

In the
Supreme Court of Ohio

STATE OF OHIO EX REL.)
JOHN NESE, ET AL.,)
)
Appellants-Relators,)
)
vs.)
)
STATE TEACHERS)
RETIREMENT SYSTEM BOARD)
OF OHIO,)
)
Appellee-Respondent,)
)
and)
)
JEFFERSON COUNTY EDUCATIONAL)
SERVICE CENTER GOVERNING)
BOARD,)
)
Appellant-Respondent.)

Supreme Court of Ohio
Case No. 2012-0251

On Appeal from the Court of
Appeals of Ohio, Tenth Appellate
District Case No. 09AP-1161

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BRIEF OF APPELLEE-RESPONDENT
STATE TEACHERS RETIREMENT SYSTEM BOARD OF OHIO

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INTRODUCTION

Appealing from the Tenth District, John Nese, Catherine Miles, and Donald Williams (“Relators”) seek an extraordinary writ compelling the State Teachers Retirement System Board (“Board”) to accept membership contributions on payments for services they provided through the Virtual Learning Academy (“VLA”). Relators do not meet the statutory definition of “teacher” for purposes of State Teachers Retirement System (“STRS”) membership based on their VLA services because Relators perform VLA work as independent contractors. For VLA work, Relators get paid per student and per course. They are not assigned to any particular district, building, or classroom. Instead, they are matched through an intermediary (Appellant-Respondent Jefferson County Educational Service Center) with students who need or want to conduct coursework over the internet. Although contracts are required for teachers, Relators do not have contracts for their work through the VLA. Relators and other VLA faculty are not employed as teachers within the meaning of R.C. 3307.01(B) for the services they provide through the VLA.

Whether work like the Relators’ VLA arrangements meets the definition of “teacher” for purposes of STRS membership is a question that the General Assembly has committed to the Board. As the fiduciary for all STRS members, the Board has final authority to determine whether Relators, or any individual, qualify for STRS membership. R.C. 3307.01(B). Here, the Board determined that Relators’ work through the VLA did not meet the criteria to define them as teachers for purposes of STRS membership. The court of appeals denied the writ because there is some evidence to support the Board’s determination. Relators have not met their high burden of proving that there is plain, clear, and convincing evidence that they qualify for STRS membership; there is *more than* some evidence in the record to support the Board’s decision.

Accordingly, the court of appeals did not abuse its discretion and this Court should affirm the decision to deny the writ.

STATEMENT OF THE FACTS AND CASE

The Ohio Legislature established STRS in 1920 to preserve and enhance retirement benefits for teachers in Ohio's public schools, colleges, and universities. STRS was placed under the administration and management of the Board, which owes a fiduciary duty to all of its members. R.C. 3307.01(K). The Board is governed by Chapter 3307 of the Ohio Revised Code. Under R.C. 3307.01(B), the Board is charged with making the final decision as to whether any person is a teacher for purposes of STRS membership.

Educational service centers are also statutory creations. They exist to provide support for state and regional education initiatives and efforts to improve school effectiveness and student achievement. R.C. 3312.01. Jefferson County Educational Service Center ("Jefferson County ESC") is an educational service center that works with administrators, teachers, students, and parents in seven local school districts to provide programs across those districts. Educational service centers, like traditional school districts, are required to enter into regular or supplemental contracts when employing teachers. R.C. 3319.08(A). These required contracts set forth a teacher's duties and specify salaries and compensation. *Id.*

One program offered by the Jefferson County ESC is the Virtual Learning Academy ("VLA"), which provides students with online curriculum. Supplement, p. 22. Jefferson County ESC describes the VLA as an internet-based educational "delivery system." Supplement, p. 22. The VLA is not a school. Supplement, p. 21. Rather, it is an educational option—a computer system capable of providing curriculum to students in a variety of subject areas for grades K-12. Supplement, pp. 10, 11.

