

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, <i>ex rel.</i> , Steve R. Maddox., <i>et al.</i> ,	:	
	:	
Relators,	:	Case No.: 14-1267
	:	
v.	:	
	:	
Village of Lincoln Heights, Ohio, <i>et al.</i> ,	:	
	:	
Respondents.	:	

RESPONDENTS' PARTIAL MOTION TO DISMISS COMPLAINT FOR WRIT OF MANDAMUS WITH CLASS ACTION ALLEGATIONS

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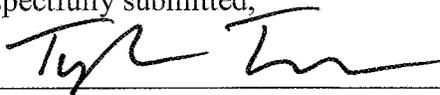
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Respondents move this Court under Civ. R. 12(B)(6) for an Order granting partial dismissal of Relators' Complaint for Writ of Mandamus with Class Action Allegations. Relators' claims for sick leave, holiday pay, and fringe benefits (Counts II-IV) are, in part, time-barred by the six-year statute of limitations under R.C. 2305.07. In addition, Relators' claims regarding sick leave (Count IV) and misclassification (Count I) fail to state a claim for which relief can be granted. The reasons in support of this Motion are explained in the attached Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. PRELIMINARY STATEMENT

Relators' sick leave, fringe benefit, and holiday pay claims—which seek compensation for public employee benefits dating back to 1973—must be dismissed to the extent that they fall outside R.C. 2305.07's six-year statute of limitations. Furthermore, the sick leave claim, to the extent that it is not already time-barred, fails to state a claim because the sick leave provisions in R.C. 124.38 and R.C. 124.39 do not apply to Respondents. Relators' misclassification claim, which concerns various aspects of Ohio Public Employee Retirement System (OPERS) benefits, also fails to state a claim because: (1) Relators have an adequate remedy at law based on the OPERS member-determination procedure and elaborate, multi-level appeal process; (2) Relators seek relief the Village cannot provide, particularly absent a final OPERS member-determination decision, and thus have no "clear legal right" to the relief sought; and (3) the allegations are, in part, time-barred. Therefore, Respondents' Partial Motion to Dismiss should be granted.

II. ALLEGATIONS IN THE COMPLAINT

Relators are nine current or former Village of Lincoln Heights police officers who claim to have worked at least thirty hours per week, "but were not provided medical and other benefits, paid sick leave or holiday pay and for whom the Village did not remit contributions" required by OPERS. (Compl. ¶ 2). Through their Complaint for Writ of Mandamus with Class Action Allegations, Relators seek to recover—on behalf of themselves and similarly-situated current and former employees—various employment benefits from the Village of Lincoln Heights, the Village Mayor, the Village Manager, the Village Finance Director, and several Village council persons (collectively "Respondents" or "the Village"). (Id. ¶¶ 3–13).

Specifically, Relators seek to represent the following four subclasses under Civ. R. 23:

1. “Misclassification Class” – All Village employees misclassified as independent contractors from May 4, 1993, to the present;
2. “Fringe Benefits Class” – All Village employees who worked at least thirty hours a week from February 10, 1997, through October 22, 2012, but were not provided fringe benefits;
3. “Sick Leave Class” – All Village employees from December 4, 1973, to present who were not provided sick leave benefits and rights pursuant to R.C. 124.38 and R.C. 124.39; and
4. “Holiday Pay Class” – All Village employees from January 1, 1976 to present who were not provided holiday pay.

(See generally, *id.* and at p. 6).

