

IN THE SUPREME COURT OF OHIO

State of Ohio, ex rel.,
Douglas D. Byers

Case No: 2011-2069

Appellant/Relator

v.

Miami County Sheriff's Office
and Charles A. Cox, Sheriff

On Appeal from the
Second District Court of Appeals
Case No. CA 09-CA-42
Decided November 15, 2011

Appellee/Respondents,

MERIT BRIEF OF APPELLEES

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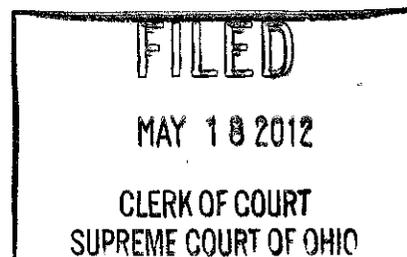


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I. STATEMENT OF FACTS:

Introduction:

Appellant's "Statement of Facts" is less than objective; and, in places, relies upon assertions that are not supported by the record before this Court. Appellees, therefore, offer their own "Statement of Facts."

Facts:

This case comes before the court as a direct appeal from a denial of a petition for a writ of Mandamus.

Appellant, hereinafter also referred to as "Relator," had first been hired by the Miami County Office of Sheriff in 2000, where he served as a Road Patrol Deputy.

In August of 2004, Relator was on a special duty assignment investigating the theft of anhydrous ammonia, when two suspects appeared (Deposition pg. 12). In confronting the subjects, one suspect drew or displayed a firearm, aiming it at Relator (Deposition pg. 15). Both Relator and a fellow police officer fired at the suspect, who subsequently died of a gunshot wound (Deposition pg. 15 – 16).

It was never established whether the Relator's bullet, or that of his fellow officer, killed the suspect¹ (Deposition pg. 16).

Thereafter, in 2005, Relator developed a sleep disorder (Deposition pg. 18), which affected his ability to work. In order to address that problem, the Sheriff assisted Relator in obtaining counseling from one Karen Bays (Deposition pg. 18 – 19).

Following an absence from work, Relator returned to duty in October 2005, but continued to have psychological problems, that manifested themselves in insomnia. Relator was going four to six days without sleep, was not eating; and did not want to go anywhere or do anything (Deposition pg. 21).

Shortly thereafter, Relator suffered even more intense symptoms (Deposition Exhibit 3). The exact date of that relapse is not clear, but Relator ceased working as of January 2006, and remained off and unable to work, until 2008 (Deposition pg. 24).

In 2008, several events transpired. First, Relator made application for a Public Employees disability retirement (PERS) (Deposition Exhibit 4; Deposition pg. 24).

¹ Relator, at page 5 of his brief, asserts that he killed the suspect, although this seems at odds with both Relator's affidavit and his deposition testimony.

Next, on June 3, 2008, Relator was evaluated by Dr. Dong Moon, M.D., a psychiatrist who opined that Relator was “**presumed to be mentally incapacitated permanently**” (Deposition Exhibit 6; Deposition pg. 28 – 29).

On July 11, 2008, Relator **resigned from employment** (Deposition Exhibit 9; Deposition pg. 33). On that date, Relator's immediate supervisor, Captain Johnson, had called Relator into his office and suggested that Relator needed to resign (Deposition pg. 33). No threats or pressure were applied (Deposition pg. 34). That resignation has never been invalidated.

Although Relator was, at that time, in a Union, he did not consult with his Union Representative about the resignation (Deposition pg. 34).

Thereafter, Relator did not attempt to rescind his resignation (Deposition pg. 34); and the resignation was accepted by Sheriff Charles Cox (Deposition Exhibit 10; Deposition pg. 35).

At no time did Relator ever attempt to appeal the resignation to the State Personnel Board of Review (Deposition pg. 37).

At no time did Relator ever allege, or attempt to suggest in any grievance, that he was “forced” to resign (Deposition pg. 37).

Indeed, as of the date of that resignation, in July of 2008, Relator was still experiencing sleep problems, depression, and crying spells (Deposition pg. 37).

On December 15, 2008, Relator was seen by Dr. Mark Reynolds, a psychiatrist, who performed an evaluation at the request of PERS (Public Employees Retirement System).

