ORIGINAL

In the Supreme Court of Ohio

STATE OF OHIO EX REL. JOHN NESE, DONALD WILLIAMS, AND CATHERINE MILES Appellants -vs- STATE TEACHERS RETIREMENT SYSTEM BOARD OF OHIO AND JEFFERSON COUNTY EDUCATIONAL SERVICE CENTER GOVERNING BOARD Appellees	)	Supreme Court of Ohio Case No. 12-0251 On Appeal from the Court of Appeals of Ohio, Tenth Appellate District Case N0. 09AP-1161

Notice of Appeal

IRA J. MIRKIN (0014395)
STANLEY J. OKUSEWSKY, III (0076130)
CHARLES W. OLDFIELD (0071656)
(Counsel of Record)
GREEN HAINES SGAMBATI CO., L.P.A.
P.O. Box 849
Youngstown, Ohio 44501
330/743-5101
330/743-3451 (fax)
imirkin@green-haines.com
sokusewsky@green-haines.com
coldfield@green-haines.com

Counsel for Appellants

MICHAEL DEWINE, Attorney General
JOHN E. PATTERSON, Assistant Attorney General
CATHERINE J. CALKO, Assistant Attorney General
30 E. Broad Street, 26th Floor
Columbus, Ohio 43215

and

R. BRENT MINNEY
PEPPLE & WAGGONER, LTD.
5005 Rockside Road, Suite 260
Cleveland, Ohio 44131

Counsel for Appellees

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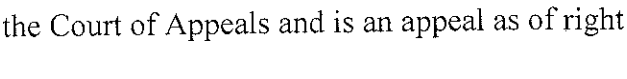
Appellants-Relators, John Nese, Donald Williams, and Catherine Miles, appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals of Ohio, Tenth Appellate District, entered in Case No. 09AP-1161, on December 30, 2011 and decision entered on December 29, 2011. This case originated in the Court of Appeals and is an appeal as of right under Sup.Ct. Prac. R. 2.1(A)(1).

Respectfully submitted,

Green Haines Sgambati Co., L.P.A.



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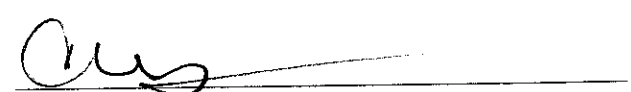
CHARLES W. OLDFIELD (0071656)
(Counsel of Record)
P.O. Box 849
Youngstown, Ohio 44501
330/743-5101
330/743-3451 (fax)
imirkin@green-haines.com
sokusewsky@green-haines.com
coldfield@green-haines.com

Counsel for Appellants

Certificate of Service

On February 9, 2012, a copy of the foregoing was served by regular U.S. Mail upon Michael DeWine, Attorney General, John E. Patterson, Assistant Attorney General, and Catherine J. Calko, Assistant Attorney General, 30 E. Broad Street, 26th Floor, Columbus, Ohio 43215; and R. Brent Minney, Pepple & Waggoner, Ltd., 5005 Rockside Road, Suite 260, Cleveland, Ohio 44131.



IRA J. MIRKIN (0014395)
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CHARLES W. OLDFIELD (0071656)
(Counsel of Record)

Counsel for Appellants

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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State of Ohio ex rel. John Nese, Donald Williams and Catherine Miles,

Relators,

v.

State Teachers Retirement System Board of Ohio and Jefferson County Educational Service Center Governing Board,

Respondents.

No. 09AP-1161

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 29, 2011, the first and second objections to the decision of the magistrate are sustained and the third objection is overruled. The findings of fact of the magistrate are approved and adopted by the court as its own, however we do not adopt the magistrate's conclusions of law, but, consistent with this decision, we conclude STRB did not abuse its discretion in concluding relators are independent contractors, and it is the judgment and order of this court that the requested writ of mandamus is denied. Costs shall be assessed against relators.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

Judith French

Judge Judith L. French

Judge Susan Brown

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. John Nese, Donald Williams and Catherine Miles,

Relators,

v.

State Teachers Retirement System Board of Ohio and Jefferson County Educational Service Center Governing Board,

Respondents.