A. Misclassification/OPERS allegations

Relators allege that the Village misclassified them as independent contractors or “temporary employees” when they were actually bona fide employees. (*Id.* ¶ 14). Through this misclassification, Relators contend that the Village: (1) failed to remit required OPERS payments; (2) failed to provide OPERS with information “required . . . to enroll [them] into OPERS” such as PED-1ER forms; (3) failed to remit applicable employment taxes to the Internal Revenue Service (IRS); (4) failed to remit unemployment taxes to the State of Ohio; and (5) failed to remit premium payments to the Ohio Bureau of Workers’ Compensation (BWC). (*Id.* ¶¶ 14–20). They further allege that Respondents have a clear legal duty to do these things and that they have no other adequate legal remedy. (*Id.* ¶¶ 45–49). As a result, they seek to command Respondents to remit OPERS contributions from May 4, 1993 to the present, provide all necessary information to OPERS, report the misclassification issue to the BWC and Ohio Department of Job and Family Services (ODJFS) and to remit all necessary payments, and remit applicable payroll taxes to the IRS. (*Id.* at Prayer for Relief ¶¶ 8–12).

B. Fringe benefits allegations

Relators also allege that on February 10, 1997 Village Ordinance Nos. 33.03 and 37.21 entitled all Village employees who worked at least thirty hours a week to “hospitalization, medical, dental, disability and death benefits.” (Id. ¶ 21). They state that these Ordinances were amended on October 22, 2012 and now only apply to employees who work 37.5 hours a week. (Id. ¶ 22). Relators allege that, although they worked an average of 30 hours a week or more from February 10, 1997 to October 22, 2012, they did not receive the fringe benefits to which they were entitled under Ordinance Nos. 33.03 and 37.21. (Id. ¶ 24). Also, they state that the Village had a clear obligation to provide these benefits and that they have no other adequate legal remedy to recover them. (Id. ¶¶ 24, 53–54). As a result, Relators seek: (1) for those who worked at least 30 hours a week from February 10, 1997 to October 22, 2012, the monetary value of the fringe benefits; and (2) for those who worked at least 30 hours a week from February 10, 1997 to October 22, 2012, reimbursement for insurance premiums, as well as out-of-pocket medical, dental, and vision expenses. (Id. at Prayer for Relief ¶¶ 6–7).

C. Sick leave allegations

According to Relators, R.C. 124.38 requires all Village employees to be permitted to accumulate paid sick leave, without limit, at a rate of 4.6 hours for every eighty hours of work, which may be taken for “personal illness, pregnancy, injury, exposure to contagious disease that could be communicated to other employees, and illness, injury, or death in the employee’s immediate family.” (Id. ¶¶ 31–32). They further contend that the Village was required to transfer all accumulated sick leave if they transferred to another public agency. (Id. ¶ 33). Also, Relators state that the Village is required to pay employees who have at least ten years of service one-fourth the value of all accrued, unused sick leave upon retirement pursuant to R.C. 124.38 and

R.C. 124.39. (Id. ¶¶ 31–35). Because they say the Village had a clear legal to do this and that they have no other adequate remedy, Relators seek: (1) sick leave pay from December 4, 1973 to the present; (2) a proper accounting of accrued sick leave from December 4, 1973 to the present; (3) to require the Village to properly provide sick leave benefits, including accumulation rights, to its current employees; (4) the proper transfer of accrued, unused sick leave for those employed by other public entities; and (5) payment in cash of one-fourth the value of their accumulated, unused sick leave for those who retired from December 4, 1973 to present under R.C. 124.39. (Id. ¶ 63 and Prayer for Relief ¶¶ 1–5).

D. Holiday pay allegations

Last, Relators state that Village Ordinance 37.15 provides that “[e]ffective January 1, 1976, all village employees shall . . . be granted a paid leave of absence” for ten recurring holidays, and, additionally, any day designated “by the President of the United States, or the Governor of the State of Ohio as a holiday, day of mourning, or the like.” (Id. ¶ 26). Relators allege that per this Ordinance police officers receive a lump-sum payment for all holidays in December while all other employees receive that pay in the period on which the holiday occurs. (Id. ¶ 27). Because they say the Village failed to properly provide holiday pay despite a clear obligation to do this, Relators seek “all unpaid holiday pay” since January 1, 1976. (Id. ¶¶ 26, 29, 58–60).