In a report dated December 15, 2008, Dr. Reynolds opined:

“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. While the claimant evidences no severe psychopathology during this psychiatric interview, a number of factors would suggest caution in returning the claimant to work. First, previous communications from his treating providers indicate significant disability and a limited prognosis, with no interim reports until the most recent suddenly describing a good prognosis and ability to return to work. Secondly, the evaluation performed by Dr. Moon's office only six months previous described significant psychopathology including a history of recurrent major depressive episodes, which the claimant does not endorse in this interview. While such a significant improvement in clinical status over a six-month period would certainly be conceivable, it is interesting that the improvement has evidently occurred with a decrease in the frequency of treatment and the *question of secondary gain in attempting to return to work must be raised. 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. If more information becomes available such information may or may not change my opinion. My opinions do not constitute per se any recommendations for specific claims or administrative functions to be made or enforced.”

(Emphasis added)(Deposition Exhibit 11)

The Psychiatrist never, per se, pronounced Relator “fit” for reemployment; rather, his opinion was phrased in terms of “if” Relator returns (see highlighted section). (“Should the claimant be returned”...)

Although this psychiatrist recommended ongoing psychotherapy, no less frequently than twice a month, Relator *never* contacted the Sheriff, nor did he ever express any willingness to comply with the recommended ongoing therapy, at that time (Deposition pg. 42).

It is important to note that, as of early 2009, Relator was regarded not as an employee on some disability leave; but as a former (now resigned) employee who was seeking reemployment.

Regarding this as a potential “new hire,” the Sheriff in March 2009 sent Relator to Dr. David Randolph, M.D., M.P.H., for an evaluation.

By report dated March 15, 2009, Dr. Randolph opined:

“I am unable, based upon the information presently available, to provide a statement that Doug Byers is capable of returning to the unrestricted duties of deputy sheriff/road patrol officer for Miami County Sheriff's Office as described.

A lengthy evaluation by Dr. Moon, a psychiatrist in June 2008 provides statements that Mr. Byers has significant symptoms with a heightened level of anxiety, sleep problems, “racing” thoughts and presented to Dr. Moon with “significant motor agitation” with his hands noted to be tremorous.

A global assessment of functioning was provided by Dr. Moon of “45.” This is considered inconsistent with the abilities to perform regular work activities.

More recently (see report of 12/15/08) he was seen by Dr. Mark Reynolds who questioned his motives in requesting return to work and raised the issue of secondary gain.

Remarkably, no treatment records from the claimant's counselor or the psychologist have been provided. No “releases” are available and most importantly psychometric tests are not ever reference in these files.

In other words the totality of the opinions expressed both from Drs. Moon and Reynolds as well as his family physician and the psychologist (Smith) are based solely upon the information provided by Mr. Byers with no corroborating information which can be statistically assessed.

The position of police officer is unique among employment positions in that the ability to safely perform said task directly impacts the safety of the police officer, his fellow officers and the public at large. This puts a remarkable onus to assure that individuals performing said tasks be physically and emotionally equipped to safely and consistently perform the sometimes extremely demanding aspects of this job.

The records as they exist are inadequate to address the concept of Mr. Byers capabilities of returning to work and given the remarkable descriptors of Mr. Byers noted in the available records as well as his clear evidence of emotional instability and "psychosis" (see note from Captain Johnson dated 01/09/06) a serious concern regarding that capability is raised.

It is my opinion that the information as it presently exists is inadequate to indicate that Doug Byers is safe to return to his previous levels of activity as deputy sheriff/road patrol officer as described and I am unable to declare him fit to return to that position based upon available documentation. A serious concern is raised regarding underlying psychopathology of a nature far greater than that referenced in the current conditions and diagnosis."

(Deposition Exhibit 12; Deposition pg. 45)

On or about March 18, 2009, PERS notified Relator that he was no longer regarded as disabled by PERS (Deposition Exhibit 13; Deposition pg. 46).

Relator did not appeal that determination (Deposition pg. 47).

At some unspecified time after March 18, 2009, Relator again contacted the Sheriff for reemployment². Although there were some initial steps taken, the Sheriff desired medical evidence of fitness for duty, and the reemployment did not take place.