In Ohio, the Jefferson County ESC VLA program is available to students located in many public school districts as well as in private schools. Supplement, p. 22. After a school district decides to adopt the VLA program as part of its curriculum, the district can then choose to use its own faculty or the Jefferson County ESC VLA faculty. Supplement, p. 5. Jefferson County ESC matches VLA faculty members with students when requested by a school district and acts as a “pass through” to pay VLA faculty. Supplement, pp. 10, 32-98. Through this arrangement, Jefferson County ESC earns a participation fee plus a per-student license fee of \$175.00 from other districts using the VLA program. Supplement, p. 10.

Relators and other individuals working through the VLA program are not employed through contracts that were adopted or approved by Jefferson County ESC, but rather, they sign a form from Jefferson County ESC “agreeing to be on board to take on VLA students.” Supplement, pp. 3, 7.-8. In this case, Relators worked with students in approximately twenty different school districts. Supplement, p. 32-98. Prior to working with students through the VLA, Relators attended a training session on the VLA program. Supplement, pp. 3, 5. But once the Relators agreed to “be on board to take VLA students,” there was no further oversight and Relators could independently determine when, where, and how they accomplished the end result of responding to student messages and grading assignments. Supplement, pp. 2-4, 27-31. And, although the VLA program is a curriculum delivery system, VLA faculty was free to create their own mid-term and final tests or to use the on-line lessons. Supplement, p. 7. VLA faculty were also free to choose when and where they wanted to complete their work; there was no specific time that work had to be done. Supplement, p. 4. In fact, VLA faculty do not normally log in to respond to students every day. Supplement, p. 1. VLA faculty did have access to a Jefferson

County ESC computer lab, but independently chose to work from home. Supplement, p. 4. Relators here never utilized the Jefferson County ESC laboratories. Supplement, p. 19.

VLA faculty like Relators were paid a stipend “when one of three circumstances occurred: (1) student completes course, (2) student’s license expires, (3) school district withdraw[al]s from a course.” Supplement, p. 6. If students were withdrawn from VLA courses, Relators would be paid a pro-rated amount based on the number of units completed by the student. Supplement, p. 6. In order to receive payment, Relators were required to complete and turn in “stipend forms” for each assigned VLA student. Supplement, pp. 32-98. Jefferson County ESC did not provide Relators with any other benefits such as health care or vacation time. Supplement, p. 2.

Jefferson County ESC originally treated VLA faculty as independent contractors and made no STRS contributions on their behalf Supplement, pp. 9, 20. Between 2004 and 2008 Jefferson County ESC sent contributions for Relators’ VLA program work to STRS. Supplement, pp. 12-14. STRS first reviewed the status of Relators’ services through the VLA after receiving a retirement application with an unreasonable increase in final average salary from a VLA faculty member that is not a party to this matter. Supplement, p. 2. Relator Miles’s final average salary, which is the basis for the life time benefit calculation, showed a similar increase (more than double). Supplement, pp. 15-18. As a result of this review, STRS informed Jefferson County ESC that because Relators were independent contractors it should not send contributions to STRS. Supplement, p. 9. Contributions previously submitted for Relators’ work performed through the VLA program were returned to Jefferson County ESC in late 2008. Supplement, pp. 9, 20.

After the Board returned Relators' contributions submitted for VLA work, Jefferson County ESC began reviewing VLA faculty performance. Supplement, pp. 23-24, 28. For example, Relator Nese first started performing services through the VLA program in 2005, but, his first evaluation was not until April 9, 2009. Supplement, pp. 12, 25-31. In addition to the new evaluations, Jefferson County ESC made other changes to its relationship with VLA faculty after the Board returned the contributions, including adopting a resolution in February 2009 that outlines "specific duties" for the contract year *starting on July 1, 2010*.¹ Supplement, pp. 23-24.

In December 2009, Relators filed a request for a writ of mandamus in the Tenth District Court of Appeals seeking to compel the Board to accept contributions for earnings stemming from services they provided through the VLA program. Relators later amended their complaint and added Jefferson County ESC as a Defendant-Respondent. A magistrate recommended granting the writ. The Board objected and the court sustained two of the Board's objections relevant here, finding that there was some evidence to support the Board's decision. The court denied the writ. Relators and Defendant-Respondent Jefferson County ESC both filed appeals to this Court. Jefferson County ESC, though, is a willing Respondent. Its answer below and its brief to this Court align it with the Relators.