III. LAW AND ARGUMENT

A. Legal standard

1. Mandamus standard

“It is well-settled that a claim by a public employee of entitlement to wages or benefits which are granted by statute or ordinance is actionable in mandamus.” *State ex rel. Madden v.*

Windham Exempted Vill. Sch. Dist. Bd. of Educ., 42 Ohio St. 3d 86, 537 N.E.2d 646, 647 (1989).

In order to be entitled to a writ of mandamus, the relator has the burden of showing that: (1) he has a clear legal right to the relief prayed for; (2) the respondent has a clear legal duty to perform the requested act; and (3) the relator has no plain and adequate remedy at law. *State ex rel. Minor v. Eschen*, 7 Ohio St.3d 134, 136, 656 N.E.2d 940 (1995).

2. Motion to dismiss standard under Civ. R. 12(B)(6)

A motion to dismiss under Civ. R. 12(B)(6) should be granted when, after construing all factual allegations in the complaint as true and taking all reasonable inferences in favor of the non-moving party, there are no facts that entitle a party to relief. *York v. Ohio St. Highway Patrol*, 60 Ohio St.3d 143, 573 N.E.2d 1063, 1064 (1991). Although the factual allegations of the complaint are taken as true, “[u]nsupported conclusions . . . are not considered admitted . . . and are not sufficient to withstand a motion to dismiss.” *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 544 N.E.2d 639, 639 (1989). Moreover, “[l]egal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness.” *Williams v. U.S. Bank Shaker Square*, 8th Dist. No. 89760, 2008-Ohio-1414, ¶ 9 (8th Dist. 2008).

B. Relators’ sick leave, fringe benefit, and holiday pay allegations must be dismissed to the extent that they fall outside of R.C. 2305.07’s six-year statute of limitations.

A defendant may raise a statute of limitations defense on a motion to dismiss “when the complaint shows on its face the bar of the statute.” *Mills v. Whitehouse Trucking Co.*, 40 Ohio St. 2d 55, 320 N.E.2d 668, 671 (1974). Relators’ sick-leave allegations seek various forms of relief for sick leave benefits dating back to December 4, 1973; their holiday-pay allegations request relief for benefits dating back to January 1, 1976; and their fringe-benefit allegations seek relief for benefits dating back to February 10, 1997. (Compl. ¶¶ 26, 60 and Prayer for Relief ¶¶ 1–7). But much of the relief sought is barred by the six-year statute of limitations.

Under R.C. 2305.07, “[a]n action upon a contract not in writing, express or implied, or upon a liability created by statute . . . shall be brought within six years after the cause thereof accrued.” “Courts uniformly hold that the right of a [public] officer to compensation for the performance of duties imposed on him by law do not rest on contract either express or implied, because in all cases the right to compensation is such only as may be given by law.” *Wright v. City of Lorain*, 70 Ohio App. 337, 46 N.E.2d 325, 327 (9th Dist. 1942). Based on this precedent—and since Relators’ sick leave, holiday pay, and fringe benefit allegations turn on violations of statutes or ordinances—it cannot reasonably be argued that Relators’ claims are actions “upon a contract.” (Compl. ¶¶ 21–36). At stake is whether the claims are based “upon a liability created by statute,” which would trigger R.C. 2305.07’s six-year statute of limitations. “In order for a statutory cause of action to be ‘an action . . . upon a liability created by statute’ . . . that cause of action must be one that would not exist but for the statute.” *McAuliffe v. W. States Imp. Co.*, 72 Ohio St. 3d 534, 651 N.E.2d 957, 960 (1995). The test is whether “the causes . . . of action asserted . . . were available at common law.” *Id.*