On April 6, 2009, Relator was advised that medical records did not show him capable of returning to work, at that time (Deposition Exhibit 14).

On or about April 22, 2009, Relator filed a charge with the Ohio Civil Rights Commission, alleging disability discrimination.

On April 24, 2009, the Sheriff was sent a report by Dr. Nick Marzella, a Police Psychologist which stated:

“Douglas Byers is a 40 year old man who has been on disability retirement from the Miami County Sheriff's Department since July 2008. He was diagnosed with Post Traumatic Stress Disorder, Major Depressive Disorder and Dysthymic Disorder by Christian Counselor Bays under the auspices of her supervising psychologist Dr. Pamela Smith. Psychologist Dr. Dong Moon concurred with the severity of these diagnoses and recommended permanent disability retirement for Mr. Byers in June 2008. A subsequent evaluation performed by Dr. Mark Reynolds, psychiatrist, highlighted the discrepancies in these evaluations with Mr. Byers' presentation in December 2008, and Dr. Reynolds opined should

² Relator refers to this as “reinstatement”; however the intervening resignation cut off “reinstatement,” per se.

Mr. Byers be returned to work, then he should participate in ongoing psychotherapy.

Upon this examiner's evaluation of Mr. Byers, several questions came to light. While Mr. Byers did participate in a critical incident, his subjective accounting of his symptoms subsequent to the incident mirrored an acute stress reaction as opposed to a post traumatic stress disorder. His treating counselor and examining psychiatrist for disability reported severe symptomatology that was recalcitrant to psychotropic medication and counseling. Mr. Byers reports after discontinuing psychotherapy and psychotropic medications, he has experienced relatively few psychological symptoms and sees himself ready to return to work. During the time Mr. Byers has been disability retired, he has been able to teach classes at Sinclair Community College and Edison Community College. Additionally, he and a partner have started a security business and are working through the problems associated with starting any small business. He seems to have performed well in these functions. I concur with Dr. Reynolds that while it is not inconceivable that Mr. Byers would experience such an abatement of symptoms and tremendous progress in six months, it is highly unlikely. That said, I would raise the question of Mr. Byers' **motivation in seeking disability and now seeking to return to work. In my opinion, they are both motivated by secondary gain.** My objective evaluation of Mr. Byers did not unearth the presence of any psychological disorder presently. The only evidence of the diagnoses mentioned above is based in prior evaluations and self reported symptoms by Mr. Byers which occurred subsequent to his participation in a critical incident. My evaluation does suggest the presence of some obsessive-compulsive, histrionic and narcissistic personality features which fall in line with one who plays a situation for their own benefit. Mr. Byers wants to return to work and he is motivated by financial stressors. **There are no psychological symptoms present that would prevent him from working; however, questions about his motivation, secondary gain and sense of entitlement are raised. Should the department allow Mr. Byers to return to work, I would reinforce Dr. Reynolds' recommendation that he participate on a bi-weekly basis, I would prefer he participate in psychotherapy with either a Ph.D. level psychologist or psychiatrist."**

(Emphasis added)

Shortly thereafter, Relator filed a grievance under his Union contract, and that grievance was moved to arbitration (Deposition Exhibit 16; Deposition pg. 52).

Although an issue of arbitrability was raised by the Employer, the case was *never decided* by an arbitrator, and was never withdrawn by the Union (Deposition pg. 53).

The Relator concedes that it is “hanging out there” *unresolved* (Deposition pg. 53). (See also complaint paragraph number 26).

On May 4, 2009, Relator, again contacted the Sheriff's Office for reemployment (Deposition Exhibit 17; Deposition pg. 55).

When reemployment was not forthcoming, Relator did not file an additional grievance (Deposition pg. 56).

Relator did not file a “failure to reinstate” appeal to the State Personnel Board of Review, even though he had, by then, resigned and taken himself outside of the collective bargaining agreement. (Deposition pg. 56).

Relator did not file any “declaratory judgment” action to challenge the legal validity of his resignation.