STANDARD OF REVIEW

The final decision as to whether any person is a teacher for purposes of STRS membership belongs to the Board. R.C. 3307.01(B). Upon review of mandamus actions, this Court has said that "[i]t is the well-settled general rule in Ohio that the issuance of a writ of

¹ The resolution is not filled out and is unsigned. Therefore, it is not clear what school districts, if any, have adopted the resolution. The record is also not clear on what the Jefferson County ESC has adopted or approved regarding the VLA since April 24, 2001. See Supplement, pp. 23-24.

mandamus rests, to a considerable extent at least, within the sound discretion of the court to which the application for the writ is made.” *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 161, 228 N.E.2d 631 (1967) (Internal citations omitted). This Court must now determine whether the court of appeals abused its discretion in denying the writ. *State ex rel. Hipp v. City of North Canton*, 70 Ohio St.3d 102, 103, 637 N.E.2d 317 (1994).

Where “some evidence” is found to support the Board's decision, the extraordinary writ of mandamus will not be issued to interfere with or control the Board's exercise of discretion. *Kinsey v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund*, 49 Ohio St.3d 224, 226-227, 551 N.E.2d 989 (1990) (citing *State ex rel. Rouch, v. Eagle Tool & Machine Co.*, 26 Ohio St.3d 197, 200, 498 N.E.2d 464 (1986)). In order to be entitled to the writ, Relators were required to show that the Board abused its discretion by denying their request. *State ex rel. Schaengold v. Ohio Pub. Emples. Ret. Sys.*, 114 Ohio St.3d 147, 149, 870 N.E.2d 719, 2007-Ohio-3760, ¶ 8. An abuse of discretion “implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency” and “will be found only where there exists *no evidence* upon which the [administrative body] could have based its decision.” *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster*, 22 Ohio St.3d 191, 193, 489 N.E.2d 288 (1986) (Emphasis added.) (Internal citations and quotations omitted).

The court of appeals correctly found that Relators were not able to meet the high burden to warrant granting the writ because there was more than *some evidence* supporting the Board's determination that Relators were not teachers for purposes of STRS membership for services performed through the VLA. Accordingly, this Court should uphold the Tenth District's decision.

LAW AND ARGUMENT

Proposition of Law

The Court did not abuse its discretion when it found that there was some evidence to support the Board's determination that Relators were not teachers for purposes of STRS membership for independent contractor work they performed through the Virtual Learning Academy.

A. Relators are not *employed* as teachers within the meaning of the statute because they were independent contractors.

For purposes of STRS membership, “teacher” is specifically defined. The relevant statute is R.C. 3307.01(B) and defines teacher, in part, as follows:

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

In all cases of doubt, the state teachers retirement board shall determine whether any person is a teacher and its decision *shall be final*.

R.C. 3307.01(B) (Emphasis added). Relators suggest approaching these statutes through the lens of statutory interpretation, but the only question in this Court is whether the Tenth District Court of Appeals abused its discretion when it found that the record contains some evidence that Relators were not “employed” for purposes of STRS membership. The task is not to decide the meaning of “employed” rather it is to decide whether Relators were, as a matter of fact, employed within the meaning of R.C. 3307.01(B).