No. 09AP-1161

(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 29, 2011

Green Haines Sgambati Co., L.P.A., Stanley J. Okusewsky, III, and *Ira J. Mirkin*, for relators.

Michael DeWine, Attorney General, and *John E. Patterson* and *Catherine J. Calko,* for respondent State Teachers Retirement Board of Ohio.

Peeple & Waggoner, Ltd., and *R. Brent Minney,* for respondent Jefferson County Educational Service Center Governing Board.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relators, John Nese, Donald Williams, and Catherine Miles, commenced this original action requesting a writ of mandamus that orders respondent State Teachers Retirement Board of Ohio ("STRB") to accept employer and employee contributions to the retirement fund based upon relators' compensation earned from employment with respondent Jefferson County Educational Service Center Governing Board ("JCESC") for teaching service with the Virtual Learning Academy ("VLA"). Relators further seek a writ of mandamus that orders respondent JCESC to make employer contributions to STRB based upon relators' compensation earned from employment with JCESC with the VLA.

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued the appended decision, including findings of fact and conclusions of law. The magistrate determined STRB abused its discretion in concluding relators were independent contractors and thus not entitled to contribute to STRB for the compensation earned from their employment with JCESC and the VLA.

{¶3} Respondent STRB filed objections to the magistrate's conclusions of law:

> [1.] The Magistrate erred in substituting judgment for that of the Board in interpreting STRS statutes.
>
> [2.] The Magistrate erred in applying the abuse of discretion standard of review.
>
> [3.] Failure to join those individuals similarly situated prejudiced STRB.

{¶4} Because STRB's first and second objections are interrelated, we address them jointly. Together they assert that the magistrate improperly applied the abuse of discretion standard, instead substituting his opinion for that of STRB in determining whether relators were independent contractors. According to STRB, the record contains "some evidence" to support its finding that relators do not meet the definition of teachers under R.C. 3307.01(B)(4).

{¶5} R.C. 3307.01(B) grants to STRB, "[i]n all cases of doubt," the authority to "determine whether any person is a teacher, and its decision shall be final." While construing identical language granting to the public employees retirement system ("PERS") board the power to decide whether an individual is an "employee" for purposes of PERS membership, the Supreme Court of Ohio confirmed that, to be entitled to mandamus, an applicant "must establish that the board abused its discretion by denying her request for PERS service credit. * * * The board abused its discretion if it acted in an unreasonable, arbitrary, or unconscionable manner." *State ex rel. Mallory v. Pub. Emps. Retirement Sys.*, 82 Ohio St.3d 235, 239, 1998-Ohio-380 (citations omitted). See also *State ex rel. State Teachers Retirement Bd. v. W. Geauga Local School Dist. Bd. of Edn.* (1998), 131 Ohio App.3d 150, 161 (stating "that STRB's decision as to whether someone is a teacher under R.C. 3307.01(B) is subject to review by the judiciary under an abuse of discretion standard"), appeal dismissed, 87 Ohio St.3d 1220, 1999-Ohio-15. This court has declined to find an abuse of discretion where there is some evidence to support a

board's decision. *State ex rel. Curtin v. Ohio Pub. Emps. Retirement Sys.*, 10th Dist. No. 09AP-801, 2011-Ohio-2536, ¶19.

{¶6} STRB did not abuse its discretion by determining that relators are independent contractors because there is some evidence to support its decision. Relators determine their own workplace and work hours. They do not have contracts for ongoing employment. Rather, they are paid on a per-student, per-credit-hour basis. They do not receive fringe benefits, and two of the relators received at least one 1099 form for tax purposes. All of this evidence supports STRB's conclusion that relators are independent contractors.

{¶7} To be sure, there is evidence to support a contrary conclusion. JCESC has the ability and obligation to monitor relators, and there is evidence in the record to show that periodic evaluations are performed. JCESC has set standards, including, for example, a requirement that each teacher log into the system daily. And, while two of the relators received at least one 1099 form, all three of the relators received W-2's for at least some of the tax years. From this evidence, STRB might have concluded that relators are not independent contractors.

