

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel.*, Steve R. Maddox., *et al.*,

Relators,

v.

Village of Lincoln Heights, Ohio, *et al.*,

Respondents.

Case No.: 14-1267

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

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

Respondents move this Court under Civ. R. 12(B)(6) for an Order granting dismissal of Relators' First Amended Complaint for Writ of Mandamus with Class Action Allegations because: (1) Relators failed to comply with S.Ct.Prac.R. 12.02(B); (2) the holiday pay and fringe benefit claims are, in part, barred by R.C. 2305.07's six-year statute of limitations; and (3) the sick leave and misclassification claims fail to state claims for which relief can be granted. The reasons in support are explained in the attached Memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. PRELIMINARY STATEMENT

Relators' Amended Complaint fails to comply with S.Ct.Prac.R. 12.02(B) because their Affidavit in support of the mandamus relief does not cover all necessary details of their claims. Further, their fringe benefit and holiday pay claims—which seek compensation for public employee benefits back to July 2004—must be dismissed to the extent that they fall outside R.C. 2305.07's six-year statute of limitations. Their sick leave claim must also be dismissed because R.C. 124.38 and R.C. 124.39 do not apply to Respondents. Additionally, Relators' misclassification claim, which concerns various aspects of Ohio Public Employee Retirement System (OPERS) benefits, likewise 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 and thus they have no "clear legal right" to the relief sought; and (3) the allegations are, in part, time-barred. Therefore, Respondents' Motion 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." (Am. Compl. ¶ 2). Through their Amended Complaint, Relators seek—on behalf of themselves and similarly-situated current and former employees—various employment benefits from the Village, Mayor, Manager, Finance Director, and several 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 July 23, 2008 to the present;

2. “Fringe Benefits Class” – All Village employees who worked at least thirty hours a week from July 23, 2004 through the present but were not provided fringe benefits;
3. “Sick Leave Class” – All Village employees from July 23, 2008 to the 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 July 23, 2004 to present who were not provided holiday pay.

(See generally, *id.* and at p. 3).

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 unemployment taxes to the State; (2) failed to remit premium payments to the Ohio Bureau of Workers’ Compensation (BWC); and (3) failed to provide completed PED-1ER forms and other required information to OPERS for those who submitted member-status determination forms by August 7, 2014 or, for those who “prove physical or mental incapacitation,” submitted member-status determination forms after August 7, 2014. (*Id.* ¶¶ 16–17, 44, 46). They further allege that Respondents have a clear legal duty to do these things and that they have no other adequate legal remedy. (*Id.* ¶¶ 41–47). As a result, they seek to command Respondents to: (1) provide all information required by OPERS to enroll the Misclassification Class in OPERS, including PED-1ER forms; (2) report to the BWC that they were employees instead of independent contractors, and to remit BWC premiums from July 23, 2008 to present; and (3) report to the Ohio Department of Job and Family Services (ODJFS) that they were employees instead of independent contractors, and to remit tax payments owed from July 23, 2008 to present. (*Id.* at Prayer for Relief ¶¶ 9–11).

B. Fringe benefit 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 per week to “hospitalization, medical, dental, disability and death benefits.” (Id. ¶ 18). Although they worked an average of thirty hours per week from July 23, 2004 to the present, they allegedly did not receive the fringe benefits to which they were entitled under Ordinance Nos. 33.03 and 37.21. (Id. ¶¶ 19, 49). 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. ¶¶ 20, 49–52). As a result, Relators seek: (1) for those who worked at least an average of thirty hours per week from July 23, 2004 to present, the value of the fringe benefits; and (2) for those who worked at least an average of thirty hours per week from July 23, 2004 to present, reimbursement for insurance premium payments and out-of-pocket medical, dental, vision, and death expenses. (Id. at Prayer for Relief ¶¶ 8–9).