At all times relevant, the Sheriff regarded the medical opinions as imposing a “condition precedent” to reemployment. That condition precedent was that Relator had to agree to ongoing counseling with either a Ph.D. level psychologist, or a psychiatrist.

When Relator, finally, satisfied that condition precedent, in *December of 2010*, he was rehired as a “new” employee (Affidavit of P. Lowe). (Respondent’s Ex A, Appendix to Memorandum in Opposition, Record).

II. ARGUMENT:

This is an appeal from judgment denying a writ of Mandamus that had sought to compel “reinstatement” following a resignation, and a “break in service,” by a public employee. The court below had been presented with a number of “adequate remedies at law,” which Relator had failed to pursue; and had determined that Relator, as one who has resigned, has “an adequate remedy at law to raise the issues set forth in his original action through an appeal to the State Personnel Board of Review” (Decision, pg.4).

Relator’s response has been to raise, in his brief to this Court, one or more arguments that he failed to raise below; and which proceed on “facts” unsupported by the record.

A. Appellee's Proposition of Law Number One:

A reviewing court will not consider any error which counsel for a party could have called, but did not call, to the trial court's attention.

Following the decision by the Second Appellant District Court of Appeals, on November 15, 2011, Counsel for Relator, apparently, determined that he wanted to raise a new, and hitherto unmentioned, argument. There followed a series of motions, here and below, in which Relator attempted, unsuccessfully, to reopen the case.

Relator's Rule Civil Rule 60 (B) motion was denied on February 10, 2012; and Appellant/Relator has not raised any "Assignment of Error" over that ruling.

That ruling was clear in noting that the after-the-fact arguments presented by Relator, (that Relator's collective bargaining agreement had waived his right to appeal to the State Personnel Board of Review); had not been timely, or properly, raised.

Relator's combined "Assignment of Error/Proposition of Law No I," then, attempts to raise that same, hitherto, "unraised" argument.

This court has consistently held that a reviewing court should not consider any error which counsel for the appellant could have, but did not; bring to the attention of the court below at a time when such error could have been avoided. See State v. Gordon, 28 Ohio St. 2d 45; and State v. Childs (1968) 14 Ohio St 2d 56 (syllabus #3). See also, Village of Clarington v. Althor, (1930) 122 Ohio St. 608 and State v. Issa (2001) 93 Ohio St. 3d 49 (failure to raise an issue below waives all but plain error).

Nowhere, in Appellant's brief to this court, does he assert that his untimely argument concerns any "plain error." Indeed, "plain error" exists only where, "but for," the alleged error, the outcome of the court below would have been otherwise.

See State v. Moreland (1990) 50 Ohio St. 3d 58, 62.

Here, the presumptively valid resignation militates against any argument that Appellant/Relator could present as to “plain error”; as there is no “clear legal duty” to “reinstate” someone who has resigned.

B. Appellee’s Proposition of Law Number Two:

A resignation cuts off reinstatement rights under R.C. 145.362

Appellant would have us believe that this is simply a case about a recuperated employee seeking reinstatement from a PERS disability, under R.C. 145.362.

The problem with that theory is that the Relator RESIGNED from employment BEFORE he began his PERS disability retirement.

Relator resigned from employment, effective July 11, 2008 (Deposition Exhibit 9; Relator’s Exhibit 5³).

³ Relator has three (3) different exhibits, all labeled as “Exhibit 5.” Despite this, all of them document that Relator resigned July 11, 2008, that the resignation was “accepted,” and that Relator’s peace officer certification was cancelled.

Relator's resignation was accepted immediately, rendering it irrevocable. See Davis v. Marion Engineer, (1991) 60 Ohio St.3d 53.

Where a public employee self-terminates employment, there are no reinstatement "rights" under R.C. 145.632.

In State of Ohio, ex rel. Stackhouse v. Becker, (1994) Ohio App. LEXIS 5714 (11th District), a public employee signed a letter of retirement that cited no reason, nor did it express any intent to ever return. That employee, later, began a PERS disability retirement. Later, PERS informed him that they had determined that he could return to duty. When the former worker contacted his former employer, he was advised that he would not be reinstated because he had resigned⁴, and the resignation had been accepted. When the worker filed a Mandamus action based upon R.C. 145.362, the Common Pleas Court denied the writ, finding that a letter of resignation/retirement cut off reinstatement rights under R.C. 145.362.