Relators’ sick leave allegations turn on statutory violations of R.C. 124.38 and R.C. 124.39. (Compl. ¶¶ 31, 34). Because there was no common law cause of action allowing public employees to recover for sick leave time, this claim is based “upon a liability created by statute” and is governed by the six-year statute of limitations. Likewise, Relators’ holiday pay and fringe benefit claims are based on alleged violations of Village Ordinance Nos. 33.03, 37.21, and 37.15. (*Id.* ¶¶ 21–22, 26). It is true that R.C. 2305.07 makes no reference to a “liability created by ordinance.” *See* R.C. 2305.07. Yet the rights associated with Relators’ employment—such as any relating to sick leave, holiday pay, or fringe benefits—as well as the ordinances at issue stem from rights created by statute. *Wright*, 46 N.E.2d at 327 (the right to compensation “grows out of

statute, plus the ordinances enacted pursuant to such statutory authority . . . in so far as the application of the statute of limitations is concerned”).¹

Significantly, a 2011 First District decision—in an appeal where the Village of Lincoln Heights was the employer and the employee was a police officer believed to be within the scope of the classes plead in Relators’ Complaint—recognized that “[n]umerous courts have applied the six-year statute of limitations to cases involving public-employee compensation.” *Miller v. Lincoln Hts.*, 2011-Ohio-6722, 967 N.E.2d 255, 256–57 (1st Dist. 2011). The Twelfth District similarly recognized that:

In a number of cases, courts have held that the right of a police officer or firefighter for a municipality to compensation is derived by statute, and by ordinances enacted pursuant to statutory authority. Consequently, any action involving that right to compensation is subject to the six year statute of limitations for actions based on statutes set forth in R.C. 2305.07.

Harville v. City of Franklin, 12th Dist. No. CA91-01-003, 1991 WL 144318, *3 (12th Dist. 1991).

The only Ohio Appellate District believed to have directly addressed this issue in the context of sick leave ruled that a public employee’s right to sick leave is a right “created by statute” for purposes of R.C. 2305.07. *Harville*, 1991 WL 144318 at *3. Although Ohio courts do not appear to have expressly addressed the application of R.C. 2305.07 to claims for holiday pay or fringe benefits, the Ohio Supreme Court, First District, Third District, Eighth District, and Tenth District have reached this result in several virtually identical contexts like overtime pay, vacation credit, military service pay, payment for all hours worked, and salary deductions. *State*

¹ See also *id.* at 327–28 (“A police officer of a municipal corporation is a public officer” and his compensation “is an incident of the office itself. . . . The statutes of Ohio provide for the organization and maintenance of a police department in the various municipalities of the state. . . . Provision is likewise made for its personnel’The police department . . . shall be composed of a chief of police and such other offices, patrolmen and employees as council shall, from time to time, provided by ordinance.”).

ex rel. N. Olmsted Fire Fighters Assn. v. N. Olmsted, 64 Ohio St. 3d 530, 597 N.E.2d 136, 141 (1992) (applying six-year statute of limitations in mandamus action seeking to recover accrued vacation leave); *State ex rel. Hadsell v. Springfield Twp.*, 92 Ohio App.3d 256, 261, 634 N.E.2d 1035 (1st Dist. 1993) (applying R.C. 2305.07 in mandamus suit seeking retroactive vacation credit); *Lincoln Hts.*, 967 N.E.2d at 256–57 (applying R.C. 2305.07 in case with police officer seeking military service compensation); *Niswonger v. City of Cincinnati*, 17 Ohio App. 2d 200, 245 N.E.2d 375, 378 (1st Dist. 1968) (applying R.C. 2305.07 to class action brought by police officers seeking payment for all hours worked); *Welch v. City of Lima*, 89 Ohio App. 457, 102 N.E.2d 888, 894 (3rd Dist. 1950) (applying R.C. 2305.07 to suit involving police officers seeking to recover for salary reductions contrary to ordinance); *see also Moran v. City of Cleveland*, 58 Ohio App. 3d 9, 567 N.E.2d 1317, 1319 (8th Dist. 1989) (overtime compensation for police officers only exists pursuant to municipal ordinance); *Ebright v. Whitehall*, 8 Ohio App.3d 29, 455 N.E.2d 1307, 1309 (10th Dist. 1982) (overtime compensation for police officers exists pursuant to municipal ordinance).