{¶8} In similar cases, this court has declined to substitute our judgment for that of a retirement-system board charged with making the determination. For example, we denied a request for mandamus where the PERS board determined that a part-time magistrate was an independent contractor, and the Supreme Court of Ohio affirmed. See *State ex rel. Schaengold v. Ohio Pub. Emps. Retirement Sys.*, 114 Ohio St.3d 147, 2007-

Ohio-3760. We also denied a request for mandamus where the PERS board determined that an individual who hauled gravel for a township was an independent contractor where the individual set his own hours, used his own equipment, and did not receive fringe benefits, and the township had reported the majority of his income on a 1099 form. *State ex rel. Peyton v. Schumacher* (Nov. 16, 2000), 10th Dist. No. 00AP-78.

{¶9} In light of that authority, we sustain STRB's first and second objections to the magistrate's decision.

{¶10} STRB's third objection contends the magistrate erred in refusing to join indispensible parties to this action. STRB suggests that the absence of such parties prejudiced it because not only was certain information unavailable to it, but their absence leaves STRB subject to "substantial risk of incurring double, multiple or otherwise inconsistent obligations." (Objections, 6.) STRB's contentions are unpersuasive.

{¶11} As relators appropriately note, "[m]ere avoidance of multiple litigation is not a sufficient basis to render one an indispensable party." *Layne v. Huffman* (1974), 43 Ohio App.2d 53, 59, affirmed (1975), 42 Ohio St.2d 287. Moreover, STRB does not indicate what specific information it needed, but was unable to procure for the purpose of this litigation involving these relators. Lastly, we must assume "the STRB will implement the decision of the highest prevailing court consistently to all STRS members and beneficiaries." *Smith v. State Teachers Retirement Bd.* (Feb. 5, 1998), 10th Dist. No. 97APE07-943, citing *State ex rel. Horvath v. State Teachers Retirement Bd.* (Mar. 31, 1995), 10th Dist. No. 94APE07-988.

{¶12} Accordingly, we overrule STRB's third objection.

{¶13} Following independent review pursuant to Civ.R. 53, we conclude the magistrate has properly determined the pertinent facts, and we adopt them as our own. We do not adopt the magistrate's conclusions of law, but, consistent with this decision, we conclude STRB did not abuse its discretion in concluding relators are independent contractors. As a result, we deny the request for a writ of mandamus.

Objections overruled in part and sustained in part; writ denied.

BROWN, J., concurs.
BRYANT, P.J., concurs in part and dissents in part.

BRYANT, J., concurring in part and dissenting in part.

{¶14} As the parties agree, the issue turns on the definition of teacher in R.C. 3307.01(B)(4) and whether relators were employed in a school or other institution wholly controlled and managed, and supported in whole or in part, by the state or any political subdivision. Focusing in its objections on whether relators were "employed" with JCESC, STRB asserts the teachers were independent contractors, not employees.

{¶15} In addressing that issue, the magistrate relied on the common law definition of independent contractor in *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 301. *Berge* sets out the analysis to be used in determining whether the employer retained control of, or the right to control, the mode and manner of doing the work contracted. If the right to control is present, the relationship is that of principal and agent, or master and servant; if not, the independent contractor appellation is appropriate.

Here, the magistrate appropriately concluded relators are employees, pointing to the various ways JCESC either exercises control or retains the right to exercise control over relators.

{¶16} Part of my difficulty with STRB's arguments lies in its imposing the traditional attributes of a teacher on the less than traditional and, in light of technological advances, a likely increasingly common approach to teaching. What constitutes control will vary with the circumstances, and the circumstances here are considerably different than those of the more traditional classroom and make the factors STRB cites not pertinent to determining whether relators are employees. In the circumstances surrounding the JCESC and the VLA, a contract may not be the most efficient way to engage teachers, since attendance, unlike in the traditional setting, is not guaranteed. Relators nonetheless are not left to come and go as they like but "sign a form agreeing to be on board to take on VLA students on an as needed basis." (Stip. Evidence, 5.) Similarly, setting hours to be worked, as in a traditional school, also would prove ineffective because the times when the students may be available differ from the set schedule of a more traditional classroom. Indeed, JCESC points out that "VLA runs for 365 days and we have students enroll every day of the year – each student works at their own pace." (Stip. Evidence, 5.) Moreover, given the nature of the teaching, teachers may work from home, but JCESC offers "our lab here at the office if teachers or students do not have access to their own computer." (Stip. Evidence, 5.)

