

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., DOUGLAS : CASE NO. 2011-2069
D. BYERS :
APPELLANT, :
V. :
MIAMI COUNTY SHERIFF'S OFFICE : ON APPEAL FROM THE SECOND
AND CHARLES A. COX, SHERIFF : DISTRICT COURT OF APPEALS
APPELLEES. :
CASE NO. CA 09-CA-42

MERIT BRIEF OF RELATOR DOUGLAS D. BYERS

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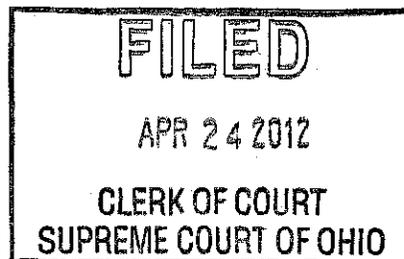


TABLE OF CONTENTS

Table of Authorities iii

Propositions of Law1

Statement of the Case.....2

Statement of Facts.....5

Argument11

**PROPOSITION OF LAW NO. 1:
THE COURT OF APPEALS ERRED IN FINDING THAT RELATOR FAILED
TO AVAIL HIMSELF OF THE REMEDY OF APPEALING TO THE STATE
PERSONNEL BOARD OF REVIEW, WHEN RELATOR’S COLLECTIVE
BARGAINING AGREEMENT EXPRESSLY PROHIBITS ANY SUCH APPEAL12**

**PROPOSITION OF LAW NO. 2:
THE COURT OF APPEALS ERRED IN FAILING TO GRANT A WRIT OF
MANDAMUS ENTITLING THE RELATOR TO BACK WAGES AND OTHER
BENEFITS THAT HAVE BEEN DENIED TO HIM14**

Conclusion21

Certificate of Service22

APPENDIX

Relator’s Notice of Appeal, *State of Ohio, ex. rel. Byers v. Miami County Sheriff’s Office*
(Dec. 12, 2011), Ohio S.C. Case No. 2011-2069.....1

Decision and Final Judgment Entry, *State of Ohio, ex. rel. Byers v. Miami County
Sheriff’s Office* (Nov. 15, 2011), 2nd Dist. No. 09-CA-4211

Decision and Entry, *State of Ohio, ex. rel. Byers v. Miami County Sheriff’s Office* (Feb.
10, 2012), 2nd Dist. No. 09-CA-42.....19

R.C. 124.3422

R.C. 145.36226

TABLE OF AUTHORITIES

Caselaw

<i>Bemmes v. Pub. Employees Retirement Sys. of Ohio</i> , 102 Ohio App.3d 782, 789, 658 N.E.2d 31 (1995).....	18
<i>Bohannon v. City of Cincinnati</i> , 1st. Dist. No. C-020629, 2003-Ohio-2334.....	19
<i>Bowling Green State University v. Williamson</i> , 39 Ohio St.3d 141, 142-43, 529 N.E.2d 1371 (1988).....	12
<i>Monaghan v. Richley</i> , 32 Ohio St.2d 190, 291 N.E.2d 462 (1972)	18
<i>State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.</i> , 97 Ohio St.3d 269, 2002-Ohio-6322, 779 N.E.2d 216, ¶19	14, 17
<i>State ex rel. Berger v. McMonagle</i> , 6 Ohio St.3d 28, 451 N.E.2d 225 (1983)	11, 14
<i>State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.</i> , 93 Ohio St.3d 558, 2001 Ohio 1608, 757 N.E.2d 339.....	14, 17, 18
<i>State, ex rel. Butler v. Demis</i> , 66 Ohio St.2d 123, 124, 420 N.E.2d 116 (1981)	16
<i>State of Ohio, ex. rel. Byers v. Miami County Sheriff's Office</i> , 2 nd Dist. No. 09-CA-42, 2011-Ohio-6125	3, 4, 11, 15
<i>State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Employment Relations Bd.</i> , 22 Ohio St.3d 1, 7-8, 488 N.E.2d 181, 18 (1986).....	16
<i>State, ex rel. Merydith Constr. Co. v. Dean</i> , 95 Ohio St. 108, 123, 116 N.E. 37 (1916).....	16
<i>State ex rel. Rose v. James</i> , 57 Ohio St.3d 14, 16, 565 N.E.2d 547 (1991)	20
<i>State ex rel. Torres v. State Teachers Retirement Bd.</i> , 10 th Dist. No. 03AP-25, 2003-Ohio-5449	11
<i>State ex rel. Zeller v. Risingsun</i> , 125 Ohio Misc.2d 36, 2003-Ohio-5515, 797 N.E.2d 1053 (Wood C.P.).....	17

Statutes

R.C. 124.0312

R.C. 124.344, 12

R.C. 145.3622, 7, 8, 10, 11, 14, 19

R.C. 417713

R.C. 5703.0213

OAC 145-1-11(D).....15

PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: THE COURT OF APPEALS ERRED IN FINDING THAT RELATOR FAILED TO AVAIL HIMSELF OF THE REMEDY OF APPEALING TO THE STATE PERSONNEL BOARD OF REVIEW, WHEN RELATOR'S COLLECTIVE BARGAINING AGREEMENT EXPRESSLY PROHIBITS ANY SUCH APPEAL.

PROPOSITION OF LAW NO. 2: THE COURT OF APPEALS ERRED IN HOLDING THAT RELATOR HAD AN ADEQUATE REMEDY AT LAW THROUGH APPEAL TO THE STATE PERSONNEL BOARD OF REVIEW AND RELATOR IS ENTITLED TO BACK WAGES AND OTHER BENEFITS THAT HAVE BEEN DENIED TO HIM.

STATEMENT OF THE CASE

This case arises from the attempt of appellant Douglas D. Byers to be reinstated with back pay to the Miami County Sheriff's Office ("MCSO") after overcoming a disability.

In 2004, Byers was involved in a shootout, resulting in the death of a suspect. After counseling, Byers was placed on medical leave for several months in 2007. In early 2008, Byers applied for disability benefits through the Public Employees Retirement System. On June 20, 2008, PERS recommended approval of the disability benefit. See OPERS letter dated June 20, 2008, attached as Exhibit 1 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010. After substantial medical treatment and counseling, on March 18, 2009, PERS certified Byers as no longer being under a permanent disability from performance as a deputy sheriff. See OPERS letter dated March 18, 2009, attached as Exhibit 4 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010. Pursuant to R.C. 145.362, the MCSO is obligated to reinstate Byers due to PERS finding that his disability abated. The MCSO refused to restore Byers to the same or similar position held prior to his disability separation with PERS, thus Byers sought a writ of mandamus compelling the MCSO to restore him to his previous position of deputy sheriff and the salary commensurate thereto.

Byers filed a petition for a writ of mandamus against MCSO and Sheriff Charles A. Cox on November 10, 2009, seeking reinstatement, back pay, and other emoluments of office. See Petition for Writ of Mandamus, filed November 10, 2009. After the Petition was filed and litigation ensued, ultimately, Byers was reinstated *without* pack pay in December of 2010. See Affidavit of Peter B. Lowe, attached as Exhibit A to Appendix to Memorandum in Opposition to Relator's Motion for Summary Judgment, filed April 19, 2011. To date, Byers has received no

back pay and his seniority appears to have been forfeited, both of which may be remedied through a mandamus action.

Prior to his reinstatement without back pay, Byers moved the Second District Court of Appeals for summary judgment in the mandamus proceeding on July 9, 2010. Subsequently, Byers filed a Reply to Respondents' cross-motion for summary judgment, focusing on the back pay issue—as Byers' reinstatement had occurred by that point. Despite Byers' reinstatement *without* back pay, the Second District Court of Appeals held there was an adequate legal remedy in the matter, therefore, it declined to order mandamus relief. *State of Ohio, ex. rel. Byers v. Miami County Sheriff's Office*, 2nd Dist. No. 09-CA-42, 2011-Ohio-6125 (Appx. 11).

On December 12, 2011, Byers filed a motion for relief from judgment pursuant to Civ.R. 60(B) on the basis that the Second District Court of Appeals misinterpreted the facts and law placed before it. Although Byers' original purpose in filing his writ of mandamus was reinstatement and Byers was reinstated, he was not “made whole” by MCSO and sought “back pay and benefits for the time he was not permitted to work, attorney fees, and costs.” *Byers*, at ¶ 2. The Second District Court of Appeals 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. *Byers*, at ¶ 15.