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. ¶¶ 27–28). They further contend that the Village was required to transfer all accumulated sick leave if they transferred to another public agency. (Id. ¶ 29). 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. ¶¶ 30, 58). Because they say the Village had a clear legal to do this and that they have no other adequate remedy, Relators seek: (1) pay for the Sick Leave Class for sick leave to

which they are or were entitled under R.C. 124.38, but were not paid from July 23, 2008 to present; (2) to account for the sick leave the Sick Leave Class had a right to accrue under R.C. 124.38; (3) to provide the sick leave benefits required by R.C. 124.38, including accumulation rights, to all Sick Leave Class members currently employed; (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 July 23, 2008 to present. (Id. ¶ 58 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. ¶ 22). 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. ¶ 23). Because Relators say that the Village failed to properly provide holiday pay despite a clear obligation to do this, they seek “all unpaid holiday pay” since July 23, 2004. (Id. ¶¶ 25, 54–56 and Prayer for Relief ¶ 7).

III. LAW AND ARGUMENT

A. Legal 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).

A motion to dismiss under Civ. R. 12(B)(6) should be granted when, after construing all factual allegations 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 factual allegations are taken as true, “[u]nsupported conclusions . . . are not considered admitted” and cannot withstand a motion to dismiss. *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 544 N.E.2d 639, 639 (1989).

B. Relators failed to comply with S.Ct.Prac.R. 12.02(B) because their Affidavit in support of mandamus relief does not cover all necessary details of their claims.

Ohio Supreme Court Rule of Practice 12.02(B)(1) states that all mandamus complaints “shall . . . be supported by an affidavit specifying the details of the claim” The Rules further specify that “shall” is mandatory. S.Ct.Prac.R.1.06(A). This is critical because the Ohio Supreme Court “routinely dismiss[es]” original actions when complaints fail to fully comply with this requirement for all necessary details of the claims. *State ex rel. Hackworth v. Hughes*, 2002-Ohio-5334, 97 Ohio St. 3d 110, ¶ 24 (2002). In one dismissal, in 2001, Justice Pfeifer explicitly warned that future violations of this requirement may be subject to dismissal with prejudice:

This case should provide prospective relators with sufficient warning regarding the potential consequences of not fully complying with the affidavit requirement Much like an umpire giving a pitcher a warning that the next pitch aimed at a batter’s head may lead to his ejection, attorneys are similarly warned here.

State ex rel. Shemo v. Mayfield Hts., 2001-Ohio-203, 92 Ohio St. 3d 324, 750 N.E.2d 167, 168 (2001) (Pfeifer, J., concurring) (emphasis added). Significantly, this requirement applies to both initial *and* amended complaints. *State ex rel. Citizens for Envtl. Justice v. Campbell*, 2001-Ohio-

1617, 93 Ohio St. 3d 585, 757 N.E.2d 366, 367 (2001) (“Nor did relator file an amended complaint with an affidavit covering the necessary elements of its mandamus claim . . .”).

Despite this, Relators failed to submit an affidavit specifying all necessary details of their Amended Complaint. (*See generally*, Am. Compl.). They merely re-submitted the same July 22, 2014 Antwan Sparks Affidavit which—instead of verifying their *Amended* Complaint—states that he read the *initial* Complaint and that “[t]he factual allegations contained therein are true and accurate.” (Am. Compl. at Ex. A, 7/22/14 Sparks Aff. ¶ 3; *see also* Compl. at Ex. A, 7/22/14 Sparks Aff.). This was executed before the initial Complaint was filed, long before the Amended Complaint existed, and makes no mention of either the Amended Complaint or *any* of its allegations. (*Id.*). Relators will surely say that a new Affidavit was not necessary because their Amended Complaint, in large part, is simply a “paired down” version of their initial Complaint and also that Respondents consented to the amendment. (*See* Am. Compl. at Ex. B, 9/18/14 Nilges Email to Kasson) (“Any objection? We will not be adding anything, just removing.”). But this argument must be rejected for three reasons.