{¶17} Unlike most members of STRS, relators are not paid a salary, as would be common in more traditional school settings. Again, the nature of the teaching environment, including the unknown numbers of students for the year, suggests that relators be compensated for the courses taught, and JCESC confirms that it monitors the work of its teachers. Although the stipulated evidence includes remarks about lapses in some teachers' habits, the failures of some teachers do not determine whether JCESC's teachers, as a group, are independent contractors or employees. What is more, failures will occur despite the ability of an employer to control the work of its employees.

{¶18} Finally, I recognize JCESC originally considered relators to be independent contractors and accordingly provided them form 1099s for tax purposes. At some point, perhaps as the VLA progressed and JCESC exerted more control, JCESC determined relators to be employees, provided them W-2s for tax purposes, and paid the employer's portion of relators' contributions to STRS. The change is significant.

{¶19} I acknowledge the cases the majority cites, but those cases do not determine the issue before us or preclude our determining STRB abused its discretion in deciding relators are not employees and, as a result, not teachers. Thus, in *State ex rel. Mallory v. Pub. Employees Retirement Bd.*, 82 Ohio St.3d 235, 1998-Ohio-380, the Supreme Court concluded the respondent abused its discretion in determining Mallory was not a public employee for purposes of PERS membership. Similarly here, STRB abused its discretion. The factors STRB cites to demonstrate a lack of the requisite control do not address the relevant factors in determining whether relators are employees

in the setting in which they render teaching services, because the factors the majority relies on, by the very nature of JCESC, VLA, and other educational providers like them, are not likely to exist as part of the control the employer exerts over teachers. Although JCESC, despite the nature of the teaching services at issue, could have provided fringe benefits, the absence of benefits alone does not support STRB's decision.

{¶20} Lastly, in response to STRB's focus on the language from R.C. 3307.01(B)(4), "wholly controlled and managed," the board's attention is misplaced. R.C. 3307.01(B)(4) defines a teacher to be one employed in any school or institution or other agency if the agency is "wholly controlled and managed, and supported in whole or in part, by the state or any political subdivision thereof." Accordingly, the issue is not whether the teacher is wholly controlled and managed but whether the agency for which the teacher works is wholly controlled and managed by a state or political subdivision, an issue not disputed in STRB's objection.

{¶21} In the final analysis, although I agree with the majority's disposition of STRB's third objection, I conclude STRB abused its discretion in deciding relators were not teachers: the faculty members were required to log into the system on a daily basis to grade, answer questions, and answer emails and were monitored in that respect, were required to participate in faculty professional development training programs, and were assigned a mentor that evaluates the teachers. I would overrule STRB's objections, adopt the magistrate's decision, and grant the writ per the magistrate's recommendation.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. John Nese, Donald Williams and Catherine Miles,	:	
Relators,	:	
v.	:	No. 09AP-1161
State Teachers Retirement System Board of Ohio and Jefferson County Educational Service Center Governing Board,	:	(REGULAR CALENDAR)
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on May 27, 2011

Green Haines Sgambati Co., L.P.A., Stanley J. Okusewsky, III, and *Ira J. Mirkin*, for relators.

Michael DeWine, Attorney General, and *John E. Patterson*, for respondent State Teachers Retirement Board of Ohio.

Peeple & Waggoner, Ltd., and *R. Brent Minney*, for respondent Jefferson County Educational Service Center Governing Board.

IN MANDAMUS

{¶22} In this original action, relators John Nese, Donald Williams, and Catherine Miles ("relators") request a writ of mandamus ordering respondent State Teachers Retirement Board of Ohio ("STRB") to accept employer and employee contributions to the retirement fund based upon relators' compensation earned from employment with respondent Jefferson County Educational Service Center Governing Board ("JCESC") for teaching service with the Virtual Learning Academy ("VLA"). Relators also seek a writ of mandamus ordering respondent JCESC to make employer contributions to STRB based upon relators' compensation earned from employment with JCESC for teaching service with the VLA.