The evidence before the Second District Court of Appeals specifically states that Byers had no right to pursue his claim with the SPBR. In fact, Byers and his fellow deputies specifically waived their right to pursue claims with the SPBR. See the Collective Bargaining Agreement between MCSO and the Fraternal Order of Police, Elliott/Morris Lodge No. 154, Ohio Labor Council, Inc., attached as Exhibit B to Appendix to Memorandum in Opposition to Relator's Motion for Summary Judgment, 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.

The Court of Appeals based its entire decision that Byers failed to exhaust his remedies on R.C. 124.34, which gives a classified civil servant the right to appeal an employment matter to the SPBR. Byers and the other union members clearly waived this right per the Collective Bargaining Agreement.

In his Civ.R. 60(B) motion, Byers asked the Second District Court of Appeals to reconsider its decision because: (1) he has no right to appeal to the SPBR, and (2) his writ of mandamus is precisely the correct vehicle for seeking back pay and other benefits despite his “reinstatement.” On February 10, 2012, the Second District Court of Appeals denied the Civ.R. 60(B) motion holding that a request for relief from judgment based on a mistake refers to a mistake by a party, not a court. (Decision and Entry at pp. 2-3 filed Feb. 10, 2012; Appx.19). Thus Byers must directly appeal to the Ohio Supreme Court contesting the ruling that he failed to exhaust his remedies. *Id.*

Byers submits that the Second District Court of Appeals erred in finding that he failed to exhaust his remedies, as the SPBR was never an option for him. Moreover, a mandamus action is precisely the legal mechanism to secure the back wages and seniority due and owing to Byers.

STATEMENT OF THE FACTS

1. PERS originally determined that Byers was disabled, and subsequently certified that Byers was fit for duty and ordered Respondents to return Byers to active duty.

Byers began working for the MCSO as a Deputy Sheriff in 2000. Relator's Motion for Summary Judgment at 2, filed July 9, 2010. Byers consistently received positive performance evaluations and commendations, including Officer of the Year in 2004. That same year, Byers shot and killed a suspect. Byers was exonerated from any wrongdoing during an investigation and following the incident, he sought counseling and eventually returned to work. Thereafter, Byers began complaining of sleep problems. He continued his counseling, but in 2007 he was placed on medical leave for several months. *Id.*

In early 2008, Byers applied for disability benefits through PERS. On June 3, 2008, a doctor selected by PERS evaluated Byers and diagnosed him with Post Traumatic Stress Disorder, Major Depressive Disorder, Insomnia and Dysthymic Disorder. *Id.*

Based on the PERS doctor's medical evaluation, plus physician reports submitted by Byers, PERS approved his disability benefit application. By letter of June 20, 2008, PERS notified Byers that the Board had approved his application for disability benefits and additionally gave Respondents "approval to proceed with processing the disability benefit." *Id.* at 3. Consequently, on July 11, 2008, Respondents presented Byers with paperwork to begin his disability leave. Respondents advised Byers that he advise PERS that he was resigning from his employment in order to entitle him to begin receiving PERS disability benefits. Byers questioned the procedure and Respondents assured him that "resignation" was the correct procedure to follow. In reliance upon MCSO's assurances, Byers signed the paperwork. At that

time, Byers had no pending disciplinary charges. Thus, his PERS disability separation, effective August 1, 2008, was "in good standing." *Id.*

On December 15, 2008, Mark Reynolds, M.D., the physician selected by PERS to conduct Byers' re-evaluation, determined that Byers was able to return to work and issued a report to that effect. See Dr. Reynolds letter dated December 15, 2008, attached as Exhibit 8 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010. Dr. Reynolds' medical report was submitted to the PERS Board for review. Dr. Reynolds opined:

The claimant presents six months subsequent to that evaluation [Dr. Moon of June 12, 2008] indicating that he has continued in individual psychotherapy with Karen Bays, Ph.D. He indicates he has been in treatment over the past three to four years and currently is seen every two to three months...

He states he is now able to talk about the incident without becoming anxious. He indicates he does become depressed at times still; however, he notes he is able to distract himself using techniques learned in his therapy...

The claimant's treating psychologist and the claimant report he is able and willing to return to his previous position of employment as a deputy with the Miami County Sheriff's Department.

Should the claimant be returned to his previous position, it would be my suggestion that requirement for ongoing psychotherapy be strongly considered, likely no less frequently than twice monthly.

This medical evaluation encompasses the subjective complaints and history as given by the examinee, as well as the medical records provided for my review and the physical examination. My opinions are based upon reasonable medical probability assuming the materials to be true and correct... *Id.*

MCSO sought a second opinion. At Respondents' request, on March 5, 2009, Byers attended a fitness for duty evaluation with David C. Randolph, M.D. Subsequently, on March 11, 2009, PERS submitted a copy of Byers' medical record to MCSO, along with notification that the Board was scheduled to discuss Byers' fitness for duty on March 18, 2009. See OPERS letter dated March 11, 2009, attached as Exhibit 2 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010. By report dated March 15, 2009, Dr. Randolph summarized the reports of Byers' other physicians, including Dr. Reynolds' evaluation, and concluded: "[t]he records as they exist are inadequate to address the concept of Mr. Byers capabilities of returning to work." See Dr. Randolph letter dated March 15, 2009, attached as Exhibit 9 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010.

On March 18, 2009, based upon Dr. Reynolds' medical recommendation, PERS terminated Byers' disability benefits because he could no longer be considered permanently disabled from the performance of duty as sheriff deputy. See OPERS letter dated March 18, 2009, attached as Exhibit 4 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010. In fact, on March 18, 2009, PERS forwarded a notice to Respondents certifying that Byers' disability benefits were being terminated and, quoting R.C. 145.362, ordering his reinstatement. It read:

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...

See OPERS letter dated March 18, 2009, attached as Exhibit 3 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010. It is indisputable that Byers was certified by PERS to return to work.

2. Respondents refused to reinstate Byers despite PERS' certification that Byers was no longer disabled.

Despite certification from PERS, Respondents postponed Byers' reinstatement. Relator's Motion for Summary Judgment filed July 9, 2010 at 4. Instead of reinstating Byers, Respondents requested that he submit to a third evaluation. Under no obligation to do so, on April 21, 2009, Byers attended a fitness evaluation with J. Nick Marzella, Ph.D. Dr. Marzella issued his report on April 24, 2009 and concluded that Byers could return to work. See Dr. Marzella's letter dated April 24, 2009, attached as Exhibit 10 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010.

On or about May 1, 2009, Respondents informed Byers that they had received Dr. Marzella's evaluation and, based on his conclusion, Byers could return to work. Relator's

Motion for Summary Judgment at 4-5, filed July 9, 2010. The MCSO instructed Byers to file a second request for reinstatement and schedule an appointment the next week to pick up his equipment. *Id.* On May 4, 2009, Byers submitted his second request for reinstatement to the MCSO and scheduled a meeting for that Thursday, May 7, 2009, to obtain his equipment. *Id.* at 5.

Despite their offer to reinstate Byers, Respondents continued to question his fitness for duty. For example, in a letter dated May 5, 2009, Respondents questioned Dr. Marzella's evaluation and opinion. See Sheriff Cox's letter dated May 5, 2009, attached as Exhibit 11 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010. Despite MCSO having requested Byers be evaluated by Dr. Marzella, Dr. Marzella repeated for MCSO his opinion as stated in his April 24, 2009 report, that Byers "is able to return to work and perform all the essential functions of his job." See Dr. Marzella's letter dated May 8, 2009, attached as Exhibit 12 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010. Despite this clarification, on or about that same day, Respondents withdrew their offer to reinstate Byers, claiming they had "jumped the gun" on returning him to work. Relator's Motion for Summary Judgment at 5, filed July 9, 2010.

Byers' efforts to seek reinstatement through the Fraternal Order of Police ("FOP") proved futile. On April 29, 2009, Byers, with the assistance of the FOP, filed a grievance. *Id.* However, both the FOP representatives and representatives from the MCSO concluded that the issues Byers raised in his grievance, such as reinstatement, are not subject to the grievance and arbitration provisions contained in the Collective Bargaining Agreement. See letter dated September 21, 2009, attached as Exhibit 2 to the Affidavit of Dwight D. Brannon, attached as

Exhibit 15 to Relator's Motion for Summary Judgment, filed July 9, 2010. Thus, the arbitration process has been indefinitely suspended. *Id.* Consequently, Byers has no administrative or ordinary course of action at law to seek relief.