The Court of Appeals affirmed, noting that the letter of retirement/resignation had not cited a reason, nor had it contained any language to suggest that it was a leave

⁴ The Court used the terms resigned and retired interchangeably.

of absence. A discretionary appeal was denied by the this Court; see 72 Ohio St.3d 1420. See also State ex rel. Snyder v. Civil Service Commission of Fremont, 1975 Ohio App. LEXIS 8248; and State ex rel. Richard v. Springfield, 48 Ohio St.3d 65. (both holding that a resignation cuts off reinstatement rights, and is a waiver of them)

Here, the exact same scenario played out. The Relator resigned, his resignation was accepted; then he started a PERS Disability, which later ended.

Although Relator might argue that he was handed a resignation to sign (Appellant's Br., pg. 5), the fact is that he signed the resignation voluntarily without threats or coercion (Deposition pg. 34). In Ohio, a party signing a document is presumed to have assented to it, and agreed with its contents. See Buemi v. Mutual of Omaha, (1987) 37 Ohio App. 3d 113.

Certainly, that resignation has never been officially challenged, nor has it ever been set aside by any court, arbitrator, or state agency. It is therefore, presumptively valid, and is a bar to Relator's assertion of rights under R.C. 145.362.

C. Response to Appellant/ Relator's "Assignment of Error/Proposition of Law Number 2," part one:

Appellant has conflated his "Assignments of Error" and "Propositions of Law," with this second such hybrid, essentially, arguing the same case that he presented below; i.e. arguing that he was entitled to a writ of Mandamus and to a list of damages.

Without so stating, Appellant has recited the various requirements of R.C. 2731, as interpreted by the Courts.

- that a party seeking mandamus must show a clear legal duty to the relief sought;
- that the respondent must be under a clear legal duty to perform the act requested;
- that Relator has no plain and adequate remedy in the ordinary course of law.

See R.C. 2731.05 and State ex rel Berger v. McMonagle (1983) 6 Ohio St 3d 28.

Appellant then argues that he was entitled to “reinstatement” as of the date of the PERS determination, and asserts that he had no “adequate remedies at law.”

a. Decision below correct

On the facts presented, the Court of Appeals applied the correct analysis.

When the Appellant/Relator resigned on July 11, 2008 he ceased being a “bargaining unit employee” whose rights flow from a labor contract; and his rights, if any, defaulted to state law.

This is because the 2006-2009 collective bargaining agreement, in effect at the time of Relator’s resignation, at page 1 stated:

“Whenever the term ‘employees’ is used in this Agreement, it shall refer to all employees occupying positions within

the bargaining unit covered by this Agreement unless otherwise specified”⁵

The term “position” is one that has existed for many years in Ohio public employment, and it refers to a group of jobs performed by an individual. See O.A.C. 123:1-47-01(A) (58).

When someone resigns, they no longer encumber, or hold, a “position”; and their rights in future months, or years, must revert to state law. To hold otherwise, would, in effect, extend a collective bargaining agreement beyond its allowed three year maximum duration.

Here, the Court of Appeals recognized all of that, and held that Appellant had an available, but unused, remedy at law through a “failure to reinstate” appeal to the State Personnel Board of Review.

⁵ The contractual definition essentially paraphrases the definition of “public employee” set forth in R.C. 4117.01 (C).

The Court's analysis, based upon law and the contract, would also render Appellant's Article 33 "Waiver" argument a moot point, even if it had been timely raised.

As noted, supra, the Court correctly believed that Appellant / Relator, as one who had resigned some seven months before his demand for reinstatement, was confined to filing an appeal with the State Personnel Board of Review. That logic has been upheld elsewhere, as in the case of Darnell v. Public Employees Retirement Systems, (1998) Ohio App LEXIS 6371 (10th District). In that case, a state worker had been on a PERS disability, but was notified that her benefits were to end. When the worker contacted her former employer seeking reinstatement, the employer directed the worker to provide additional evidence of fitness for duty. When the worker filed for Mandamus, the Court dismissed her Petition, reasoning that she had a right, as a public employee, to appeal to the State Personnel Board of Review under R.C. 124.03; and that such an appeal from a failure to reinstate was an "adequate remedy at law".

