

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 :
AND CHARLES A. COX, SHERIFF :**

**ON APPEAL FROM THE SECOND
DISTRICT COURT OF APPEALS
CASE NO. CA 09-CA-42**

APPELLEES. :

REPLY BRIEF OF RELATOR DOUGLAS D. BYERS

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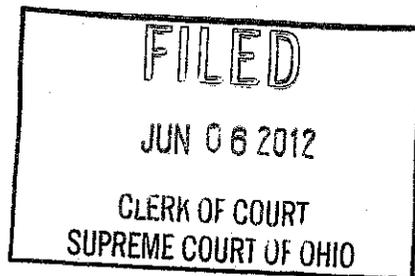


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ARGUMENT

I. Respondents' recitation of the "facts" in their Merit Brief simply indicates that there are factual issues that must be determined at trial.

Rather than restate the facts already documented and supported in Byers' Merit Brief, the following facts are unquestionably in dispute; therefore, should be reserved for a finding of fact at the trial level:

Although Respondents argue "Relator **resigned from employment**," the actual settlement agreement returning Byers to duty left that issue wide open, as clearly Byers' position was that he was reinstated rather than rehired as a new hire. (Appellee's Brief, p. 3). Byers testified at his deposition that he sought "reinstatement" through his union. (Byers Deposition, pp. 52-54). Regarding the "resignation form" that Appellees keep insisting was executed with Byers' intent to resign, Byers was told by Appellees that signing that particular form was "part of the process for [his] disability." (Byers Deposition, p. 36). Obviously there is an issue of fact of whether Byers resigned. However, R.C. 145.362 provides, "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." Byers has a very strong argument that he has a statutory right to reinstatement, as he returned to work within five years of his disability.

Next, the argument that Byers was never deemed "fit" for reinstatement to deputy sheriff, is simply disingenuous. (Appellee's Brief, pp. 5-7). Basically, Respondents' argument goes like this: because Byers' disability terminated, Byers is still not consider "fit" to return to duty. *Id.*

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 his duty as a sheriff's deputy. See OPERS letter dated March 18, 2009, attached as Exhibit 4 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Byers' 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 Byers' Motion for Summary Judgment filed July 9, 2010 (emphasis added). It is indisputable that Byers was certified by PERS to return to work.

The next issue of fact in dispute is whether there is an *unresolved* arbitration between Byers and Respondents. (Appellee's Brief, p. 10). 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, Respondents' 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 Byers' 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 *refused* to permit Byers' claims to proceed to arbitration on the grounds that the grievance procedure lacked jurisdiction due to Ohio law. Moreover, as Byers points out to this Court, the SPBR was not an option, because it was agreed to in the governing Collective Bargaining Agreement that "***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.***" 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 Byers' Motion for Summary Judgment filed April 19, 2011. Although Respondents repeatedly suggest that there was an arbitration option for Byers, there was not.

II. Relator is not raising new issues to this Court, as clearly the summary judgment decision by the Second District Court of Appeals prevented Relator from making any arguments to the trial court.

A. Relator appeals directly from the failure of the Second District Court to properly interpret the Collective Bargaining Agreement governing this case.

Appellee argues that Byers failed to inform the Second District Court of Appeals that the SPBR was not an option for Byers, as the CBA expressly states that the SPBR shall have no authority over the deputy sheriffs in Miami County. (Appellee's Brief, pp. 11-13). The simple counter-argument is that it is a ridiculous notion that Byers would have to inform the Second District Court of Appeals of every term of the CBA, anticipating which clause that Court would target. It is simply enough to submit the CBA to the Court, which he did. 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 Byers' Motion for Summary Judgment filed April 19, 2011. Byers had no way of knowing the direction of the Court of Appeals, and certainly could not anticipate that the CBA would be interpreted so blatantly incorrect.

The construction and interpretation of contracts are matters of law. *Latina v. Woodpath Dev. Co.*, 57 Ohio St.3d 212, 214, 597 N.E.2d 262 (1990). The appellate court should apply a de novo standard of review to questions of law and may interpret the language of the contract. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 9. The Collective Bargaining Agreement at issue 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.

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 Byers' Motion for Summary Judgment filed April 19, 2011 (emphasis added). The Court of Appeals based its entire decision on the idea that Byers failed to exhaust his remedies per 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. Byers tried to remedy the Second District Court of Appeals' oversight by making a Civ.R. 60(B) Motion for Relief from Judgment. However, the Second District simply held, "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." Decision, p. 2 (Feb. 10, 2012). It is evident that the Second District Court of Appeals simply misinterpreted the CBA, therefore, the matter should be remanded so that it may be addressed.

B. As a matter of law and fact, Relator did not "resign" under R.C. 145.362.

Although Respondents would have this Court believe Byers "resigned" his position as deputy sheriff, the issue was simply not determined by the Second District Court of Appeals. 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). The Second District never made a determination as to whether Byers resigned, therefore, the issue must be remanded.

