duty. As explained above, on March 11, 2009, PERS provided Respondents notice of the Board's upcoming March 18, 2009 meeting. Exhibit 2, attached to Relator's Mtn. for Summ. Judg. Included in that notice was a copy of Relator's medical

documentation, including Dr. Reynolds' medical report certifying Relator's fitness for duty. At the request of PERS, Dr. Reynolds conducted an examination of Relator and rendered his opinion as to Relator's ability to perform the duties of his position. Although Dr. Reynolds was not the doctor that evaluated Relator prior to his disability leave, Dr. Reynolds was familiar with Relator's medical history, familiar with the duties of his position and conducted his own in-person examination of Relator. Exhibit 8, attached to Relators' Mtn. for Summ. Judg. Thus, Dr. Reynolds' detailed report submitted to Respondents was more than sufficient to satisfy the "substantial credible medical evidence" requirement of OAC 123:1-30-04. Indeed, PERS based its reinstatement determination on such evidence. OAC 123:1-30-04's "Right to reinstatement; rights of appeal" provisions state:

(H) If the employee has been granted disability benefits by a state retirement system, the requirements of this rule shall apply for up to five years, except that a licensed practitioner shall be appointed by the public employees' retirement board and application for reinstatement shall not be filed after the date of service eligibility retirement. Employers shall restore an employee found to be physically and mentally capable of resuming service under section 145.362 of the Revised Code, but may request the employee to submit to a medical or psychological examination, conducted in accordance with rule 123: 1-30-03 of the Administrative Code, prior to such restoration.

Grossly abusing their discretion, Respondents refused to reinstate Relator and instead scheduled him to undergo a second examination on March 5, 2009 with Dr. Randolph, and a third examination on April 21, 2009 with Dr. Marzella. Dr. Randolph's report, although inconclusive, refers to the other medical professionals that played a role in making the decision that Relator should return to work. Exhibit 9, attached to Relator's Mtn. for Summ. Judg. On the other hand, Dr. Marzella concluded in his report that Relator could return to work. Exhibit 10, attached to Relator's Mtn. for Summ. Judg. In accordance with OAC 123:1-30-04, Relator's second and third opinions provided more than sufficient medical evidence of his fitness. Rather than

reinstating Relator, on May 5, 2009, Respondents questioned Dr. Marzella's professional opinion with a terse letter:

Are you willing to bet your professional career on his ability to perform this very dangerous job prior to his completion of the additional psychotherapy?

Our question, at this point, is expressed in a 'binary logic' – Can Mr. Byers safely perform all of the essential functions of his job at this time, without posing ANY risk to himself or others? Yes or No?

Exhibit 11, attached to Relator's Mtn. for Summ. Judg. In response, Dr. Marzella concisely states:

He is not currently experiencing any emotional sequelae resultant from the critical incident in 2004. I was not able to establish any symptoms that would qualify him for a diagnosis of [PTSD].

Exhibit 12, attached to Relator's Mtn. for Summ. Judg. Furthermore, based on his thirty-five years of experience in evaluating and assessing law enforcement officers, Dr. Marzella states:

I do think should you decide to return Deputy Byers to work that he could participate in psychotherapy concurrently to returning to work. Unfortunately the principles of binary logic do not apply here. No one can guarantee Officer Byers returning to work without imposing ANY risk to him or others. The probability is Mr. Byers is able to return to work and perform all the essential functions of his job. He is responsible for all of his actions personally and professionally.

Id. Despite the fact that Dr. Marzella clearly conveyed to Respondents that Relator was capable of performing his duties, Respondents refused to reinstate Relator until December 20, 2010. Note that PERS sent their letter of March 18, 2009 telling Respondents that Relator was fit for duty and shall be reinstated. However, Relator was not reinstated for 1 year, 9 months, and 2 days. And although Relator was finally reinstated, he was not provided seniority, back pay, and other benefits, which was the reason this action was filed.

3. Relator has no adequate remedy at law.

As Relator explained in his Complaint, Relator had no recourse but a mandamus action in this Court. The Complaint states:

24. As of July 7, 2009, Respondent had not returned Relator to work. As a result, pursuant to the Agreement, a Step 4 arbitration hearing was scheduled for September 29, 2009 in regards to Relator's April 29, 2009 grievance.
25. In a letter Relator received on or about September 21, 2009, attached as Exhibit 3, Respondent raised several arbitrability issues, which he argued should be bifurcated from the merits of Relator's grievance. According to Respondents' letter, an arbitration hearing was not a necessary or proper because Relator's grievance is "based upon law external to the [Agreement] and inarbitrable under Article 6.1."
26. As a result of the discrepancies contained in Article 6 of the Agreement, Relator's arbitration hearing has been postponed indefinitely and MCSO has failed to return Relator to active duty. Compl., ¶¶24-26.