This result is consistent with the general policy interests underlying statutes of limitations. The Ohio Supreme Court explained that “[t]he rationale underlying statutes of limitations is fourfold: to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress state and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases.” *O’Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 447 N.E.2d 727, 731 (1983). All of these interests further justify applying the six-year statute of limitations in R.C. 2305.07 in this context. Allowing Relators’ suit for class-wide relief—on allegations dating all the way back to 1973—would effectively extend public employers’ liability for employee benefits forever, create conflict with

public record retention standards, discourage the prompt prosecution of claims, have far-reaching state-wide application, and impose a tremendous burden on already-strained, taxpayer-funded resources. Ultimately, this type of uncertain employment environment—where public employers have no idea whether or when they can “close the books” on a claim—is one of the reasons that the statute of limitations exists.

With the scope of R.C. 2305.07 resolved, the issue becomes the date that the statute of limitations is triggered. In applying the six-year statute of limitations to a former public employee’s suit for accumulated, unused sick leave, the Twelfth District ruled that “a cause of action arising from a statute accrues and the period specified in the statute of limitations begins to run when the violation giving rise to the liability occurs.” *Harville*, 1991 WL 144318, *3. The Twelfth District specifically declined to apply the “discovery rule,” which is “usually applied in malpractice cases,” to alleged statutory violations in the context of public employee benefits. *Id.* Much like the Twelfth District’s *Harville* decision, the Third District recognized that “[p]ersons dealing with municipal corporations are charged with notice of all limitations upon the authority of the municipality or its agents, and they are required, at their peril, to ascertain whether statutory requirements relating to the subject of the transaction have been complied with.” *Welch*, 102 N.E.2d at 893. In other words, the statute of limitations begins to run when the benefits become due and payable as prescribed by statute or ordinance. *Id.* at 894. Applied to this case, Relators’ sick leave, holiday pay, and fringe benefits claims are barred by the statute of limitations to the extent that they allege claims that became due and payable before July 24, 2008.

C. Relators' sick leave allegations—including those already barred by the statute of limitations—must be dismissed because R.C. 124.38 and R.C. 124.39 do not apply to the Village of Lincoln Heights.

Relators' sick leave allegations are based on alleged statutory violations of R.C. 124.38 and R.C. 124.39 which, they say, imposed a "clear legal duty" on the Village to properly pay, credit, and transfer sick leave benefits as prescribed by the statutes. (Compl. ¶¶ 31–35, 63). It is true that the Ohio Supreme Court ruled that municipalities covered by R.C. 124.38 and R.C. 124.39 are barred from enacting ordinances that circumvent these requirements because they are laws of a general nature that prevail over conflicting municipal ordinances. *State ex. re. Mun. Constr. Equip. Operators' Labor Council v. City of Cleveland*, 114 Ohio St.3d 183, 870 N.E.2d 1174, 1188 (2007). Municipalities are permitted to set standards for determining when sick leave is properly used, but they cannot modify the rights created by these statutes. *S. Euclid Fraternal Order of Police, Lodge 80 v. D'Amico*, 13 Ohio App. 3d 46, 468 N.E.2d 735, 738 (1983). Stated differently, R.C. 124.38 and R.C. 124.39 operate as a minimum threshold below which municipalities may not venture. *Ebert v. Bd. of Mental Retardation*, 63 Ohio St.2d 31, 406 N.E.2d 1098, 1100 (1980).

But this precedent does not apply—and Relators' sick leave allegations must be dismissed—because R.C. 124.38 and 124.39 do not apply to villages like the Village of Lincoln Heights. In the Ninth District's *Heatwell v. Boston Hts.* decision, a village appealed from a trial court judgment requiring it to compensate a former police captain for \$8,748 in accumulated, unused sick leave under R.C. 124.38 and R.C. 124.39. 101 Ohio App. 3d 290, 655 N.E.2d 437, 437–38 (9th Dist. 1995). The Ninth District reversed the trial court's decision because the village was "not covered" by those statutory sick leave requirements and thus had "no statutory duty to pay its ex-employees an amount for accrued but unused sick leave." *Id.* at 438. Likewise, in the