Additionally, on April 22, 2009, and June 30, 2009, Byers filed charges with the Ohio Civil Rights Commission alleging unlawful discriminatory employment practices and retaliation. Relator's Motion for Summary Judgment at 5, filed July 9, 2010. After investigating Byers' charges, the OCRC issued a Letter of Determination, dated January 28, 2010, wherein the Commission made a finding that:

It is **PROBABLE** that the Respondent engaged in an unlawful discriminatory practice under section 4112 of the Ohio Revised Code and that Respondent likely perceived [Byers] as being disabled, and denied him full reinstatement and back pay. It is also likely that Respondent retaliated against [Byers] for having filed charges of discrimination based on disability.

Id. at 5-6. It should be noted that the pending OCRC action does not bar this mandamus action. The issues involved here and in Byers' disability discrimination charge before the OCRC are different. The OCRC is given the statutory authority to determine whether an employment action constituted unlawful discrimination, whereas here, the purpose of this mandamus action is to determine Byers' right to reinstatement pursuant to R.C. 145.362. The OCRC has not intervened in this action to enforce the statutory or administrative provisions at issue here. Moreover, the OCRC cannot seek Byers' right to back pay. Byers' right to relief is clear under R.C. 145.362. Likewise, Respondents' duty to follow the law is clear under R.C. 145.362. Even if the OCRC ultimately prevails on Byers' behalf, Byers is not necessarily entitled to reinstatement in that action.

3. *Although Byers was ultimately reinstated, Respondents failed to pay back wages and credit Respondent with his seniority, in violation of Ohio Revised Code Section 145.362.*

After Byers filed his writ of mandamus petition and litigation ensued, ultimately, Byers was reinstated *without* back pay in December of 2010. Affidavit of Peter B. Lowe, attached as Exhibit A to Appendix to Memorandum in Opposition to Relator's Motion for Summary Judgment, filed April 19, 2011. To date, Byers has received no back pay and his seniority appears to have been forfeit, both of which may be remedied through a writ of mandamus.

Respondents' duty to follow the law is clear under R.C. 145.362, thus they agreed to reinstate Byers to duty. This is now a fight about damages, seniority, attorney's fees, back pay, and the extent of the unreasonable, unconscionable, and arbitrary conduct of Respondents. Byers has been reinstated; however, his reinstatement did not include back wages and seniority.

ARGUMENT

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. Berger v. McMonagle*, 6 Ohio St.3d 28, 451 N.E.2d 225 (1983). In this case, the Court of Appeals ruled on cross-motions for summary judgment that as a matter of law, Byers had an adequate remedy at law. *Byers*, at ¶ 15. That Court found that an appeal to the SPBR was *the* adequate remedy at law. *Id.* However, the Court of Appeals erred because the SPBR is not a remedy available to Byers or any other MCSO deputy.

As an initial matter, this Court should review this case under the de novo standard, as Byers is appealing from the Court of Appeals' ruling on a summary judgment motion. *See State ex rel. Torres v. State Teachers Retirement Bd.*, 10th Dist. No. 03AP-25, 2003-Ohio-5449 (holding that, despite relator's failure to obtain a writ of mandamus from the trial court, because

the writ was lost on summary judgment, the proper standard of review was de novo rather than the abuse of discretion standard).

PROPOSITION OF LAW NO. 1: THE COURT OF APPEALS ERRED IN FINDING THAT RELATOR FAILED TO AVAIL HIMSELF OF THE REMEDY OF APPEALING TO THE STATE PERSONNEL BOARD OF REVIEW WHEN RELATOR'S COLLECTIVE BARGAINING AGREEMENT EXPRESSLY PROHIBITS ANY SUCH APPEAL.

The Second District Court of Appeals erred in finding that Byers could have appealed to the SPBR. The SPBR was not an option, and thus not an adequate remedy for Byers—not at any point. Byers and his fellow deputies specifically waived their right to pursue claims with the SPBR. The Collective Bargaining Agreement between MCSO and the Fraternal Order of Police, attached as Exhibit B to Appendix to Memorandum in Opposition to Relator's Motion for Summary Judgment, filed April 19, 2011, states:

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.

The Second District Court based its entire decision—that Byers failed to exhaust his remedies—on R.C. 124.34(B) 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, expressly waived this right per Section 33.2 of the CBA, thus the SPBR was no option. The law is clear that the SPBR has no jurisdiction in Byers' case.

In *Bowling Green State University v. Williamson*, 39 Ohio St.3d 141, 142-43, 529 N.E.2d 1371 (1988), this Court held:

R.C. 124.34 does not specifically manifest an intent to remove from common pleas courts the mandamus jurisdiction they ordinarily have...R.C. 124.03, which

created the SPBR, does not specifically establish exclusive jurisdiction and remove mandamus jurisdiction. It provides in subdivision (A) that the SPBR shall “hear appeals, as provided by law, of employees in the classified state service from final decisions of appointing authorities * * * relative to reduction in pay or position * * *.” Unlike R.C. 5703.02, it does not state that the SPBR shall hear “all [such] appeals.”

This Court has also noted: “Except for laws specifically exempted, the provisions of a collective bargaining agreement entered into pursuant to R.C. 4117 prevail over conflicting laws.” *State ex rel. Parsons v. Fleming*, 68 Ohio St. 3d 509, 513, 628 N.E.2d 1377. Under R.C. 4177; Byers and his fellow deputies agreed through collective bargaining, that the SPBR “shall have no authority or jurisdiction as it relates to any matter addressed in whole or in part of this [CBA].” See the Collective Bargaining Agreement between MCSO and the Fraternal Order of Police, attached as Exhibit B to Appendix to Memorandum in Opposition to Relator’s Motion for Summary Judgment filed April 19, 2011. It is evident that the SPBR never had jurisdiction, and indeed never will have jurisdiction, over any personnel matters of the MCSO. Because an appeal to the SPBR is not an adequate remedy at law of which Byers may avail himself, he had no choice but to file an original mandamus action.

For the foregoing reasons, the Second District Court of Appeals erred in holding that Byers should have appealed to the SPBR rather than filing his petition for a writ of mandamus.

PROPOSITION OF LAW NO. 2: THE COURT OF APPEALS ERRED IN FAILING TO GRANT A WRIT OF MANDAMUS ENTITLING RELATOR TO BACK WAGES AND OTHER BENEFITS THAT HAVE BEEN DENIED TO HIM.

- 1. Relator is entitled to a writ of mandamus entitling him to back wages and other benefits that he was denied during the period in which Respondents refused to reinstatement Relator despite a legal obligation to do so.*

It is black letter law in Ohio that a “wrongfully excluded public employee may obtain back pay and related benefits in a mandamus action following reinstatement.” *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 93 Ohio St.3d 558, 563, 2001-Ohio-1608, 757 N.E.2d 339 (per curiam); see also *State ex rel. Schneider v. Board of Educ. of North Olmsted City School Dist.*, 65 Ohio St. 3d 348, 350, 1992-Ohio-126, 603 N.E.2d 1024 (“We have permitted a wrongfully excluded employee to obtain back pay in a mandamus action after he has been reinstated.”); *State ex rel. Stacy v. Batavia Local Sch. Dist. Bd. of Educ.*, 97 Ohio St. 3d 269, 273, 2002 Ohio 6322; 779 N.E.2d 216, ¶ 19. (“It is axiomatic that ‘a wrongfully excluded public employee may obtain back pay and related benefits in a mandamus action following reinstatement.’”) (quoting *Boggs*). Although Byers was ultimately reinstated by the Miami County Sheriff’s Office, that reinstatement occurred *without* back pay and other benefits. Mandamus remains the proper remedy for him to seek back wages and other benefits that were lost after his reinstatement.

For a writ of mandamus to be issued, Byers 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. Berger*, 6 Ohio St.3d 28, 21. Byers fulfills all elements for a writ to be issued. First, Byers has a clear legal right to reinstatement, *with back wages and other benefits*. PERS, pursuant to R.C. 145.362, determined Byers was no longer prohibited from performing his duties

as a deputy sheriff. See OPERS letter dated March 18, 2009, attached as Exhibit 3 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010. It is undisputed that PERS has discretion to make the final determination of a disability benefit recipient's fitness to return to duty. OAC 145-1-11(D). PERS and Byers certified to Respondents, in writing and orally, that Byers should be reinstated. See OPERS letter dated March 18, 2009, attached as Exhibit 3 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010. Respondents were therefore legally obligated to return Byers to work *with* back pay, seniority, and other emoluments of office. Similarly, because of the legal duty to reinstate Byers, Byers fulfills the second element in requesting a writ of mandamus. Although Byers was ultimately reinstated by Respondents, that reinstatement occurred, again, *without* back pay and other benefits.