First, the Amended Complaint *does* add new allegations. For example, although the initial Complaint only sought to recover class-wide fringe benefits through October 22, 2012, the Amended Complaint seeks them through “the present.” (Compl. ¶ 23 and Prayer for Relief ¶¶ 6–7; Am. Comp. ¶ 52 and Prayer for Relief ¶ 6). Given that the fringe benefits at stake are all insurance premiums and out-of-pocket hospitalization, medical, dental, vision, disability, and death benefit expenses for a class of current and former employees—which Relators themselves say includes over forty members—this is no trivial addition. (Am. Compl. ¶¶ 18, 34, 52). It is a major revision that cannot be compared to the *State ex rel. Community for Charter Amendment Petition v. Maple Heights* decision where an affidavit stating that it was made on “person”

knowledge instead of “personal” was deemed a “typographical error, not a substantive defect.” No. 2014-1478, 2014-Ohio-4097, ¶ 23 (Sept. 19, 2014). **Because Relators’ Affidavit “does not cover all of the necessary details of [their] claim for extraordinary relief in mandamus,” “[d]ismissal of [R]elators’ case is thus required.”** *Shemo*, 750 N.E.2d at 168.

Second, although Respondents agreed to consent to Relators’ amendment, they never agreed to waive the Affidavit requirement. (See Am. Compl. at Ex. B, 9/18/14 Kasson Email to Nilges). Moreover, Respondents’ consent was provided in response to an express representation that “[w]e will not be adding anything, just removing”—which, as shown, did not happen. (See Am. Compl. at Ex. B, 9/18/14 Kasson Email to Nilges).

Third, even if the Amended Complaint did not contain any new allegations and was truly a “paired down” version of the initial Complaint, there is no exception to the affidavit requirement for amended pleadings. Further, Ohio Supreme Court precedent confirms that this requirement still applies to amended complaints. *Campbell*, 757 N.E.2d at 367. Because Relators failed to comply with S.Ct.Prac.R. 12.02(B), their Amended Complaint must be dismissed.

C. Relators’ 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.

1. Relators’ allegations are for public employee benefits and governed by R.C. 2305.07’s six-year statute of limitations.

Relators’ fringe benefit and holiday pay allegations seek various forms of relief for public employee benefits dating back to July 23, 2004. (Am. Compl. ¶¶ 25, 54–56 and Prayer for Relief ¶¶ 6–8). 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’ allegations turn on violations of ordinances—it cannot reasonably be argued that their claims are actions “upon a contract.” (Am. Compl. ¶¶ 49–50, 54, 58–59). At issue is whether the claims are based “upon a liability created by statute,” which triggers 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 claims were available at common law. *Id.*

Relators’ holiday pay and fringe benefit claims are based on alleged violations of Village Ordinances. (Am. Compl. ¶¶ 18, 20, 22–25). It is true that R.C. 2305.07 makes no reference to a “liability created by ordinance.” See R.C. 2305.07. But the rights associated with Relators’ employment and the Ordinances at issue stem from rights created by statute. *Wright*, 46 N.E.2d at 327–28 (the right to compensation “grows out of statute, plus the ordinances enacted pursuant to such statutory authority” insofar as “the statute of limitations is concerned.”). Significantly, a 2011 First District decision—in an appeal where the Village was the employer and the employee was a police officer believed to be within the scope of the classes plead in Relators’ Amended 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, 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 ex rel. N. Olmsted Fire Fighters Assn. v. N. Olmsted*, 64 Ohio St. 3d 530, 597 N.E.2d 136, 141 (1992) (applying R.C. 2305.07 in mandamus suit seeking accrued vacation); *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 involving police officer 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 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 police officer suit 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).