First District's *Doughton v. Village of Mariemont* decision, the plaintiff was employed by a village as a police officer. 16 Ohio App. 3d 382, 476 N.E.2d 720, 721 (1984). After his termination, he filed suit seeking pay for accumulated sick leave under R.C. 124.38 and 124.39, which the village had refused to pay. *Id.* The First District ruled that because R.C. 124.38 and 124.39 are part of the Ohio civil service provisions—which “do not apply to village employees”—the plaintiff was “not covered by these provisions” and therefore “not entitled to the accumulated sick pay.” *Id.*; see also *Christensen v. Hagedorn*, 174 Ohio St. 98, 186 N.E.2d 848, 850 (1962) (holding that “a patrolman appointed by a mayor of a village has no civil service status under state law”); *State ex re. Heffeman v. Serp*, 11 Ohio Law Abs. 480, 125 Ohio St. 87, 88 (1932) (“the civil service provisions apply to cities, but [d]o not apply to villages”); *Ward v. Swanton*, 6th Dist. No. F-06-016, 2007-Ohio-3110, ¶¶ 19–20 (6th Dist. 2007) (holding that civil service statutes, such as R.C. 737.12, apply to “state, city, and county employees but not to villages”). Because R.C. 124.38 and R.C. 124.39 do not apply to the Village of Lincoln Heights, Relators’ sick leave allegations must be dismissed.

D. Relators’ misclassification claim involving OPERS’ benefits must be dismissed because: (1) they have an adequate remedy at law; (2) they have no “clear legal right” to the requested relief; and (3) many of the allegations are time-barred.

Relators allege that the Village misclassified them as independent contractors or “temporary employees” when they were actually bona fide employees. (Compl. ¶ 14). They further allege that, through this misclassification, the Village: (1) failed to remit required OPERS payments; (2) failed to provide OPERS “with information required . . . to enroll [them]” as members including PED-1ER forms; (3) failed to remit applicable employment taxes to the IRS; (4) failed to remit unemployment taxes to the State of Ohio; and (5) failed to remit premium payments to the BWC. (*Id.* ¶¶ 14–20). Because they claim that the Village has a clear duty to do

these things and they have no other adequate legal remedy, they seek an order commanding the Village to perform these acts. (Id. ¶¶ 45–49).

The rights and obligations concerning employer–employee OPERS contributions are governed by Ohio Revised Code Chapter 145. *State ex rel. Teamsters Loc. Un. 377 v. City of Youngstown*, 364 N.E.2d 18, 20 (1977). As a general matter, OPERS membership is compulsory for all “public employers.” R.C. 145.01(A). For public employees, the fiscal officer of each public authority is required to:

transmit to the system for each contributor subsequent to the date of coverage an amount equal to the applicable per cent of each contributor’s earnable salary at such intervals and in such form as the system shall require. . . . [T]he fiscal officer of each local authority . . . shall transmit promptly to the system a report of contributions at such intervals and in such form as the system shall require, showing thereon all the contributions and earnable salary of each contributor employed, together with warrants, checks, or electronic payments covering the total of such deductions. R.C. 145.47(B).

Public employers’ obligations also “include the normal and deficiency contributions and employer liability resulting from omitted member contributions required under Section 145.47 of the Revised Code” *City of Youngstown*, 364 N.E.2d at 20.² But these requirements apply to “public employees,” the definition of which specifically excludes persons “employed . . . on a contractual basis as an independent contractor.” R.C. 145.012(A)(1); *see also* O.A.C. 145-1-42(B)(2) (“An independent contractor is not a public employee and shall not become a contributor to the retirement system.”).

² *See also* R.C. 145.483 (“Upon a finding that an employer failed to deduct contributions pursuant to section 145.47 of the Revised Code during a period of employment for which such contributions were required, a statement of delinquent contributions shall be prepared showing the amount the contributor and employer would have contributed had regular payroll deductions been taken.”).