Although public pension statutes that are *ambiguous* must be construed liberally in favor of public employees, see *State ex rel. Moss v. Ohio State Hwy. Patrol Ret. Sys.*, 97 Ohio St.3d 198, 2002-Ohio-5806, 777 N.E.2d 259, ¶ 21, there is “no need to liberally construe a statute whose meaning is unequivocal and definite.” *State ex rel. Solomon v. Bd. of Trustees of Police & Firemen’s Disability & Pension Fund*, 72 Ohio St. 3d 62, 66, 647 N.E.2d 486 (1995) (quoting, *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.*, 69 Ohio St.3d 521, 525, 634 N.E.2d 611 (1994)); *In re Protest of Evans*, 10th Dist. Nos. 06AP-539-06AP-548, 2006-Ohio-4690 at ¶11 (finding that an unambiguous statute is to be applied, not interpreted) (citing *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus). Relators do not take issue with the meaning of “employed” in the statute. Their real gripe about the decision below is that the court found evidence to sustain the Board’s decision finding no right to STRS membership for their work through the VLA, not that the statute suffers from any ambiguity.

Under either R.C. 3307.01(B)(1) or (B)(4), the statute compels the Board to evaluate the relationship between Relators and Jefferson County ESC to determine whether Relators were employed as employees or engaged as independent contractors. *In re Protest of Evans* at ¶16; 1979 Ohio Atty. Gen. Op. No. 79-15. Ohio courts frequently confront the employee-versus-independent-contractor question. *E.g.*, *In re Protest of Evans* at ¶11; *Gillum v. Indus. Comm.*, 141 Ohio St. 373, 48 N.E.2d 234 (1943); *Bostic v. Connor*, 37 Ohio St.3d 144, 524 N.E.2d 881 (1988). Whether an individual works as an independent contractor is determined by the right-to-control test. *Berge v. Columbus Community Cable Access et al.*, 136 Ohio App.3d 281, 301, 736 N.E.2d 517 (10th Dist. 1999) (citing *Bostic v. Connor*, 37 Ohio St.3d 144, 524 N.E.2d 881 (1988), paragraph one of the syllabus); *Gillum v. Indus. Comm.*, 141 Ohio St. 373, 48 N.E.2d 234 (1943), paragraph two of the syllabus; *Koch v. Conrad*, 10th Dist. No 97APE05-663, 1997

Ohio App. LEXIS 5607 (Dec. 9, 1997)). The right-to-control analysis requires an examination of whether the employer retained control of, or the right to control, the mode and manner of doing the work contracted. *Berge* at 301. If the employer retained the right to control the mode and manner of doing work, the relationship is that of principal and agent or master and servant. *Id.* If, however, the employer retained control but is interested merely in the ultimate result to be accomplished, the relationship is that of independent contractor. *Id.* (citing *Councell v. Douglas*, 163 Ohio St. 292, 126 N.E.2d 597, (1955), paragraph one of the syllabus).

Whether an individual is an employee or an independent contractor depends on the facts of the case. *Slauter v. Klink*, 2nd Dist. No. 18150, 2000 Ohio App. LEXIS 3716, * 4-5 (Aug. 18, 2000); *Gillum* at paragraph two of the syllabus. Factors that distinguish control over an employee versus control over an independent contractor include control over the details and quality of the work, the hours worked, selection of materials, tools and personnel used, the routes traveled, the length of employment, the type of business, the method of payment, and any pertinent agreements or contracts. *Berge* at 301 (Internal citations omitted.). This Court has also emphasized that “no one feature of the relation is determinative, but all must be considered together....” *Bobik v. Indus. Comm. of Ohio*, 146 Ohio St. 187, 192, 64 N.E.2d 829 (1946) (Internal citations omitted). Further explaining this analysis, Ohio courts have found that “where one employs another to do certain work for him, the mere right reserved by the employer to direct as to the quality of work to be done, or the condition of the work when completed, is not a right to control the mode or manner of doing the work so as to justify the conclusion that the relationship between the employer and the contractor is either that of principal and agent or master servant.” *Bennett v. Wilson*, 113 Ohio App. 503, 504, 179 N.E.2d 86 (10th Dist. 1961) (Internal citations omitted.).

Relators did not have a contract or supplemental contract, oral or written, to work through the VLA program. Relators selected where they worked and set their own hours. Relators provided their own computers to perform work through the VLA. Relators also had control over whether they created their own mid-terms and final exams or used the online tests, with no oversight. There was no supervision of daily interaction with students. Although Relators point out that there were performance evaluations, the record shows that the first evaluation, specifically for Relator Nese, was not completed until April 4, 2009—approximately seven months after the Board made its determination that Relators were independent contractors. There is no evidence that Relators were receiving any evaluations or feedback prior to 2009.