With the scope of R.C. 2305.07 now resolved, the issue becomes the date that the limitations period was triggered. The Twelfth District ruled that, in this context, "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; *see also Welch*, 102 N.E.2d at 893 (“Persons dealing with municipal corporations are charged with notice of all limitations upon the authority of the municipality or its agents . . .”). In other words, the statute of limitations begins to run when the benefits become due and payable as prescribed by ordinance. *Id.* at 894. Applied to this case, Relators’ claims are barred by the statute of limitations to the extent that they allege claims that became due and payable before July 24, 2008. Ultimately, this result makes sense because allowing Relators’ suit for class-wide relief—on allegations dating back to 2004—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.

2. *Not only does Relators’ purported ten-year statute of limitations argument ignore the overwhelming precedent analyzing public employee benefits under R.C. 2305.07, but Relators are equitably estopped from asserting it.*

Relators’ Amended Complaint, in response to Respondents’ initial Motion to Dismiss, reduced the time period at issue for their fringe benefit, holiday pay, and sick leave allegations from January 1, 1976 to the present, to July 23, 2004 to the present. (*See generally*, Compl.; Am. Compl. ¶¶ 31, 49, 55). Although the basis for the newly-amended ten-year period is unclear and appears completely arbitrary, the only conclusion that can be reached from this amendment is that Relators do not believe that their fringe benefit and holiday claims arise “upon a liability created by statute” under R.C. 2305.07 and believe instead that they arise from liability created by the Ohio Constitution’s “municipal home rule” provision. Under Ohio Const. art. XVIII, § 3, “[m]unicipalities shall have authority to exercise all powers of local self-government and to

adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” Aside from the overwhelming and unanimous precedent cited by Respondents above—showing that issues of public employee compensation are governed by R.C. 2305.07—Relators’ position must be rejected.

On the one hand, Relators attempt to sidestep the six-year statute of limitations by arguing that the Ohio Constitution grants the Village expansive authority to adopt, provide, and enforce employee benefits. (*See generally*, Compl.; Am. Compl. ¶¶ 31, 49, 55). On the other hand, and once outside the context of the statute of limitations, Relators contradict themselves by alleging that the Village misclassified numerous individuals as independent contractors when, according to Relators, they were actually “bona fide employees.” (Am. Compl. ¶¶ 14, 18, 22, 27). Their case and claims revolve around the premise that—based on the misclassification of their employment status—numerous individuals, who were actually *employees*, were deprived of benefits and that the Village lacked discretionary authority to classify them like they did, or to otherwise exclude certain classifications of individuals from certain benefits. (*See id.*). Not only does this contradict Ohio Supreme Court precedent ruling that “[t]he right of a municipality to determine the compensation of its employees is, without question, a power of local self-government,” it is fundamentally inconsistent with Relators’ statute of limitations position. *Teamster Loc. Un. No. 377 v. Youngstown*, 413 N.E.2d 837, 64 Ohio St. 2d 158, 160 (1980). Simply put, Relators cannot have it both ways and they are equitably estopped from using this fundamentally inconsistent argument to dodge R.C. 2305.07. *Hutchinson v. Wenzke*, 131 Ohio App. 3d 613, 616, 723 N.E.2d 176, 178 (2nd Dist. 1999); *In re McKenzie*, 225 B.R. 377, 380 (N.D. Ohio 1998) (The “hallmark” of equitable estoppel “is its flexible application.”); *Rice’s Auto Leasing, Inc. v. Lee Paull Ins. Agency*, 2nd Dist. No. 85-B-35, 1986 WL 9119, *4 (2nd

Dist. 1986) (ruling that a party's "inconsistent positions . . . permitted the [trial] court to apply the doctrine of equitable estoppel by inconsistent acts.").

D. Relators' sick leave allegations 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. (Am. Compl. ¶¶ 27–30, 58–59). 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. rel. Mun. Constr. Equip. Operators' Lab. Counc. v. City of Cleveland*, 114 Ohio St.3d 183, 870 N.E.2d 1174, 1188 (2007). Municipalities can set standards for 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. 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, Relators’ sick leave allegations must be dismissed.