The original action filed in the Second District Court of Appeals, however, was terminated because that court held that Byers had an adequate remedy at law precluding mandamus relief. *Byers*, at ¶ 15. As discussed above, the only adequate remedy available for Byers was filing the original action. Byers fulfills the third element in mandamus relief because he has no adequate remedy at law. This Court's decisions have made it clear that, after an employee has been reinstated, mandamus is the proper remedy to obtain back wages.

This Court will presumably hear arguments from Respondents that Byers had other adequate remedies. But to what venue would Respondents or this Court have Byers go? Byers complied with arbitration to the point where Respondents refused to arbitrate his reinstatement and back wages, as discussed *infra*. He was prohibited from filing an appeal to the SPBR by the Collective Bargaining Agreement. Now he has been denied mandamus relief.

Ohio law requires that “[f]or a remedy at law to be adequate, the remedy should be complete in its nature, beneficial and speedy.” *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Employment Relations Bd.*, 22 Ohio St.3d 1, 7-8, 488 N.E.2d 181, 18 (1986) citing *State, ex rel. Merydith Constr. Co. v. Dean*, 95 Ohio St. 108, 123, 116 N.E. 37 (1916). The question is whether the remedy is adequate under the circumstances. *State, ex rel. Butler v. Demis*, 66 Ohio St.2d 123, 124, 420 N.E.2d 116 (1981). Respondents have repeatedly held to the position that Byers had options to arbitrate his grievance, but Byers exhausted that “remedy.” The CBA, Section 6.1 states:

The term “grievance” shall mean an allegation by a bargaining unit employee that there has been a breach, misinterpretation, or improper application of this Agreement. It is not intended that the grievance procedure be used to effect changes in the articles of this Agreement or those matters which are controlled by the provisions of the federal and/or state laws, and/or by the United States or Ohio State Constitutions.

Collective Bargaining Agreement between MCSO and the Fraternal Order of Police, Elliott/Morris Lodge No. 154, Ohio Labor Council, Inc., attached as Exhibit B to Appendix to Memorandum in Opposition to Relator’s Motion for Summary Judgment, filed April 19, 2011.

What Byers is stressing to this Court, and stressed to the Court of Appeals, is the fact that Byers *tried* to arbitrate his reinstatement but was rebuffed by Respondents in his efforts to bring the matter to arbitration. Respondents tacitly admit that Byers had no adequate remedy at law because Respondents would not arbitrate the reinstatement issue resulting in an indefinite suspension of the arbitration process. On September 21, 2009, Respondent’s counsel wrote a letter to the arbitrator regarding Byers’ collective bargaining matter. See letter dated September 21, 2009, attached as Exhibit 2 to the Affidavit of Dwight D. Brannon, attached as Exhibit 15 to Relator’s Motion for Summary Judgment, filed July 9, 2010. It states:

Pursuant to the contract, I am giving notice of our intent to raise several arbitrability issues; and am moving for bifurcation...The Grievance is based upon law external to the contract and inarbitrable under Article 6.1.

This is a situation whereby Respondents and Respondents' counsel *refused* to permit Byers' claims to proceed to arbitration on the grounds that the grievance procedure lacked jurisdiction due to Ohio law. As previously stated, the SPBR was not an option. What was Byers to do, other than file a petition in mandamus? His speediest, and indeed only, remedy was to follow through this mandamus action, as Respondents would not permit the arbitration to proceed. To permit Respondents to refuse to arbitrate because it is outside the scope of the CBA, yet prevail in the mandamus action because Byers supposedly has an adequate remedy through arbitration makes a mockery of the system. Filing the mandamus action was his only remedy. Respondents should not be permitted to shield themselves with an "adequate remedy" defense when they refuse to "show up" to arbitration or in a court of law. For the foregoing reasons, Byers is entitled to back pay and other benefits he was denied.

2. Relator's damages are reasonably ascertainable.

A wrongfully excluded public employee may obtain reinstatement, back pay, and related benefits in the same mandamus action. See *State ex rel. Stacy*, 105 Ohio St.3d 476, 829 N.E.2d 298. In addition to reinstatement, Byers was entitled to relief in the form of back pay, seniority, and all emoluments of office. The purpose of a back pay award is to make the wrongfully-terminated public employee whole. Thus, 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. *State ex rel. Boggs*, 93 Ohio St.3d 558, 757 N.E.2d 339.

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*, 125 Ohio Misc.2d 36, 2003-

Ohio-5515, 797 N.E.2d 1053 (Wood C.P.). While certainty is generally established by a specific monetary amount, “a definitive dollar figure is not available for wrongfully discharged employees who have not yet been reinstated because the damages continue to accrue until that time. In these cases, the necessary certainty requires only a readily ascertainable dollar figure upon reinstatement.” *Boggs*, 93 Ohio St.3d at 565.

As explained below, Byers can establish with certainty the damages to which he is entitled. *Bemmes v. Pub. Employees Retirement Sys. of Ohio*, 102 Ohio App.3d 782, 789, 658 N.E.2d 31 (1995); *Monaghan v. Richley*, 32 Ohio St.2d 190, 291 N.E.2d 462 (1972).

a. Lost Wages

The amount of back pay to which Byers is entitled is readily ascertainable. Byers’ disability separation was effective July 11, 2008. Reply Memorandum in Support of Relator’s Motion for Summary Judgment at 23, filed May 5, 2011. 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. *Id.* In addition to his base salary, Byers earned additional income from working overtime and extra details. *Id.* On average, Byers 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 Byers earned approximately \$62,176.00 per year, or \$170.35 per day. *Id.*

Byers is owed lost wages beginning March 18, 2009, the date PERS notified Respondents of their termination of Byers’ disability benefits and ordered his reinstatement. *Id.* From March 18, 2009 to June 30, 2009, Byers’ loss of income is reduced by his receipt of 45% of his salary for disability pension. *Id.* Therefore, from March 18 to June 30, 2009, Byers’ 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. *Id.* Thereafter, from

July 1, 2009 to December 20, 2010, (his return to work date) Byers' lost back pay is \$170.81 per day times 537 days, for a total of \$91,724.97 without the additional overtime. *Id.* In addition, Mr. 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 $1.471 * \$6,000 = \$8,827.40$.

From March 18, 2009 through December 20, 2010, Mr. Byers has 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. *Id.* at 24.

b. Related Benefits

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

c. Lost Pension Benefits:

Byers is entitled to have the MCSO bear the cost of reinstating his pension benefits to where they would have been had Mr. 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 revisited.

d. Medical Benefits:

¹ As per *Bohannon v. City of Cincinnati*, 1st. Dist. No. C-020629, 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 Byers' pension benefits.

Byers 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, or a health insurance provider provided by MCSO, had he not been denied reinstatement. He has submitted into evidence medical bills in the amount of \$2,560.25. See OPERS letter dated June 20, 2008, attached as Exhibit 1 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Relator's Motion for Summary Judgment, filed July 9, 2010.

e. Lost vacation and sick days:

Byers 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.

f. Seniority:

Mr. Byers 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.

g. Attorney Fees

Additionally, attorney's fees and costs may be awarded where a reinstated public employee shows that the employer acted in bad faith. *State ex rel. Rose v. James*, 57 Ohio St.3d 14, 16, 565 N.E.2d 547 (1991).

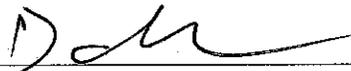
As explained above, this action was necessitated by the Respondents' continued bad faith refusal to reinstate Byers. Byers was wrongfully denied reinstatement by Respondents and forced into this litigation to protect his interests, notwithstanding efforts to remedy the situation through arbitration, the OCRC, and settlement. Essentially, Respondents argue points that are

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

CONCLUSION

The decision of the Second District Court of Appeals holding that Douglas Byers failed to appeal his case to the SPBR is clearly in error, as Byers and his fellow deputies expressly agreed in the Collective Bargaining Agreement that the SPBR would have no authority over such issues. Next, Byers has proven that he is entitled to back wages and other benefits which he was denied during the period in which Respondents refused to reinstate him, despite a lawful right to reinstatement. The decision of the Second District Court of Appeals must be reversed, and Byers should be found to be entitled to his back wages and other benefits.