Relators were paid by the job on a per-student, per-credit-hour basis. In some instances, at least through 2008, the payments for the services Relators provided through the VLA were reported to the Internal Revenue Service on 1099 forms (the forms used to report independent-contractor income). Additionally, Relators did not receive any fringe benefits as a result of their work through the VLA.

The end results of Relators' VLA work were graded units for participating students. But how Relators accomplished this end result was left to Relators' discretion. These facts provide more than some evidence to support the Board's determination that Relators were not teachers for purposes of STRS membership for work through the VLA.

B. Relators' independent contractor status is not altered by the STRS fact sheet or non-record speculation about others performing VLA-type work.

The evidence reviewed below shows that Relators provided services through the VLA program as independent contractors, not employees within the scope of R.C. 3307.01(B). Relators (and Jefferson County ESC) resist this conclusion in a few ways. Both Relators and Jefferson County ESC cite the STRS fact sheet as conclusive proof that Relators were not

independent contractors. Both fail to recognize that the STRS fact sheet reiterates the Board's ultimate authority to make the membership eligibility decision:

In all cases of doubt, it is best to check with STRS Ohio to determine if membership is required. You should send a copy of the independent contract to STRS Ohio for review. The State Teachers Retirement Board has the legal authority to determine who meets the criteria of an STRS Ohio member as defined in Section 3307.01 of the Revised Code. (Emphasis added.).

The fact sheet is just a reminder that the label "independent contractor" is not determinative. Moreover, even Relators and Jefferson County ESC do not agree as to whether all six questions of the fact sheet can be answered affirmatively. (Relators' Brief, p. 9 (ESC treated Relators as employees and provided a facility where work could be performed); Jefferson County ESC Brief, p. 10 ("it is the ESC's position that 'yes' is the answer to all the questions.")).

Relators' other attack on the Tenth District's judgment is a claim that they were performing the same services as teachers under contract (i.e., that services performed through the VLA program meet the statutory criteria for teacher and STRS member). (Relators' Brief, p. 11). But Relators simply repeat the language from the STRS employer manual without pointing to any evidence in the record to support these claims. Despite this lack of evidence, Relators are asking this Court to assume—without pointing to any evidence—that school districts that employ VLA-type faculty through contract have the same relationship as Relators have with Jefferson County ESC. Nothing in the record supports this speculation. And the Board cannot have abused its discretion based on evidence that was never presented to it. *State ex rel. Marchiano v. School Emps. Ret. Sys.*, 121 Ohio St.3d 139, 2009-Ohio-307, 902 N.E.2d 953, ¶¶ 24-25.

Besides, the Board had more than some evidence before it that Relators' relationship with Jefferson County ESC and the VLA program differed from STRS-member teachers. From the beginning, Jefferson County ESC did not treat Relators as teachers as there were no contracts,

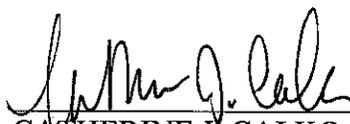
oral or written, specifying duties and compensation. Relators had control over the timing and structure of their student interactions. Relators worked for several school districts at once. The Board did not abuse its discretion by concluding that Relators are not teachers for purposes of STRS membership and therefore ineligible to contribute to the system.

CONCLUSION

The Tenth District Court of Appeals correctly found that the Board did not abuse its discretion when it determined that Relators were not teachers for purposes of STRS membership. The Board is charged with making the final determination regarding STRS membership. Where there is some evidence to support its determination, the Court may not substitute its judgment for that of the Board. In this case there is not merely some evidence but more than some evidence supporting the Board's determination. This Court must uphold the court of appeals decision to deny Relators' request for a writ of mandamus.

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CERTIFICATE OF SERVICE

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