Respondents refused to arbitrate back pay and reinstatement, although CBA exclusively removed jurisdiction from the SPBR. That left Relator with no option, but to file a mandamus action. Despite his "reinstatement," Relator is owed back pay and other benefits. Mandamus is the proper remedy for back pay after reinstatement. Thus, under Civ.R. 60(B), this Court failed to recognize that the SPBR was not an option for Relator.

D. Even though Relator was "reinstated," he was not compensated with the back pay and related benefits to which he is entitled to.

In *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, the Ohio Supreme Court held that even after an employee is reinstated, he or she is entitled to back pay and related benefits in a mandamus action.

1. Realtor's Damages are calculated below with reasonable certainty.

The amount recoverable by a public employee entitled to reinstatement is that amount which the employee would have received had he or she not been wrongfully dismissed. *Boggs*, 93 Ohio St.3d 558. However, to be entitled to back pay, the employee must be able to establish the amount due with "reasonable certainty." See *State ex rel. Zeller v. Risingsun* (2003), 125 Ohio Misc.2d 36, 797 N.E.2d 1053. In back pay cases, the necessary "certainty" requires only a readily ascertainable dollar figure upon reinstatement. *Boggs*, 93 Ohio St.3d at 565. As explained below, Relator can establish with certainty the damages to which he is entitled. *Bemmes v. Pub. Employees Retirement Sys. of Ohio* (1995), 102 Ohio App.3d 782, 789, 658 N.E.2d 31; *Monaghan v. Richley* (1972), 32 Ohio St.2d 190, 291 N.E.2d 462.

a. Lost Wages

The amount of back pay to which Relator is entitled is readily ascertainable. Relator's disability separation was effective July 11, 2008. At the time of his separation, he was paid \$24.85 an hour for a forty hour work week, or \$53,676.00 per year. Exhibit 13, attached to Relator's Mtn. for Summ. Judg. In addition to his base salary, Relator earned additional income from working overtime and extra details. On average, Relator earned approximately \$6,000.00 per year, or \$37.28 for each hour of overtime worked, and \$2,500.00 per year, or \$30.00 for each hour that he worked extra detail. *Id.* Therefore, prior to his disability separation, Relator earned approximately \$62,176.00 per year, or \$170.35 per day.

Relator is owed back pay beginning March 18, 2009, the date PERS notified Respondents of their termination of Relator's disability benefits and ordered Relator's reinstatement. From March 18, 2009 to June 30, 2009, Relator's loss of income is reduced by his receipt of 45% of his salary for disability pension. This, however, is not a set-off or a collateral source. Therefore, from March 18 to June 30, 2009, Relator's lost back pay is \$170.35 times 105 days

($170.35 \times 105 = \$17,886.23$) minus \$8,048.81, reflecting his receipt of disability pension ($17,886.23 \times 45\% = \$8,048.81$), for a total of \$9,837.42. Thereafter, from July 1, 2009 to December 20, 2010 (his return to work date), Relator Byers' lost back pay is \$170.81 per day times 537 days, for a total of \$91,724.97 (without the additional overtime). In addition, Relator Byers would have made an additional \$8,827.40, based on his overtime of \$6,000 per year (537 days divided by 365 days per year = 1.471 years). Thus $1.471 \times \$6,000 = \$8,827.40$.

From March 18, 2009 through December 20, 2010, Relator Byers lost a combined total of \$100,552.37 (salary and overtime) in back wages that have been determined with certainty as a matter of law.

b. Related Benefits

In addition to back pay, Relator has a right to all entitlements of his position, including fringe benefits, seniority and other emoluments of office. R.C. 145.362. Additionally, Relator has incurred expenses such as medical bills and loans, that he would not have incurred but for Respondents' refusal to reinstate him.

Lost Pension Benefits:

Relator is entitled to have the MCSO bear the cost of reinstating his pension benefits to where they would have been had Byers never been denied reinstatement.¹ Therefore, Mr. Byers requests that MCSO pay the cost of buying back his pension benefits, equal to what those benefits would have been if Byers had not been wrongfully denied reinstatement and his salary had been increased to the corrected rate on the date of such denial. Those numbers are not available to the undersigned and will need to be worked out.