Respectfully submitted,



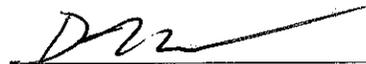
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was served upon the following via regular U.S. Mail, postage pre-paid, this 23rd day of April, 2012:

Eugene P. Nevada, Esq.
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. Brannon (0079755)

IN THE SUPREME COURT OF OHIO

11-2069

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

CASE NO. _____

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.

NOTICE OF APPEAL

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FILED
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SUPREME COURT OF OHIO

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DEC 12 2011
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SUPREME COURT OF OHIO

Now comes Appellant ex rel. Douglas Byers, and hereby give notice of his appeal of the Decision and Final Judgment Entry entered by the Second District Court of Appeals in the case at bar on November 15, 2011 to the Ohio Supreme Court. Pursuant to S.Ct. Pract. R. 2.1, a date-stamped copy of the Decision and Entry is attached.

Respectfully submitted,



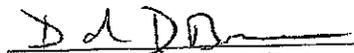
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Attorneys for Appellants

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.

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JAN A. MOTTINGER
CLERK OF COURTS

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

STATE OF OHIO, ex rel., DOUGLAS D. BYERS : Appellate Case No. 09-CA-42

Relator

v.

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

Respondents

DECISION AND FINAL JUDGMENT ENTRY
November 15, 2011

PER CURIAM:

This matter is before the court on the Motion for Summary Judgment filed by Relator, Douglas D. Byers, on July 9, 2010. Respondents, Miami County Sheriff's Office, et al., filed a Cross-Motion for Summary Judgment on April 19, 2011.

Byers seeks a writ of mandamus compelling the Miami County Sheriff's Office ("MCSO") to restore him to his previous position of deputy sheriff and the salary commensurate thereto or to a similar position and salary, pursuant to R.C. 145.362. Byers further seeks backpay and benefits for the time he was not permitted to work, although allegedly entitled to work; attorney fees; and costs.

In relevant part, the underlying facts indicate that Byers began working for MCSO as

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

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a deputy sheriff in 2000. In 2004, Byers and another deputy were involved in an incident in which both deputies fired at a suspect who had pointed his weapon in the direction of the deputies, and fatally wounded the suspect. A determination was not made as to which deputy's bullet caused the death of the suspect.

Following the incident, Byers began to have sleeping problems. Although he underwent counseling, Byers ultimately went off work in January 2006 and remained off work until June 2008.

In June 2008, a medical examiner for Ohio's Public Employees Retirement System ("PERS") determined that Byers was mentally incapacitated permanently to perform his duty as a deputy sheriff and should be entitled to disability benefits.

Byers submitted a letter of resignation to MCSO on July 11, 2008, which was formally accepted by Sheriff Cox and made effective that same date. Byers attests that he was presented with the resignation paperwork at that time by his immediate supervisor, Captain Greg Johnson, in order to start the disability leave process.

Byers' PERS disability retirement ran from August 1, 2008 until June 30, 2009. At the end of this period, however, MCSO did not immediately return Byers to service but, instead, asked him to undergo psychological fitness evaluations. Byers was reinstated as a deputy sheriff in December 2010, starting a new seniority date.

Byers now seeks a writ of mandamus compelling MCSO to reinstate him to his previous position of deputy sheriff and the salary commensurate thereto, pursuant to R.C. R.C. 145.362. This section provides, in part:

"A disability benefit recipient shall retain membership status and shall be considered on leave of absence from employment during the first five years following the effective date

of a disability benefit, notwithstanding any contrary provisions in this chapter.

"On completion of the examination by an examining physician or physicians selected by the board, the physician or physicians shall report and certify to the board whether the disability benefit recipient is no longer physically and mentally incapable of resuming the service from which the recipient was found disabled. If the board concurs in the report that the disability benefit recipient is no longer incapable, the payment of the disability benefit shall be terminated not later than three months after the date of the board's concurrence or upon employment as a public employee. If the leave of absence has not expired, the retirement board shall certify to the disability benefit recipient's last employer before being found disabled that the recipient is no longer physically and mentally incapable of resuming service that is the same or similar to that from which the recipient was found disabled. *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.*" (Emphasis added.)

Byers further seeks backpay and benefits for the time he was not permitted to work, attorney fees, and costs.

To be entitled to a writ of mandamus, Byers 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 acts, and (3) that [Byers] has no plain and adequate remedy in the ordinary course of the law.' " *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, quoting *State ex rel. Harris v. Rhodes* (1978), 54 Ohio St.2d 41, 42; *State ex rel. Heller v.*

Miller (1980), 61 Ohio St.2d 6, paragraph one of the syllabus; *State ex rel. Westchester v. Bacon* (1980), 61 Ohio St.2d 42, paragraph one of the syllabus.

Both parties have moved for summary judgment. "Summary judgment pursuant to Civ.R. 56 should be granted only if no genuine issue of fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which conclusion is adverse to the nonmoving party. When considering a motion for summary judgment, the evidence must be construed in favor of the nonmoving party." *State ex rel. Shelly Materials v. Clark Cty. Bd. of Commrs.*, Clark App. No. 2003-CA-72, 2005-Ohio-6682, at ¶5, quoting *Wheelbarger v. Dayton Bd. of Edn.*, Montgomery App. No. 20272, 2004-Ohio-4367, at ¶8.

Adequate Remedy

"The writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law." R.C. 2731.05. Upon consideration, this Court finds that Byers had an adequate remedy at law to raise the issues set forth in this original action through an appeal to the State Personnel Board of Review ("SPBR").

R.C. 124.34 gives a classified civil servant the right to appeal a decision concerning the continuation of his or her employment to the SPBR. The scope of an appeal is described in R.C. 124.03, which states, in part:

"(A) The state personnel board of review shall exercise the following powers and perform the following duties:

"(1) Hear appeals, as provided by law, of employees in the classified state service from final decisions of appointing authorities or the director of administrative services relative to reduction in pay or position, job abolishments, layoff, suspension, discharge,

assignment or reassignment to a new or different position classification, or refusal of the director, or anybody authorized to perform the director's functions, to reassign an employee to another classification or to reclassify the employee's position with or without a job audit under division (D) of section 124.14 of the Revised Code. As used in this division, 'discharge' includes disability separations."

It is undisputed that Byers is a deputy sheriff, and as such, a classified civil service employee. "A deputy sheriff is, more or less, presumed to be in classified civil service unless some special duties are demonstrated which would put him in the unclassified group." *Davis v. Jones* (Sept. 28, 1993), Hocking App. No. 93 CA 06, 1993 WL 405486, at *5, fn. 5, citing 1986 Ohio Atty.Gen.Ops. No. 86-068, at 2-381. "[D]eputy sheriffs are deemed unclassified civil servants only when they are assigned to, and perform, duties in which they hold a fiduciary or administrative relationship to the sheriff." *Id.*, citing *In re Termination of Employment* (1974), 40 Ohio St.2d 107, paragraph two of the syllabus. The evidence before this Court does not show that Byers holds a fiduciary or administrative relationship to the sheriff.

The issue turns to whether Byers had the right to appeal MCSO's refusal to reinstate him at his previous position and salary, or to a similar position and salary.

In *State ex rel. Copen v. Kaley* (Feb. 4, 2000), Portage App. No. 99-O-0041, the Eleventh District Court of Appeals found in a case similar to the present matter that an appeal to the SPBR provided an adequate remedy at law, where the employer Sheriff Department refused to reinstate a deputy sheriff following the termination of the deputy's PERS disability benefits.

The relator in *Kaley* was informed by PERS in 1999 that his disability benefits would

be terminated following a determination that he no longer was disabled and could return to work as a deputy sheriff. Id. at *1. PERS also notified the Sheriff's Department of the relator's eligibility to return to work. Id. After two failed attempts to resume his position as deputy sheriff, the relator filed an action in mandamus.

The court of appeals ultimately concluded that a "mandamus action cannot be brought before a decision has been rendered by the SPBR because such an action cannot be employed as a substitute for the civil service appeal." Id. at *4, citing *State ex rel. Weiss v. Indus. Comm.* (1992), 65 Ohio St.3d 470, 476-77. The relator could have appealed to SPBR when the Sheriff's Department failed to respond to his request to return to work, even in the event the respondent did not file a written decision concerning the matter to SPBR. Id. at *3, fn. 1, citing R.C. 124.03(A); *State ex rel. Shine v. Garofalo* (1982), 69 Ohio St.2d 253, 256.

