

Table of Contents

| | |
|---|-----|
| Table of Authorities | iii |
| I. Introduction | 1 |
| II. Statement of Facts | 1 |
| III. Argument | 2 |
| Response to STRSB’s Proposition of Law: STRSB abused its discretion when it determined Relators were not teachers under R.C. 3307.01 | 2 |
| A. Relators were employed by ESC and were teachers Under R.C. 3307.01 | 2 |
| B. Relators were not independent contractors under STRSB’s own criteria | 4 |
| IV. Conclusion | 6 |
| Certificate of Service | 7 |

Table of Authorities

Cases:

| | |
|---|------|
| <i>Bobik v. Industrial Com'n.</i> , 146 Ohio St. 187, 64 N.E. 2d 829 (1946) | 2 |
| <i>Industrial Commn. of Ohio v. Laird</i> , 126 Ohio St. 617, 186 N.E. 718 (1933)..... | 3, 4 |
| <i>State ex rel. Teamsters Local Union 377 v. City of Youngstown</i> , 50 Ohio St.2d 200, 364 N.E.2d 18 (1977) | 5 |

Statutes:

| | |
|--------------------|------------|
| R.C. 3307.01 | 1, 2, 4, 6 |
|--------------------|------------|

I. Introduction

STRSB focuses on whether Relators were independent contractors or employees. But R.C. 3307.01 focuses not on the distinction between employee and independent contractor; the statute focuses, and makes STRS membership dependent on, one's status as a teacher. STRSB's conclusion was unreasonable, arbitrary and unconscionable. STRS had instructed ESC to make contributions on behalf of VLA teachers in the past and, under STRS's own published criteria, Relators were not independent contractors but were eligible participants. The court of appeals's judgment should be reversed.

II. Statement of Facts

STRSB argues the only evidence of ESC's direction and control of Relators activities came about after STRSB had determined Relators were independent contractors. (STRSB Brief, p.5.) However, the record shows ESC maintained it had the right to control Relators' work, and presented evidence of that, before STRSB determined Relators were not eligible to participate.

The following e-mail exchange occurred in September 2008:

2. Does Jefferson County ESC have the ability to monitor or direct the work that is being performed? Yes we monitor our teachers – also another reason why [redacted] numbers are so high – many districts request him as a VLA teacher. He is very efficient with his work. Any time we would check on his account, all messages were responded to, and all lessons were graded. This is not the norm – many times we have to remove VLA teachers and give their students to other teachers because they are not login [sic] in every day doing their work. Many times districts have called complaining that students have sent in work but nothing has been graded. ***. (Record, pp.21-22.)

In November 2008, ESC provided STRSB with information detailing the expectations and requirements of VLA teachers. VLA teachers had to have a valid teaching license; hold “High Qualified Teaching certification (HQT);” have BCI and FBI background checks; undergo

professional development training; and be assigned a mentor. (Record, p.43.) In addition, VLA teachers were evaluated twice during each school year. (Record, p.43.)

STRSB also contends there was no evidence other teachers performed the same duties as VLA teachers. (STRB brief, p.11.) The record shows school districts could use ESC teachers or their own teachers. (Record, p.43.) So clearly, other teachers, employed by other districts, were performing the same services as ESC teachers.

Further, STRSB misidentifies certain portions of its Supplement. STRSB says page 20 of the Supplement concerned Jefferson County ESC. It did not; it was for the Ohio Valley ESC. (Supplement, p.20.) Jefferson County ESC has never conceded its teachers are independent contractors. Further, the resolution at page 23 of the Supplement was not adopted by ESC, it was adopted by participating members. The document at Supplement p.24 was adopted by ESC and provides a detailed job description for Jefferson ESC teachers.

III. Argument

Response to STRSB's Proposition of Law: STRSB abused its discretion when it determined Relators were not teachers under R.C. 3307.01.

A. Relators were employed by ESC and were teachers under R.C. 3307.01.

This Court has explained that the “[t]he chief test in determining whether one is an employee or an independent contractor is the right to control the manner or means of performing the work.” *Bobik v. Industrial Com’n.*, 146 Ohio St. 187, 64 N.E.2d 829, (1946), at paragraph one of syllabus. “If such right is in the employer, the relationship is that of employer and employee”. *Id.* at paragraph two of the syllabus.

STRSB maintains Relators were not “employed” by ESC and thus, could not be teachers under R.C. 3307.01. The evidence is to the contrary. The evidence shows ESC had the right to control, and did control, Relators’ work.

ESC maintained significant ability to direct and control Relators' activities while they performed services for ESC through VLA. In response to STRS's questions, evidence was presented showing ESC monitored the teachers' work by checking the teachers' accounts to ensure they were logging in every day; that all messages were responded to; and that all lessons were graded. (Record, p.5.) ESC provided a lab for the use of teachers or students who did not have access to a computer. (Record, p.5.) ESC also stated that the teachers signed a form agreeing to accept students through VLA and were put on the ESC payroll when the teachers received their first students. (Record, p.5.) Further, teachers were assigned mentors who evaluated each teacher twice a year using a performance evaluation that was created using the NEA [National Education Association] Guide to Teaching Online Courses and the NACOL National Standards for Quality Online Teaching. (Record, p.43.) Teacher evaluations are part of the record in this case. (Additional Records, p.13-42.)

The Additional Records submitted by ESC also show the specific direction and control of the daily activities of VLA teachers. Teachers were required to log onto the system every day of the year; communicate with students via e-mail and outline expectations; contact ESC if students were not logging in or performing well; provide technical assistance; attend yearly professional development programs; and perform other assigned duties. (Additional Records, p.12.) ESC also issued Relators W-2s in many years. (Additional Records, pp.43-52.)