See also, State ex rel Copen v. Kaley, (2000) 2000 Ohio App LEXIS 395 (11th District) (appeal to State Personnel Board is an adequate remedy for a deputy seeking reinstatement from disability retirement); and State ex rel

Weiss v. Industrial Commission, (1992) 65 Ohio St. 3d 470, 476-77; and
State ex rel Shine v. Garafolo, (1982) 69 Ohio St. 2d 253.

b. Other available remedy – the still pending grievance arbitration

It is uncontested that the Appellant/Relator first raised some of the issues contained herein, in a grievance that he filed under his Union contract.

That contract provided for final and binding arbitration; and, indeed, his Union filed for arbitration, a date was set; and then the Union asked for, and got, an indefinite continuance.

Although the employer had raised an issue of arbitrability, that issue was never decided. In public sector Ohio, arbitrability is for the arbitrator to decide - not the employer, nor the employee. See Belmont County Sheriff v. FOP/OLC, (2004) 104 Ohio St.3d 568; and Marion County Sheriff's Office v. FOP/OLC, 2009-Ohio-6159 (3rd District).

The ability to arbitrate is an “adequate remedy.” See State ex rel. Zimmerman v. Tompkins, (1996) 75 Ohio St. 3d 447; State ex rel. Johnson v. Cleveland Heights, (1995) 73 Ohio St.3d 189.

In State ex rel. Rose v. Blackwell, 2004-Ohio-6125 (10th District), an employee who had been off on a PERS disability was reinstated, but to a different position; and filed a Mandamus action seeking pay differential and retroactivity in pay, due to what she believed to be a delay in reinstating her. The Court dismissed her Petition and granted Summary Judgment in favor of the governmental employer because she had an adequate remedy through her Union contract grievance procedure.

Here, if the Appellant/Relator wants to argue against the adequacy of an appeal to the State Personnel Board of Review, he must, then, face the fact that he still has an arbitration pending.

Appellant faces an “adequate remedy,” no matter which direction he turns. See State, ex rel Nichols v. Cuyahoga County Board of Mental Retardation and Developmental Disabilities (1995), 72 Ohio St. 3d 205.

At worst, the decision below was correct, but for other reasons (like the availability of arbitration)... See Butche, dba The Electrosonics Co. v. The Ohio Casualty Ins. Co., (1962) 174 Ohio St 144; Agricultural Insurance Co v. Constantine, (1944) 144 Ohio St 275; and Ohio Valley Radiology Assoc. v. Ohio Valley Hospital, (1986) 28 Ohio St. 3d 118. (decision below affirmed if correct, even for the wrong reasons).

D. Response to Appellant/Relators “Assignment of Error/Proposition of Law, part two:

The second part of Realtor’s argument deals with his claim for damages.

a. Wages

Here, Appellant/Relator (at page 18 of his brief), attempts to introduce “facts” from outside of the record as he introduces an “hourly rate,” citing to “Id,” where there is no apparent prior recitation of anything.

Later, on that same page, Appellant introduces figures that, supposedly, represent disability benefit income; again, citing “Id,” but with no apparent prior recitation of anything.

Later still on page 19, Appellant asserts a figure from outside of the record as a basis for claiming exactly six thousand dollars (\$6,000) in overtime, per year.

None of this is anything but speculation based upon some claimed fact that is not in the record.

As noted by this Court, in several past cases, Mandamus will not lie for an unliquidated, or approximate, amount of money. See Monaghan v. Richley (1972) 32 Ohio St. 2d 10, and State ex rel Reyna v. Natalucci-Persichetti (1998) 83 Ohio St. 3d 194. As noted in several cases, in order to be entitled to a Writ of Mandamus, the right to relief must be clear and the amount established with certainty. See State ex rel Villari v. City of Bedford Heights, (1984) 11 Ohio St 3d 222; and State ex rel Waiters v. Szabo, (2011) 129 Ohio St. 3d 122

b. “Related benefits”

At page 19, of Appellant’s brief, Appellant/Relator asserts that there is a “clear legal duty” to pay him “related benefits.”