Findings of Fact:

{¶23} 1. The VLA is an internet-based educational delivery system designed for K-12, providing alternative educational options for credit deficiencies, alternative programs, home schooling, home bound instruction, and 2002 summer school programs.

{¶24} 2. JCESC described the VLA as a curriculum option utilized by participating school districts, but it is not a school, so the students remain part of the average daily membership count of the local district.

{¶25} 3. Relator John Nese is a teacher in the Indian Creek Local School District and is a "teacher" pursuant to R.C. 3307.01(B) and a "member" in the State Teachers Retirement System ("STRS") pursuant to R.C. 3307.01(C).

{¶26} 4. Nese was employed by JCESC to provide teaching service through the VLA from the 2005-2006 fiscal year through the 2007-2008 fiscal year.

{¶27} 5. Relator Donald Williams is a teacher in the Edison Local School District and is a "teacher" pursuant to R.C. 3307.01(B) and a "member" in the STRS pursuant to R.C. 3307.01(C).

{¶28} 6. Williams was employed by JCESC to provide teaching services through the VLA from the 2004-2005 fiscal year through the 2007-2008 fiscal year.

{¶29} 7. Relator Catherine Miles was a teacher in the Edison Local School District until her retirement at the end of the 2008-2009 school year. She is a "teacher" pursuant to R.C. 3307.01(B) and a "member" in the STRS pursuant to R.C. 3307.01(C).

{¶30} 8. Miles was employed by JCESC to provide teaching services through the VLA from the 2004-2005 fiscal year through the 2007-2008 fiscal year.

{¶31} 9. Contributions were submitted to STRS by relators and JCESC based upon relators' compensation earned from their services through the VLA in accordance with R.C. 3307.26 and 3307.28.

{¶32} 10. In October and December 2008, STRS returned contributions to JCESC derived from payments made through the VLA. STRS considered the contributions as "unauthorized contributions" and returned the employer and employee shares.

{¶33} 11. In December 2009, relators filed the instant mandamus action asserting that STRB abused its discretion in finding that relators were not teachers and refusing to accept their contributions to STRS from their employment with JCESC and the VLA.

Conclusions of Law:

{¶34} The issue is whether STRB abused its discretion in concluding that relators were independent contractors and therefore, not entitled to contribute to STRS for the compensation earned from their employment with JCESC and the VLA. For the reasons that follow, the magistrate finds that STRB abused its discretion.

{¶35} " '[M]andamus is an appropriate remedy where no statutory right of appeal is available to correct an abuse of discretion by an administrative body.' " *State ex rel. Mager v. State Teachers Retirement Sys.*, 123 Ohio St.3d 195, 2009-Ohio-4908, ¶11, quoting *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, ¶14. In this case, because relators do not have a statutory right to appeal from STRB's decision to deny them their VLA contributions to STRS, relators may seek to remedy STRB's alleged abuse of discretion through a petition for a writ of mandamus. " 'An abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable.' " *State ex rel. Ackerman v. State Teachers Retirement Bd.*, 117 Ohio St.3d 268, 2008-Ohio-863, ¶16, quoting *State ex rel. Stiles v. School Emps. Retirement Sys.*, 102 Ohio St.3d 156, 2004-Ohio-2140, ¶13.

{¶36} STRB manages the teachers retirement system and determines benefit eligibility. See R.C. 3307.04. Pursuant to R.C. 3307.01(B)(5), "[i]n all cases of doubt, the state teachers retirement board shall determine whether any person is a teacher, and its decision shall be final." In addition to the declaration in R.C. 3307.01(B), that STRB's determination is final, courts pay due deference to the reasonable administrative

construction of the rule and statute. *State ex rel. Palmer v. State Teachers Retirement Bd.* (1993), 90 Ohio App.3d 497, 502.

{¶37} R.C. 3307.01(B) defines "teacher" as follows:

> (B) "Teacher" means all of the following:
>
> (1) Any person paid from public funds and employed in the public schools of the state under any type of contract described in section 3319.08 of the Revised Code in a position for which the person is required to have a license issued pursuant to sections 3319.22 to 3319.31 of the Revised Code;
>
> * * *
>
> (4) Any other teacher or faculty member employed in any school, college, university, institution, or other agency wholly controlled and managed, and supported in whole or in part, by the state or any political subdivision thereof, including Central state university, Cleveland state university, and the university of Toledo[.]