E. 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. (Am. Compl. ¶ 14). They further allege that, through this misclassification, the Village failed to: (1) provide all information required by OPERS to enroll them in OPERS, including PED-1ER forms; (2) report to the BWC that they were employees and to remit all BWC premiums owed from July 23, 2008 to present; and (3) report to ODJFS that they were employees and misclassified and to remit all applicable tax payments owed from July 23, 2008 to present. (*Id.* at Prayer for Relief ¶¶ 9–11).

Because they claim that the Village has a clear duty to do these things and that they have no other remedy, they seek to command the Village to perform these acts. (Id. ¶¶ 45–47).

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. 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); O.A.C. 145-1-42(B)(2).

1. Relators’ misclassification 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); O.A.C. 145-1-10(A). Upon receipt of a membership determination request, OPERS reviews the submission, requests 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 various employment considerations in O.A.C. 145-1-42(A)(2)(a)–(h).

Following a staff determination, “[a]ny affected person” may appeal. O.A.C. 145-1-10(B). If appealed, “the system shall review all information and issue a senior staff determination,” which in turn can be appealed to the OPERS Board. 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). This determination is final. R.C. 145.037(C)(2).

Here, Relators allege that the Village misclassified them as independent contractors or temporary employees when they were actually bona fide employees. (Am. 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. (Id. ¶ 15). They also allege that the Village has “a clear legal duty” to provide information to OPERS to even make the determination of whether they were employees or independent contractors. (Id. ¶ 44; *see also* id. at Prayer for Relief ¶ 9). Based on the lack of any allegation suggesting that OPERS *has* 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.

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.***

“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.” *Ohio Pub. Emps. Ret. Sys. v. Akron Gen. Med. Ctr.*, 10th Dist. No. 11AP-993, 2013-Ohio-944, ¶ 15 (10th Dist. 2013). The relief Relators seek with regard to their misclassification claim is not justiciable because it involves relief that can only be granted by administrative determinations by OPERS, the BWC, and ODJFS—not by this Court. For instance, although a clear legal right in a mandamus action involving OPERS benefits “exists when the [OPERS] board is found to have abused its discretion by entering an order that is not supported by some evidence,” the OPERS board has never made any determination on these issues—much less one addressing Relators’ alleged public employee status. *State ex rel. Schaengold v. Ohio Pub. Employees Ret. Bd.*, 114 Ohio St.3d 147, 2007-Ohio-3760, ¶ 19 (2007).¹ Likewise, even though Relators request that

¹ Although Relators may say that commanding the Village to provide information to OPERS does not require an underlying member determination, there is no indication that OPERS is

Respondents be required to remit past BWC premiums, it is beyond dispute that the BWC and its administrator have the sole power to fix the rate of workers' compensation premiums and to assess applicable penalties. R.C. 4123.29(A); *see also* R.C. 4123.34; R.C. 4123.29. Further, ODJFS has the sole power to assess back taxes allegedly owed to it. *See, e.g.*, R.C. 5101.02. In addition to the fact that these necessary determinations have never been made, Relators have not joined them as parties. (*See generally*, Am. Compl.).

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

Requests for member-status determinations concerning 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. R.C. 145.037(D)(1). Thus, Relators' claims—to the extent that they assert claims based on requests not submitted before August 7, 2014—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' misclassification claims must be dismissed to the extent 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.

IV. CONCLUSION

Respondents' Motion to Dismiss should be granted because: (1) Relators failed to comply with S.Ct.Prac.R. 12.02(B)(1); (2) the holiday pay and fringe benefit claims are, in part, barred by R.C. 2305.07's six-year statute of limitations; and (3) the sick leave and misclassification claims fail to state claims for which relief can be granted.

barred from making membership determinations without this information or that Relators are left with no other statutory or administrative remedy to address this.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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