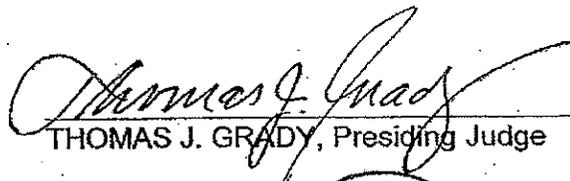
The facts in *Kaley* are quite similar to those here. In March 2009, PERS notified Byers that he was no longer considered permanently disabled from the performance of duties as a deputy sheriff and, as a result, his disability retirement benefits would end effective June 30, 2009. Despite several attempts to contact MCSO and request that he be permitted to resume his position, MCSO did not act until December 2010. MCSO's refusal to immediately reinstate Byers, and ultimately its decision to reinstate him although forfeiting his seniority, were challengeable on appeal to the SPBR. Mandamus will not act as a substitute for the civil service appeal. *Weiss*, 65 Ohio St.3d at 477. Furthermore, the fact that a party fails to timely pursue his or her right of appeal does not make that remedy inadequate. "If that were the case, this criterion for a writ of mandamus would be met whenever the opportunity to pursue another adequate remedy expired." *State ex rel.*

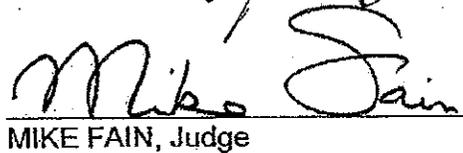
Cartmell v. Dorrian (1984), 11 Ohio St.3d 177, 178.

Accordingly, this Court finds that MCSO has shown that there is no factual dispute with respect to whether Byers had an adequate remedy at law that precludes mandamus relief. MCSO is entitled to judgment as a matter of law.

Having found there to be an adequate legal remedy in this matter, the court need not address the issues of legal right or legal duty. MCSO's Cross-Motion for Summary Judgment is SUSTAINED. Byers' petition for a writ of mandamus is DENIED.¹

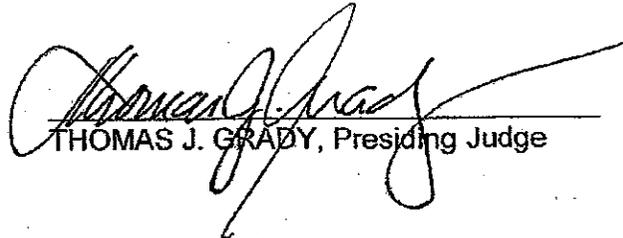
SO ORDERED.


THOMAS J. GRADY, Presiding Judge


MIKE FAIN, Judge


MICHAEL T. HALL, Judge

To The Clerk: Within three (3) days of entering this judgment on the journal, you are directed to serve on all parties not in default for failure to appear notice of the judgment and the date of its entry upon the journal, pursuant to Civ.R. 58(B).


THOMAS J. GRADY, Presiding Judge

¹The October 18, 2011 "Relator's Motion for Leave to File a Request for Oral Argument" is OVERRULED.

Copies to:

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JAN A. MOTTINGER
CLERK OF COURTS

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

STATE OF OHIO, ex rel., DOUGLAS D. BYERS : Appellate Case No. 09-CA-42

Relator

v.

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AND CHARLES A. COX, SHERIFF

Respondents

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“ * * *

“On completion of the examination by an examining physician or physicians selected by the board, the physician or physicians shall report and certify to the board whether the disability benefit recipient is no longer physically and mentally incapable of resuming the service from which the recipient was found disabled. If the board concurs in the report that the disability benefit recipient is no longer incapable, the payment of the disability benefit shall be terminated not later than three months after the date of the board's concurrence or upon employment as a public employee. If the leave of absence has not expired, the retirement board shall certify to the disability benefit recipient's last employer before being found disabled that the recipient is no longer physically and mentally incapable of resuming service that is the same or similar to that from which the recipient was found disabled. *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.*” (Emphasis added.)

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To be entitled to a writ of mandamus, Byers 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 acts, and (3) that [Byers] has no plain and adequate remedy in the ordinary course of the law.’ ” *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, quoting *State ex rel. Harris v. Rhodes* (1978), 54 Ohio St.2d 41, 42; *State ex rel. Heller v.*

Miller (1980), 61 Ohio St.2d 6, paragraph one of the syllabus; *State ex rel. Westchester v. Bacon* (1980), 61 Ohio St.2d 42, paragraph one of the syllabus.

Both parties have moved for summary judgment. "Summary judgment pursuant to Civ.R. 56 should be granted only if no genuine issue of fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which conclusion is adverse to the nonmoving party. When considering a motion for summary judgment, the evidence must be construed in favor of the nonmoving party." *State ex rel. Shelly Materials v. Clark Cty. Bd. of Commrs.*, Clark App. No. 2003-CA-72, 2005-Ohio-6682, at ¶5, quoting *Wheelbarger v. Dayton Bd. of Edn.*, Montgomery App. No. 20272, 2004-Ohio-4367, at ¶8.

Adequate Remedy

"The writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law." R.C. 2731.05. Upon consideration, this Court finds that Byers had an adequate remedy at law to raise the issues set forth in this original action through an appeal to the State Personnel Board of Review ("SPBR").

R.C. 124.34 gives a classified civil servant the right to appeal a decision concerning the continuation of his or her employment to the SPBR. The scope of an appeal is described in R.C. 124.03, which states, in part:

"(A) The state personnel board of review shall exercise the following powers and perform the following duties:

"(1) Hear appeals, as provided by law, of employees in the classified state service from final decisions of appointing authorities or the director of administrative services relative to reduction in pay or position, job abolishments, layoff, suspension, discharge,

assignment or reassignment to a new or different position classification, or refusal of the director, or anybody authorized to perform the director's functions, to reassign an employee to another classification or to reclassify the employee's position with or without a job audit under division (D) of section 124.14 of the Revised Code. As used in this division, 'discharge' includes disability separations."

It is undisputed that Byers is a deputy sheriff, and as such, a classified civil service employee. "A deputy sheriff is, more or less, presumed to be in classified civil service unless some special duties are demonstrated which would put him in the unclassified group." *Davis v. Jones* (Sept. 28, 1993), Hocking App. No. 93 CA 06, 1993 WL 405486, at *5, fn. 5, citing 1986 Ohio Atty.Gen.Ops. No. 86-068, at 2-381. "[D]eputy sheriffs are deemed unclassified civil servants only when they are assigned to, and perform, duties in which they hold a fiduciary or administrative relationship to the sheriff." *Id.*, citing *In re Termination of Employment* (1974), 40 Ohio St.2d 107, paragraph two of the syllabus. The evidence before this Court does not show that Byers holds a fiduciary or administrative relationship to the sheriff.

The issue turns to whether Byers had the right to appeal MCSO's refusal to reinstate him at his previous position and salary, or to a similar position and salary.

In *State ex rel. Copen v. Kaley* (Feb. 4, 2000), Portage App. No. 99-O-0041, the Eleventh District Court of Appeals found in a case similar to the present matter that an appeal to the SPBR provided an adequate remedy at law, where the employer Sheriff Department refused to reinstate a deputy sheriff following the termination of the deputy's PERS disability benefits.

The relator in *Kaley* was informed by PERS in 1999 that his disability benefits would

be terminated following a determination that he no longer was disabled and could return to work as a deputy sheriff. Id. at *1. PERS also notified the Sheriff's Department of the relator's eligibility to return to work. Id. After two failed attempts to resume his position as deputy sheriff, the relator filed an action in mandamus.

The court of appeals ultimately concluded that a "mandamus action cannot be brought before a decision has been rendered by the SPBR because such an action cannot be employed as a substitute for the civil service appeal." Id. at *4, citing *State ex rel. Weiss v. Indus. Comm.* (1992), 65 Ohio St.3d 470, 476-77. The relator could have appealed to SPBR when the Sheriff's Department failed to respond to his request to return to work, even in the event the respondent did not file a written decision concerning the matter to SPBR. Id. at *3, fn. 1, citing R.C. 124.03(A); *State ex rel. Shine v. Garofalo* (1982), 69 Ohio St.2d 253, 256.