{¶38} Ohio courts have interpreted R.C. 3307.01(B)(1) as having four requirements for someone to be considered a teacher eligible for STRS membership: "(1) the individual must be paid from public funds, (2) the individual must be employed in the public schools of the state, (3) the individual must be employed under any type of contract described in R.C. 3319.08, and (4) the individual must occupy a position for which a certificate is required under R.C. 3319.22 to 3319.31. Courts have held that all four conditions must be met for someone to qualify as a teacher under the statute." *State ex rel. State Teachers Retirement Bd. v. West Geauga Local School Dist. Bd. of Edn.* (1998), 131 Ohio App.3d 150, 159. See also *State Teachers Retirement Sys. Bd. v.*

Cuyahoga Falls Bd. of Edn. (1985), 26 Ohio App.3d 45, 46; *State ex rel. Yovich v. Cuyahoga Falls Bd. of Edn.* (June 23, 1992), 10th Dist. No. 91AP-1325.

{¶39} STRB argues that relators fail to meet two of these requirements—that they were not employed in a public school and do not have a contract. STRB argues that the records supplied by respondent JCESC include an explanation of the origin of the VLA which explicitly states that the "VLA is not a school. It is a curriculum option utilized by school districts to service their students." Thus, STRB argues, if the VLA is not a school, relators cannot meet the second requirement to be a teacher. However, relators were employed by JCESC, not the VLA and the W-2s they received were from the JCESC, not the VLA.

{¶40} STRB also argues that, even if the VLA qualifies as a school, relators did not work in a school building, and thus, they do not qualify. However, the record provides that JCESC provides the JCESC Lab if any VLA teacher or student does not have access to a computer, but most teachers and students work from home. Additionally, in *State Teachers Retirement Sys. Bd. v. Cuyahoga Falls*, the Ninth District Court of Appeals found home instructors were teachers for purposes of membership in STRS. STRB's argument does not have merit.

{¶41} STRB argues that relators fail to meet the requirement that an individual must be employed under any type of contract described in R.C. 3319.08. R.C. 3319.08(A) requires "[t]he board of education of each city, exempted village, local, and joint vocational school district and the governing board of each educational service center

shall enter into written contracts for the employment and reemployment of all teachers. Contracts for the employment of teachers shall be of two types, limited contracts and continuing contracts." R.C. 3319.08(A) provides an exception to the written contract when the board adopts a motion or resolution to employ a teacher under a limited or continuing contract and the teacher accepts the employment.

{¶42} In this case, the record provides a statement from the attorney for JCESC that no contracts between JCESC and relators exist. Relators contend in their reply brief to this court, that JCESC adopted a resolution to employ relators, however, there is nothing in the record to support this contention. The minutes of the April 24, 2001 meeting of JCESC approving the VLA are in the record, but those minutes do not indicate a motion or resolution to employ relators under a limited or continuing contract.

{¶43} Moreover, relators were paid by the specific job. They were paid $250 for a one-credit course and $125 for a half-credit course. The lack of contract or evidence of a resolution means relators do not meet the four requirements of the definition of teacher pursuant to R.C. 3307.01(B)(1).

{¶44} On July 13, 2000, the statute was amended as part of Senate Bill 190. See S.B. 190. The definition of "teacher" was changed and section (4) was added to R.C. 3307.01(B), as stated above, as follows:

> Any other teacher or faculty member employed in any school, college, university, institution, or other agency wholly controlled and managed, and supported in whole or in part, by the state or any political subdivision thereof, including Central state university, Cleveland state university, and the university of Toledo[.]

{¶45} Relators fall within this definition. They are teachers employed by an institution or other agency wholly controlled and managed and supported in whole or in part by any political subdivision. The record supports the finding that JCESC has the ability to monitor or direct the work of the teachers by checking on a teacher's work account, whether the teacher is responding to students, grading lessons, etc. The record contains Faculty Performance Rubrics of relators. Furthermore, school districts have been found to be political subdivisions. See *Price v. Austintown Local School Dist. Bd. of Edn.*, 178 Ohio App.3d 256, 2008-Ohio-4514. The Montgomery County Educational Service Center has been found to be a political subdivision for R.C. 2744.02 purposes. See *Quinn v. Montgomery County Educational Serv. Ctr.*, 2nd Dist. No. Civ.A. 20596, 2005-Ohio-808. Thus, pursuant to R.C. 3307.01(B)(4), relators fit within the definition of teacher.