1. Relators' OPERS claims must be dismissed because they have a plain and adequate legal remedy at law based on the OPERS member-determination procedure and elaborate, multi-level appeal process.

An action in mandamus is the proper method to appeal a final decision to determine a worker's claimed entitlement to OPERS contributions or credit. *State ex rel VanDyke v Pub. Emp. Retirement Bd.*, 99 Ohio St 3d 430, 434, 793 N.E.2d 438 (2003); *State ex rel. Mallory v. Pub. Emp. Ret. Bd.*, 82 Ohio St. 3d 235, 694 N.E.2d 1356, 1360 (1998). But "[t]o be entitled to the requested writ of mandamus, [the relator] must establish that the board abused its discretion by denying [a] request for PERS service credit." *Mallory*, 694 N.E.2d at 1360 (emphasis added).

There is a specific procedure for determining whether a worker is entitled to be classified as a public employee for purposes of OPERS, rather than an independent contractor, as well as an elaborate appeal process. For instance, "an individual who provided personal services to a public employer on or before January 7, 2013, but was not classified as a public employee may request from the public employees retirement board a determination of whether the individual should have been classified as a public employee" R.C. 145.037(B)(1); *see also* O.A.C. 145-1-10(A) ("Any affected person may request a determination of membership by providing the public employees retirement system with a written request and supporting documentation of the nature of work performed for which a determination is requested."). Upon receipt of a membership determination request, OPERS will review the submission, request additional information if necessary, and "shall issue the staff determination . . . to the impacted parties." O.A.C. 145-1-10(B). The analysis involved in making this determination requires a review of O.A.C. 145-1-42(A)(2). Here, an independent contractor is defined as "an individual who: (a) Is a party to a bilateral agreement which may be a written document, ordinance, or resolution that defines the compensation, rights, obligations, benefits and responsibilities of both parties; (b) Is

paid a fee, retainer or other payment by contractual arrangement for particular services; (c) Is not eligible for workers' compensation or unemployment compensation; (d) May not be eligible for employee fringe benefits such as vacation or sick leave; (e) Does not appear on a public employer's payroll; (f) Is required to provide his own supplies and equipment, and provide and pay his assistants or replacements if necessary; (g) Is not controlled or supervised by personnel of the public employer as to the manner of work; and (h) Should receive an Internal Revenue Service form 1099 for income tax reporting purposes." O.A.C. 145-1-42(A)(2)(a)–(h).

Following a staff determination, "[a]ny affected person" may appeal within 30 days. O.A.C. 145-1-10(B). If the staff determination is appealed, "the system shall review all information and issue a senior staff determination," which in turn can be appealed to the OPERS Board within sixty days. O.A.C. 145-1-10(C); *see also* O.A.C. 145-1-11(A). "If the board determines that the individual is not a public employee with regard to the services in question . . . the individual shall not be considered a public employee" R.C. 145.037(C)(2). The OPERS Board's determination is final. R.C. 145.037(C)(2). The OPERS Board also has the power to delegate this determination by having an independent hearing examiner provide a recommendation, which the OPERS Board can then accept, reject, or modify. O.A.C. 145-1-11(C)(4).

Here, Relators allege that the Village misclassified them as independent contractors or temporary employees when they were actually bona fide employees. (Compl. ¶ 14). But they fail to allege that OPERS ever made this determination—much less that they exhausted their appeal rights on this issue through a staff determination, senior staff determination, or a determination from the OPERS Board. (*See generally, id.*). The closest they come is setting forth a few conclusory allegations sometimes considered as factors in an employee-or-independent-

contractor type analysis. More importantly, they specifically allege that the Village “has failed to provide OPERS with information required” for OPERS to even make the determination of whether they were employees or independent contractors. (Id. ¶ 17; *see also* id. at Prayer for Relief ¶ 9). Through their concession that OPERS has not yet made a determination that they were bona fide employees, as well as the lack of any indication that they exhausted the multi-stage determination and appeal process on this issue, Relators have effectively admitted that there is a plain and adequate remedy at law that bars their claim. *Windham*, 537 N.E.2d at 647 (A mandamus is not appropriate if the relator has a “plain and adequate remedy at law”); *State ex rel. Schachter v. Ohio Pub. Emps. Ret. Bd.*, 121 Ohio St. 3d 526, 905 N.E.2d 1210, 1219–20 (2009) (“An administrative appeal generally provides an adequate remedy in the ordinary course of law that precludes extraordinary relief in mandamus.”).