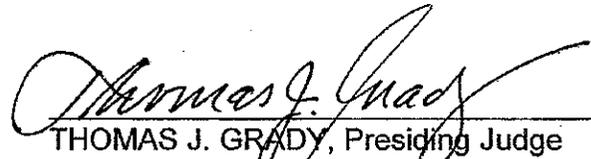
The facts in *Kaley* are quite similar to those here. In March 2009, PERS notified Byers that he was no longer considered permanently disabled from the performance of duties as a deputy sheriff and, as a result, his disability retirement benefits would end effective June 30, 2009. Despite several attempts to contact MCSO and request that he be permitted to resume his position, MCSO did not act until December 2010. MCSO's refusal to immediately reinstate Byers, and ultimately its decision to reinstate him although forfeiting his seniority, were challengeable on appeal to the SPBR. Mandamus will not act as a substitute for the civil service appeal. *Weiss*, 65 Ohio St.3d at 477. Furthermore, the fact that a party fails to timely pursue his or her right of appeal does not make that remedy inadequate. "If that were the case, this criterion for a writ of mandamus would be met whenever the opportunity to pursue another adequate remedy expired." *State ex rel.*

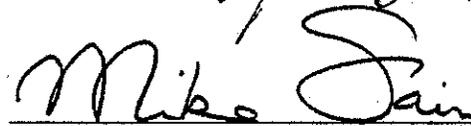
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Cartmell v. Dorrian (1984), 11 Ohio St.3d 177, 178.

Accordingly, this Court finds that MCSO has shown that there is no factual dispute with respect to whether Byers had an adequate remedy at law that precludes mandamus relief. MCSO is entitled to judgment as a matter of law.

Having found there to be an adequate legal remedy in this matter, the court need not address the issues of legal right or legal duty. MCSO's Cross-Motion for Summary Judgment is SUSTAINED. Byers' petition for a writ of mandamus is DENIED.¹

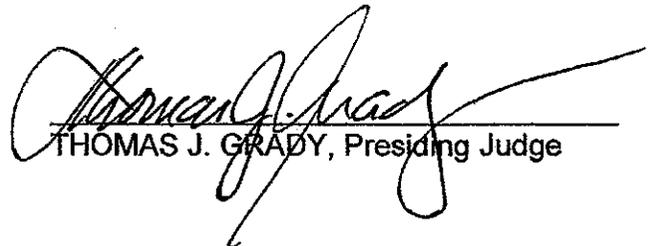
SO ORDERED.


THOMAS J. GRADY, Presiding Judge


MIKE FAIN, Judge


MICHAEL T. HALL, Judge

To The Clerk: Within three (3) days of entering this judgment on the journal, you are directed to serve on all parties not in default for failure to appear notice of the judgment and the date of its entry upon the journal, pursuant to Civ.R. 58(B).


THOMAS J. GRADY, Presiding Judge

¹The October 18, 2011 "Relator's Motion for Leave to File a Request for Oral Argument" is OVERRULED.

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

STATE OF OHIO, ex rel., DOUGLAS D. BYERS : Appellate Case No. 09-CA-42

Relator

v.

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

Respondents

DECISION AND ENTRY
February 10, 2012

PER CURIAM:

This matter is before the court on Douglas Byers' December 11, 2011 "Motion for Relief from Judgment Pursuant to Civ.R. 60(B)." Byers seeks relief from this Court's November 15, 2011 judgment denying his petition for a writ of mandamus. *State ex rel. Byers v. Miami Cty. Sheriff's Office*, 2d Dist. Miami No. 09-CA-42, 2011-Ohio-6125.

On January 10, 2012, we declined to rule on Byers' Civ.R. 60(B) motion, finding that his intervening notice of appeal to the Supreme Court deprived us of jurisdiction. Byers subsequently sought and obtained an order of remand from the Supreme Court directing us to determine Byers' motion for Civ.R. 60(B) relief.

The controversy in this case involves Byers' reinstatement as a deputy sheriff

following disability leave through Ohio's Public Employees Retirement System ("PERS"). The record shows that Byers initially sought a writ of mandamus compelling the Miami County Sheriff's Office ("MCSO") to restore him to his previous position of deputy sheriff and the salary commensurate thereto or to a similar position and salary, pursuant to R.C. 145.362. Having been reinstated while this action was pending, Byers modified his claim to request backpay and benefits for the time he was not permitted to work, although allegedly entitled to work; attorney's fees; and costs.

Both parties moved for summary judgment. In a final decision rendered November 15, 2011, this Court concluded that Byers had an adequate remedy at law via an appeal to the State Personnel Board of Review ("SPBR"), and we entered a summary judgment in favor of Respondents. *Id.* at ¶ 24-25.

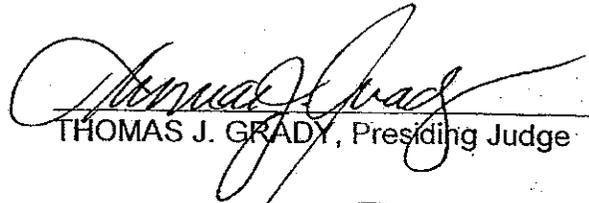
Byers claims entitlement to relief from the final judgment in this matter under Civ.R. 60(B)(1). He argues that the court's decision is based on a mistake, because the Collective Bargaining Agreement ("CBA") governing his employment with MCSO demonstrates that Byers waived his right to pursue claims with the SPBR. However, "a motion for relief from judgment cannot be predicated upon the argument that the trial court [i.e., the court of appeals in this original action] made a mistake in rendering its decision." *Foy v. Trumbull Corr. Inst.*, 10th Dist. Franklin No. 11AP-464, 2011-Ohio-6298, at ¶ 11, citing *Chester Twp. v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 102 Ohio App.3d 404, 408, 657 N.E.2d 348 (11th Dist. Geauga 1995). Civ.R. 60(B)(1) contemplates a mistake by a party or a legal representative, not a mistake by the trial court in its legal analysis. *Id.*, citing *Antonopoulos v. Eisner*, 30 Ohio App.2d 187, 284 N.E.2d 194 (8th Dist. Cuyahoga 1972).

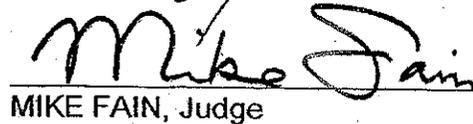
Byers must directly appeal the November 15, 2011 judgment to contest our finding

that his legal remedy was a claim with the SPBR. Civ.R. 60(B) is not a substitute for a direct appeal. *Seitz v. Seitz*, 2d Dist. Montgomery Nos. 22426 & 23698, 2010-Ohio-3655, at ¶ 7.

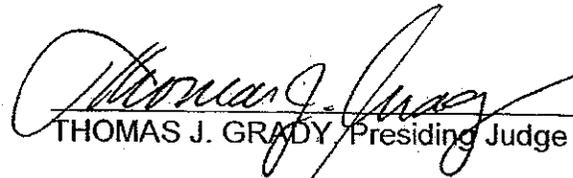
Accordingly, Byers' "Motion for Relief from Judgment Pursuant to Civ.R. 60(B)" is OVERRULED.

SO ORDERED.


THOMAS J. GRADY, Presiding Judge


MIKE FAIN, Judge

To The Clerk: Within three (3) days of entering this judgment on the journal, you are directed to serve on all parties not in default for failure to appear notice of the judgment and the date of its entry upon the journal, pursuant to Civ.R. 58(B).


THOMAS J. GRADY, Presiding Judge

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Baldwin's Ohio Revised Code Annotated Currentness

Title I. State Government

▣ Chapter 124. Department of Administrative Services--Personnel (Refs & Annos)

▣ Tenure; Employee Protection; Appeals

→→ **124.34 Tenure of office; felony convictions; reduction, suspension, and removal; appeal**

(A) The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts of the state, holding a position under this chapter, shall be during good behavior and efficient service. No officer or employee shall be reduced in pay or position, fined, suspended, or removed, or have the officer's or employee's longevity reduced or eliminated, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony. The denial of a one-time pay supplement or a bonus to an officer or employee is not a reduction in pay for purposes of this section.

This section does not apply to any modifications or reductions in pay or work week authorized by division (Q) of section 124.181 or section 124.392, 124.393, or 124.394 of the Revised Code.

An appointing authority may require an employee who is suspended to report to work to serve the suspension. An employee serving a suspension in this manner shall continue to be compensated at the employee's regular rate of pay for hours worked. The disciplinary action shall be recorded in the employee's personnel file in the same manner as other disciplinary actions and has the same effect as a suspension without pay for the purpose of recording disciplinary actions.

A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102., section 2921.42, or section 2921.43 of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal. The tenure of an employee in the career professional service of the department of transportation is subject to section 5501.20 of the Revised Code.