Respondents cite *State ex rel. Stackhouse v. Becker*, 11th Dist. Case No. 94-L-024, 1994 WL 721693 (Dec. 16, 1994), for the proposition that Byers simply resigned and the city accepted the resignation, waiving any right to reinstatement. (Respondents' Brief, p. 15). Respondents vastly oversimplify the holding in *Stackhouse*, and the case is easily distinguished. In *Stackhouse*, the employee received a disability retirement from PERS on November 22, 1991. *Id.*, at *1. The employee submitted a *retirement* letter on August 7, 1991, effective August 16, 1991. *Id.* at *2. When the employee notified the city of his intention to return to work on June 7, 1993, the city refused reinstatement and reminded the employee that he had "voluntarily retired." *Id.* The facts of the *Stackhouse* case showed that the employee had no intention of returning to work upon retirement, and it was a retirement in every sense of the word. *Id.*

In the case at bar, Byers did not submit a "retirement" letter, and indeed, only took a leave of absence because he was *directed to* by Captain Greg Johnston, in order to accommodate the PERS disability application. See Termination Notice, attached as Exhibit 4 to the Affidavit of David Brannon, attached as Exhibit 2 to Byers' Reply Memorandum in Support of Byers' Motion for Summary Judgment, filed May 5, 2011. The "Reason for Termination" states "Resignation-Disability Retirement." *Id.* Respondents' Captain Johnston also promised Byers he would be returned to work as soon as possible and that he was following the correct procedure, when Byers was told by Johnston to sign a resignation letter in order to obtain disability. (Byers Deposition, p. 33). For Respondents to now argue that because there was no language on the "resignation" form (drafted by Respondents) stating that the reason for Byers'

leave of absence was based on a disability thus waiving a right to reinstatement under R.C. 145.362—is ridiculous. All parties, especially Respondents, were aware of Byers’ disability, and that he was not “retiring” or “resigning,” but going on disability leave. Indeed, Respondents can’t even get their language of “retirement” or “resignation” correct and should be estopped from arguing otherwise. On Realtor’s Notice of Peace officer Appointment/Termination Form, under the “reason for termination,” the checkbox of “retired” was marked rather than “resigned.” It appears that Sheriff Cox signed off on this form as of August 7, 2008. Exhibit 5 to the Affidavit of David Brannon, attached as Exhibit 2 to Byers’ Reply Memorandum in Support of Byers’ Motion for Summary Judgment, filed May 5, 2011. Moreover, the *Stackhouse* court did not use “resignation” and “retirement” interchangeably, as clearly these are distinguishable terms based on the plain language and case law and Respondents’ own forms.

Further proof that Byers took disability rather than retired is found in an OPERS form called “Report of Employer for Disability Applicant,” in which Sheriff Cox identified that the “disabling condition [was] the result of an on-duty illness or injury that occurred during or resulted from the performance of duties under the direct supervision of the employee’s appointing authority.” *Id.* In the free response section, Respondents wrote, “Result of officer involved shooting.” *Id.* Clearly, OPERS, Respondents, and Byers all knew that Byers left employment during the course of his disability *because of a disability*. And because he took a leave of absence because of his disability, there is a *right of reinstatement* pursuant to R.C. 145.362 (providing “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.”).

Byers has a statutory right to reinstatement, because he returned to work within five years of his disability.

Further evidence that Byers did not “retire,” is the fact that Respondents *ordered* Byers to undergo multiple psychiatric evaluations throughout his PERS disability application, treatment, and reinstatement, which indicates that Byers was still subject to directives of the MCSO—which would not be the case if he had “resigned” or “retired.”

On or about April 6, 2009, Sheriff Cox wrote Byers a letter stating:

On March 5, 2009, you were examined by David C. Randolph, M.D., M.P.H., C.E.D.I.R. Dr. Randolph was asked to evaluate your ability to perform the essential functions of the position of Deputy Sheriff with the Miami County Sheriff's Office.

I regret to inform you that Dr. Randolph has determined...that you are not capable, **at this time**, of returning to perform the duties of Deputy Sheriff...

If there are any additional medical or psychological evaluations from other health care professionals or other information you would like to submit for Dr. Randolph's consideration, please notify me and present such information as soon as possible. I will forward to Dr. Randolph any additional data that you provide.

However, if you remain unable to return to work, I wish you the very best in your future endeavors.

See Cox letter dated April 6, 2009, attached as Exhibit 6 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Byers' Motion for Summary Judgment filed July 9, 2010 (emphasis added). Clearly Byers was not told that he “retired” or “resigned,” and in fact was subject to orders by Respondents.

On April 24, 2009, Dr. Marzella wrote Respondents and stated, “*Mr. Byers is currently on disability leave* from the department and reports he wants to return to work. Toward that end, he was sent for several psychological evaluations and received conflicting results. Subsequently, he was referred to this office for an objective opinion as to his ability to work.” See Marzella

letter dated April 24, 2009, attached as Exhibit 10 to the Affidavit of Sara Fluhr, attached as Exhibit 18 to Byers' Motion for Summary Judgment filed July 9, 2010. All the evidence indicates that Respondents were aware that Byers was on disability leave, and indeed helped him get there. Realtor did not "waive" any right to reinstatement and back pay under R.C. 145.362 simply by signing a form and relying on Respondents' representations. If anything this issue should be remanded to the trial court.

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. In addition, there are numerous issues of fact that must be remanded to the trial court for determination.

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 6th day of June, 2012:

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