2. Relators seek relief the Village cannot provide—particularly absent a final OPERS member-determination decision—and thus have no “clear legal right” to the relief sought.

Relators allege that they have a clear legal right to require the Village to: (1) remit the employer and employee’s portion of contributions to OPERS from May 4, 1993, to the present; (2) provide all information required by OPERS to enroll them as members; (3) report to the BWC that they were misclassified and provide applicable premiums; (4) report to ODJFS that they were misclassified and remit applicable tax payments; and (5) remit applicable payroll taxes to the IRS as a result of their misclassification. (Compl. ¶¶ 14–20, 45–49).

But a clear legal right in a mandamus action involving OPERS benefits “exists when the board is found to have abused its discretion by entering an order that is not supported by some evidence.” *State ex rel. Schaengold v. Ohio Pub. Employees Ret. Bd.*, 114 Ohio St.3d 147, 2007-Ohio-3760, ¶ 19 (2007). As shown, Relators cannot show that they have a clear legal right to the

relief requested because OPERS has not made a final determination—or any determination—as to whether they were public employees or, alternatively, independent contractors. The relief Relators seek revolves around determinations left to OPERS, which neither the Village nor this Court can provide, and are therefore not justiciable. *Ohio Pub. Emps. Ret. Sys. v. Akron Gen. Med. Ctr.*, 10th Dist. No. 11AP-993, 2013-Ohio-944, ¶ 15 (10th Dist. 2013) (“For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties.”).

Relators “put the cart before the horse” and improperly assume they are public employees when that determination has never been made—at least not under the standard governing their entitlement to OPERS benefits. Although Relators may argue that the part of the requested relief, about requiring the Village to provide all information to OPERS, does not directly turn on the employee-or-independent-contractor determination, there is no indication that OPERS is barred from making their membership determination without this information or that Relators are left with no other statutory or administrative mechanism to remedy this.

3. *Even if Relators had no adequate remedy at law and the Village had a clear legal right to provide the requested relief, many of their OPERS allegations are time-barred.*

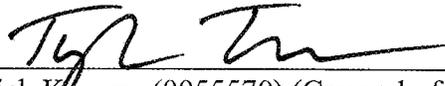
Under R.C. 145.037(D)(1), requests for member-status determinations, which concern services performed for a public employer before January 7, 2013, must be made no later than August 7, 2014 absent proof of physical or mental incapacitation. As such, Relators’ claims—to the extent that they attempt to assert claims based on member-determination requests not submitted before August 7, 2014 on behalf of themselves or those similarly-situated—must be dismissed. Additionally, “[a] request for a determination must be made not later than five years after the individual begins to provide personal services to the public employer” absent proof of

physical or mental incapacitation. R.C. 145.038(C). Thus, Relators' OPERS claims must be dismissed to the extent that they concern individuals who failed to submit a request for membership determination within five years of when they began to perform services for the Village of Lincoln Heights.

IV. CONCLUSION

Relators' claims for sick leave, holiday pay, and fringe benefits concern are, in part, time-barred by the six-year statute of limitations. In addition, Relators' sick leave and misclassification claims fail to state a claim on which relief can be granted. Therefore, Respondents' Motion should be granted.

Respectfully submitted,



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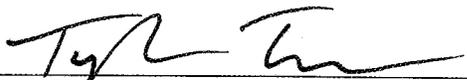
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following via email and regular mail on September 8, 2014:

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