{¶46} STRB also argues that relators are independent contractors and therefore, not eligible for membership in STRS. STRB relies on the standard discussed by this court in *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 301, as follows:

> * * * Independent-contractor status is determined by the right to control. The analysis inquires whether the employer retained control of, or the right to control, the mode and manner of doing the work contracted for. If so, the relationship is that of principal and agent or master and servant. If the employer did not retain control but is interested merely in the ultimate result to be accomplished, the relationship is that of independent contractor. Factors to be considered include control over the details and quality of the work, the hours worked, selection of materials, tools, and

> personnel used, the routes traveled, the length of employment, the type of business, the method of payment, and any pertinent agreements or contracts.

(Citations omitted.) See also *Bobik v. Indus. Comm.* (1946), 146 Ohio St. 187.

{¶47} STRB relied upon several factors in concluding that relators are independent contractors: (1) the fact that there are no written contracts and they are paid by the job, (2) relators did not receive benefits such as health insurance, (3) relators set their own hours, (4) relators did not use onsite laboratories, (5) JCESC did not provide supervision or evaluation regarding specific students, but rather, evaluated relators two or three times per year on their performance, and (6) initially, JCESC reported earnings with 1099 forms.

{¶48} Pursuant to *Berge*, the independent contractor analysis inquiry is whether the employer retained control of, or the right to control, the mode and manner of doing the work contracted. If so, the relationship is that of principal and agent or master and servant. Here, the record contained the duties of the VLA faculty. Each faculty member was required to log into the system on a daily basis to grade, answer questions, answer e-mails, etc. The JCESC monitors the teachers and checks on their daily logging into the accounts. Many times teachers were removed because they were not logging into the account every day. The duties are specifically outlined. The VLA teachers are required to participate in a VLA faculty professional development training program during the summer prior to being assigned any students. Each teacher is assigned a mentor that evaluates the teachers using an evaluation that was created by following the NEA Guide

to Teaching Online Courses and the NACOL National Standards for Quality Online Teaching. Teachers are either suspended or terminated if their evaluation is below satisfactory.

{¶49} Other factors to be considered include that JCESC provides laboratories for the teachers or students to use if necessary. Nese did not have any 1099s in the record, Willliams only had one 1099 in the record for 2004, which did not match the amount that was "unauthorized" in his STRS account for 2004-2005, and Miles had 1099s for 2003, 2004, 2005, and 2008. For all other years, W-2s were received. The fact that relators received both W-2s and 1099s (and Nese did not receive any 1099s) does not indicate independent contractor status.

{¶50} Furthermore, the STRS Employer Manual advises employers that hiring independent contractors does not relieve employers of the obligation for member and employer contributions on earnings. It states, as follows:

> Hiring a teacher or administrator as an independent contractor or through a temporary agency does not relieve the obligation for member and employer contributions on earnings. Primary criterion cited in Attorney General Opinions and IRS Guidelines for distinguishing between independent contractor and employee is the right of the employer to control the "mode and manner" of the work performed.
>
> If the teaching duties performed by an independent contractor are the same as those performed by teachers under employment contracts, then there is no difference for STRS Ohio purposes. In all cases of doubt, the State Teachers Retirement Board shall determine whether a person is a teacher for STRS Ohio purposes.

{¶51} Given the record, the fact that relators fit within the definition of R.C. 3307.01(B)(4), and STRS policy regarding independent contractors, the evidence fails to support STRB's finding that relators are not members of STRS for the employment with JCESC and teaching at the VLA.

{¶52} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering STRB to accept employer and employee contributions to the retirement fund based upon relators' compensation earned from employment with respondent JCESC for teaching service with the VLA.

{¶53} It is further the magistrate's decision that the writ order respondent JCESC to make employer contributions to STRB based upon relators' compensation earned from employment with JCESC for teaching service with the VLA.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).