¹ As per *Bohannon v. City of Cincinnati*, 2003-Ohio-2334, when a public employee has been wrongfully dismissed and the employer is required to reinstate the employee with full benefits, the employer is required to bear the cost of purchasing service credit necessary to put the employee in the same position he would have been had he not been dismissed. Thus MCSO is required to bear the cost of purchasing service credit to reinstate Mr. Byers' pension benefits.

Medical Benefits:

Relator demands that MCSO compensate him for monies spent providing health care and other benefits for himself and his family, which would have been provided by MCSO, and/or a health insurance provider provided by MCSO, had he not been denied reinstatement. He has provided medical bills in the amount of \$2,560.25, which would have been covered by his insurance had he been employed. Exhibit 1, attached to Realtor's Mtn. for Summ. Judg.

Lost vacation and sick days:

Relator requests that MCSO compensate him for vacation and sick days that he accumulated prior to the time of his disability separation and the additional credits he would have accumulated from March 18, 2009 to December 20, 2010. Vacation/Sick Days: \$10,000.00.

Seniority:

Relator demands that his seniority be reinstated to his original date of hire, September 22, 2000, with pay adjustments if applicable, from March 18, 2009, the date Mr. Byers should have been returned to work.

2. Attorney's Fees

Additionally, attorney's fee and costs may be awarded where a reinstated public employee shows that the employer acted in bad faith. *State ex rel. Rose v. James* (1991), 57 Ohio St.3d 14, 565 N.E.2d 547. As explained in Relator's Motion for Summary Judgment and subsequent Replies, incorporated herein, this action was necessitated by the Respondents' continuing bad faith refusal to reinstate Relator. When Relator *finally* was reinstated, Respondents refused to pay back pay and related benefits. Essentially, Respondents argued points that are irrational and unlawful. For example, Relator never "quit" his job. Another

argument evidencing malicious intent of Respondents revolves around the fact that Relator never was permitted to arbitrate his grievance *because of Respondents*, despite Respondents' argument that he failed to exhaust remedies. Moreover, arguing there is "no credible medical evidence" that Relator's disability has abated is extremely problematic. Sheriff Cox personally questioned the medical findings, and issued threats of liability to Relator's doctors after they found Relator able to return to duty. The thrust of Relator's bad faith claim is that Respondents knew Byers was entitled to reinstatement (hence his subsequent reinstatement), yet Respondents refused to do so for up to a year-and-a-half later. Now, even though Relator has his job back, it is without full seniority, back pay, and attorney fees.

Relator cannot be made completely whole unless he recovers reasonable attorney's fees incurred in defending his interests in litigation against Respondents. Even if Relator recovers fully for his damages, he will nonetheless be responsible for attorney's fees and other expenses in pursuing this lawsuit. Unless Relator is permitted to recover those expenses, as the law in Ohio permits under these circumstances, he cannot be made whole.

IV. CONCLUSION

For the foregoing reasons, Relator asks that this Court amend its prior Decision that essentially states Relator had the ability to go to the SPBR to exhaust his remedies prior to commencing this mandamus action, as clearly Byers was contractually excluded from SPBR remedies per his CBA. The Respondents' subsequent reinstatement of Relator *without back pay and other benefits* is evidence that Respondents knew Relator would be returned to duty. This Court may either stop this charade at this point, or it can make Relator pursue another mandamus action shortly. Regardless, interest is accruing against Respondents on monies owed. For the

sake of judicial economy and to save Respondents money, Relator should be awarded back pay and other benefits at this juncture.

Respectfully submitted,



Dwight D. Brannon (0021657)

David D. Brannon (0079755)

Attorneys for Relator

BRANNON & ASSOCIATES

130 W. Second St., Suite 900

Dayton, OH 45402

Telephone: (937) 228-2306

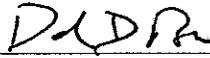
Facsimile: (937) 228-8475

E-Mail: dbrannon@branlaw.com



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on **Eugene P. Nevada**, *Clemans, Nelson and Associates, Inc.*, 6500 Emerald Parkway, Suite 100, Dublin, Ohio 43016-6235, by regular U.S. Mail this 9th day of December, 2011.



David D. Brannon