Conviction of a felony is a separate basis for reducing in pay or position, suspending, or removing an officer or employee, even if the officer or employee has already been reduced in pay or position, suspended, or removed for the same conduct that is the basis of the felony. An officer or employee may not appeal to the state personnel board of review or the commission any disciplinary action taken by an appointing authority as a result of the officer's or employee's conviction of a felony. If an officer or employee removed under this section is reinstated as a result of an appeal of the removal, any conviction of a felony that occurs during the pendency of the appeal is a basis for further disciplinary action under this section upon the officer's or employee's reinstatement.

A person convicted of a felony immediately forfeits the person's status as a classified employee in any public employment on and after the date of the conviction for the felony. If an officer or employee is removed under this section as a result of being convicted of a felony or is subsequently convicted of a felony that involves the same conduct that was the basis for the removal, the officer or employee is barred from receiving any compensation after the removal notwithstanding any modification or disaffirmance of the removal, unless the conviction for the felony is subsequently reversed or annulled.

Any person removed for conviction of a felony is entitled to a cash payment for any accrued but unused sick, personal, and vacation leave as authorized by law. If subsequently reemployed in the public sector, the person shall qualify for and accrue these forms of leave in the manner specified by law for a newly appointed employee and shall not be credited with prior public service for the purpose of receiving these forms of leave.

As used in this division, "felony" means any of the following:

- (1) A felony that is an offense of violence as defined in section 2901.01 of the Revised Code;
- (2) A felony that is a felony drug abuse offense as defined in section 2925.01 of the Revised Code;
- (3) A felony under the laws of this or any other state or the United States that is a crime of moral turpitude;
- (4) A felony involving dishonesty, fraud, or theft;
- (5) A felony that is a violation of section 2921.05, 2921.32, or 2921.42 of the Revised Code.

(B) In case of a reduction, a suspension of more than forty work hours in the case of an employee exempt from the payment of overtime compensation, a suspension of more than twenty-four work hours in the case of an employee required to be paid overtime compensation, a fine of more than forty hours' pay in the case of an employee exempt from the payment of overtime compensation, a fine of more than twenty-four hours' pay in the case of an employee required to be paid overtime compensation, or removal, except for the reduction or removal of a probationary employee, the appointing authority shall serve the employee with a copy of the order of reduction, fine, suspension, or removal, which order shall state the reasons for the action.

Within ten days following the date on which the order is served or, in the case of an employee in the career professional service of the department of transportation, within ten days following the filing of a removal order, the employee, except as otherwise provided in this section, may file an appeal of the order in writing with the state personnel board of review or the commission. For purposes of this section, the date on which an order is served is the date of hand delivery of the order or the date of delivery of the order by certified United States mail, whichever occurs first. If

an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, the appeal within thirty days from and after its filing with the board or commission. The board, commission, or trial board may affirm, disaffirm, or modify the judgment of the appointing authority. However, in an appeal of a removal order based upon a violation of a last chance agreement, the board, commission, or trial board may only determine if the employee violated the agreement and thus affirm or disaffirm the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission, and any such appeal shall be to the court of common pleas of the county in which the appointing authority is located, or to the court of common pleas of Franklin county, as provided by section 119.12 of the Revised Code.

(C) In the case of the suspension for any period of time, or a fine, demotion, or removal, of a chief of police, a chief of a fire department, or any member of the police or fire department of a city or civil service township, who is in the classified civil service, the appointing authority shall furnish the chief or member with a copy of the order of suspension, fine, demotion, or removal, which order shall state the reasons for the action. The order shall be filed with the municipal or civil service township civil service commission. Within ten days following the filing of the order, the chief or member may file an appeal, in writing, with the commission. If an appeal is filed, the commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, the appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority. An appeal on questions of law and fact may be had from the decision of the commission to the court of common pleas in the county in which the city or civil service township is situated. The appeal shall be taken within thirty days from the finding of the commission.

(D) A violation of division (A)(7) of section 2907.03 of the Revised Code is grounds for termination of employment of a nonteaching employee under this section.

(E) As used in this section, "last chance agreement" means an agreement signed by both an appointing authority and an officer or employee of the appointing authority that describes the type of behavior or circumstances that, if it occurs, will automatically lead to removal of the officer or employee without the right of appeal to the state personnel board of review or the appropriate commission.

CREDIT(S)

(2011 H 153, eff. 9-29-11; 2009 H 1, eff. 7-17-09; 2009 H 16, eff. 6-30-09; 2006 H 187, eff. 7-1-07; 2000 H 640, eff. 6-15-00; 1998 S 144, eff. 3-30-99; 1998 H 348, eff. 3-22-99; 1998 S 229, eff. 9-16-98; 1997 H 215, eff. 9-29-97; 1994 H 454, eff. 7-19-94; 1986 H 300, eff. 9-17-86; 1979 H 155; 1977 H 47; 1975 H 1; 1974 S 243, H 513; 1973 S 174)

Current through all 2011 laws and statewide issues and 2012 File 80 of the 129th GA (2011-2012).

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Baldwin's Ohio Revised Code Annotated Currentness

Title I. State Government

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

Disability Retirement

→→ 145.362 Disability benefit recipient considered on leave of absence; medical examination; statement; restoration to position and salary

A disability benefit recipient shall retain membership status and shall be considered on leave of absence from employment during the first five years following the effective date of a disability benefit, notwithstanding any contrary provisions in this chapter.

The public employees retirement board shall require any disability benefit recipient to undergo an annual medical examination, except that the board may waive the medical examination if the board's physician or physicians certify that the recipient's disability is ongoing. If any disability benefit recipient refuses to submit to a medical examination, the recipient's disability benefit shall be suspended until withdrawal of the refusal. Should the refusal continue for one year, all the recipient's rights in and to the disability benefit shall be terminated as of the effective date of the original suspension.

On completion of the examination by an examining physician or physicians selected by the board, the physician or physicians shall report and certify to the board whether the disability benefit recipient is no longer physically and mentally incapable of resuming the service from which the recipient was found disabled. If the board concurs in the report that the disability benefit recipient is no longer incapable, the payment of the disability benefit shall be terminated not later than three months after the date of the board's concurrence or upon employment as a public employee. If the leave of absence has not expired, the retirement board shall certify to the disability benefit recipient's last employer before being found disabled that the recipient is no longer physically and mentally incapable of resuming service that is the same or similar to that from which the recipient was found disabled. 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.

Each disability benefit recipient shall file with the board an annual statement of earnings, current medical information on the recipient's condition, and any other information required in rules adopted by the board. The board may waive the requirement that a disability benefit recipient file an annual statement of earnings or current medical information if the board's physician certifies that the recipient's disability is ongoing.

The board shall annually examine the information submitted by the recipient. If a disability benefit recipient refuses to file the statement or information, the disability benefit shall be suspended until the statement and information are filed. If the refusal continues for one year, the recipient's right to the disability benefit shall be terminated as of the effective date of the original suspension.

If a disability benefit recipient is restored to service by, or elected to an elective office with, an employer covered by this chapter, the recipient's disability benefit shall cease.

The board may terminate a disability benefit at the request of the recipient.

If disability retirement under section 145.36 of the Revised Code is terminated for any reason, the annuity and pension reserves at that time in the annuity and pension reserve fund shall be transferred to the employees' savings fund and the employers' accumulation fund, respectively. If the total disability benefit paid is less than the amount of the accumulated contributions of the member transferred to the annuity and pension reserve fund at the time of the member's disability retirement, the difference shall be transferred from the annuity and pension reserve fund to another fund as may be required. In determining the amount of a member's account following the termination of disability retirement for any reason, the total amount paid shall be charged against the member's refundable account.

If a disability allowance paid under section 145.361 of the Revised Code is terminated for any reason, the reserve on the allowance at that time in the annuity and pension reserve fund shall be transferred from that fund to the employers' accumulation fund.

If a former disability benefit recipient again becomes a contributor, other than as an other system retirant under section 145.38 of the Revised Code, to this system, the state teachers retirement system, or the school employees retirement system, and completes an additional two years of service credit, the former disability benefit recipient shall be entitled to full service credit for the period as a disability benefit recipient.

If any employer employs any member who is receiving a disability benefit, the employer shall file notice of employment with the retirement board, designating the date of employment. In case the notice is not filed, the total amount of the benefit paid during the period of employment prior to notice shall be charged to and paid by the employer.

CREDIT(S)

(1998 H 648, eff. 9-16-98; 1996 S 82, eff. 3-7-97; 1992 S 346, eff. 7-29-92)

Current through all 2011 laws and statewide issues and 2012 File 80 of the 129th GA (2011-2012).

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