Exactly why “related benefits” should accrue to someone after they have **resigned** is not clear from Appellant’s brief.

Beyond that, however, Appellant/Relator fails to list exactly what these benefits are, except for some vague reference to medical bills and loans; neither does he assign any dollar value to them.

It is respectfully submitted that Mandamus does not lie for unliquidated sums.

c. Lost Pension Benefits

Also on page 19 of his brief, Appellant seeks “Lost Pension benefits.”

As before, Appellant fails to explain exactly how or why such benefits would have accrued AFTER his **resignation**.

Here, again, even Appellant/Relator concedes that the “numbers are not available.”

d. Lost Medical Benefits

On pages 19-20, Appellant/Relator also seeks “medical benefits” for treatment allegedly incurred AFTER his resignation. As before, Appellant/Relator recited no authority that would compel Respondent to pay for health insurance or medical bills for a worker who has resigned.

e. Lost Vacation and Sick Days

On this category Appellant provides a confusing theory. First, he claims entitlement to vacation and sick leave accumulated PRIOR to his separation/resignation. Appellant does this without reference to any evidence of record to suggest that he was not recredited with unused sick leave after being rehired. This is confusing because Appellant/Relator has never, before, claimed that R.C. 124.38 (C) has not been honored. (restoration of previously accumulated sick leave if reemployed within ten years...)

Amazingly, and without the benefit of seeing actual figures, Appellant/Relator values this inchoate claim at *exactly* ten thousand dollars (\$10,000). Such a round number, even if supported, would be statistically unlikely.

Again, Appellees contest the core premise as well as the numbers.

f. Seniority

At page 20, Appellant/Relator claims a right to “seniority” back to his original date of hire “with pay adjustments if applicable.”

Again, this demand is both unfounded and wholly speculative.

First, as noted before, Appellant/Relator resigned on July 11, 2008; and he can point to no authority that would entitle a non-employee to accrue anything, much less seniority.

Second, even if Appellant/Relator had, through some declaratory judgment or other forum, somehow, negated his resignation (which he did not do...); the 2006-2009 labor contract, itself cuts off seniority where there is a “break in service,” and a “voluntary or involuntary separation constitutes a break in service.” (Respondent Ex B Appendix) The later contract, at Article 12.1 (B), specifically made such an absence a defined “break in service.” (Respondent’s Ex C, Appendix)

g. Attorney Fees

Appellant/Relator's claim for "Attorney Fees" is outside the scope of his "assignment of Error/Proposition of Law Number 2"; which is self-limited to "wages and benefits⁶."

Here, there is not a speculative sum expressed.

Further, as Appellant concedes, attorney fees can be awarded only where there is an allegation and proof of "bad faith."

Here, Appellant/Relator never alleged "bad faith" in his original complaint; nor did he prove "bad faith." Indeed, every action and argument of Appellee is supported by caselaw and statute.

⁶ A reviewing court need not consider a matter that is not assigned as error. See State v. Ferrette, 18 Ohio St. 3d 106.

III. CONCLUSION

Appellant/Relator is not entitled to a Writ of Mandamus and the Court of Appeals committed no error in denying his petition.

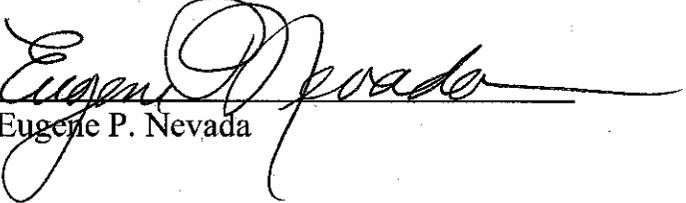
Respectfully submitted,

A handwritten signature in cursive script, reading "Eugene P. Nevada", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Appellee was served on Dwight D. Brannon, Brannon and Assoc., 130 W. Second Street, Suite 900, Dayton OH 45402 and David D. Brannon, Brannon and Assoc., 130 W. Second Street, Suite 900, Dayton OH 45402; all by regular U.S. mail this 18 day of May, 2012.


Eugene P. Nevada