STRSB argues that because ESC may not have exercised as much control as it could have, Relators were not employees. But the question is not the actual exercise of control, but the right to control. *See, Industrial Commn. of Ohio v. Laird*, 126 Ohio St. 617, 619, 186 N.E. 718 (1933). The evidence shows ESC maintained the right to control, and did control, the details of Relators' employment.

Further, this Court has long recognized that “The power of the employer to terminate the work at any time is absolutely incompatible with the full control of the work enjoyed by an independent contractor, and is a strong circumstances [sic] tending to show the subserviency of the employee.” *Id.* 619-620. Here, the evidence shows ESC maintained the right to, and did in fact, terminate the work of ESC teachers who were not meeting expectations. (Record, pp.21-22.)

While STRSB argues for a very narrow and unreasonable interpretation of R.C. 3307.01 in this case, its own Fact Sheet (Brief of Plaintiffs-Relators in Support of Complaint in Mandamus, Ex. A) recognizes the need for a broader more inclusive definition—one Relators clearly meet.

B. Relators were not independent contractors under STRSB’s own criteria.

STRSB attempts to minimize the importance of its own fact sheet and the circumstances of this case. It is undisputed that ESC originally treated its teachers as independent contractors, but began treating them as employees, and issuing W-2s and submitting STRS contributions, based on information received directly from STRS. (Record, pp., 43-53, 57.)

The STRS Fact Sheet explains that a member is *not* an independent contractor for STRS purposes if the answer is “Yes” to *any*¹ of the following questions:

1. Are there other STRS Ohio members on staff who perform the same or similar duties under employment contracts?
2. Is the individual performing the duties of a teacher, administrator, psychologist, tutor or other STRS Ohio-covered position on a full-time or regular basis?
3. Under the agreement, does the school define the hours or days to be worked, regulate how the work is to be performed, or supply the facilities and materials to do the job?

¹ STRSB argues ESC and Relators cannot agree as to how many of these factors Relators meet. (STRSB Brief, p.11.) That is beside the point, because Relators are not independent contractors if any *one* of the factors is met and, at the very least, ESC and Relators agree at least one is met.

4. Do you, as the employer, treat the individual like an employee?
5. Does the individual have a direct supervisor who is an employee of the school?
6. Is there an element of permanency in the relationship? (Brief of Plaintiffs-Relators in Support of Complaint in Mandamus, Ex. A.)

STRSB now claims its fact sheet does not really mean what it says, and that even if the answer to one of the questions is yes, it can still determine the person is an independent contractor. In fact, using STRSB's logic, it could determine a person is an independent contractor even if all of the criteria are met. Such reasoning does not comport with this Court's rule that pension statutes are to be liberally construed. *State ex rel. Teamsters Local Union 377 v. City of Youngstown*, 50 Ohio St.2d 200, 205, 364 N.E.2d 18 (1977.)

Interestingly, with respect to the criteria identified in the STRS fact sheet, STRSB never argues the answer to **all** of the questions is "no" for Relators, which is what STRSB would have to show to establish Relators were independent contractors under its published criteria. Thus, it abused its discretion when it determined Relators were not eligible to participate.

It is undisputed that ESC treated Relators as employees. They were on ESC payroll (Record, p.32), they were issued W-2s, and ESC made STRS contributions for them. ESC admits it considered them employees, not independent contractors. (ESC Merit Brief.)

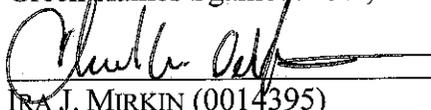
Finally, STRSB argues Relators presented no evidence they perform the same duties as teachers under contract. (STRSB Brief, p.11.) However, Relators did present such evidence. The record shows school districts could use ESC teachers or the school districts' own teachers. (Record, p.43.) So clearly, ESC teachers were performing the same services as teachers under contract in other school districts.

IV. Conclusion

STRSB abused its discretion when it determined Relators were not teachers under R.C. 3307.01(B) and thus, not eligible to participate in STRS. STRSB representatives first told ESC to treat VLA teachers as employees and make contributions for them. After ESC did so for a number of years, STRSB decided, after ignoring its own criteria, that these VLA teachers were not eligible to participate. This Court should reverse the court of appeal's judgment and issue the writ of mandamus.

Respectfully submitted,

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



IRA J. MIRKIN (0014395)

STANLEY J. OKUSEWSKY, III (0076130)

CHARLES W. OLDFIELD (0071656)

(Counsel of Record)

P.O. Box 849

Youngstown, Ohio 44501

330/743-5101

330/743-3451 (fax)

imirkin@green-haines.com

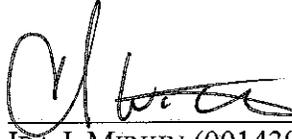
sokusewsky@green-haines.com

coldfield@green-haines.com

Counsel for Relators-Appellants

Certificate of Service

On June 28, 2012, a copy of the foregoing was served by regular U.S. Mail upon Michael DeWine, Attorney General, John E. Patterson, Assistant Attorney General, and Catherine J. Calko, Assistant Attorney General, 30 E. Broad Street, 26th Floor, Columbus, Ohio 43215; and R. Brent Minney, Pepple & Waggoner, Ltd., 5005 Rockside Road, Suite 260, Cleveland, Ohio 44131.



IRA J. MIRKIN (0014395)

STANLEY J. OKUSEWSKY, III (0076130)

CHARLES W. OLDFIELD (0071656)

(Counsel of Record)

Counsel for Relators-Appellants