

IN THE OHIO SUPREME COURT

State of Ohio ex rel. STEVE R.
MADDOX, et al.

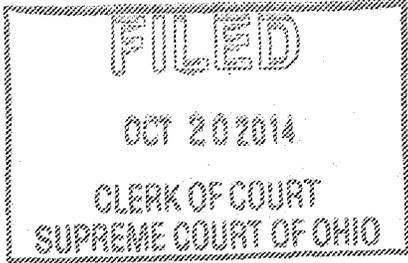
Relators,

v.

THE VILLAGE OF LINCOLN
HEIGHTS, OHIO, et al.

Respondents.

CASE NO. 14-1267



**RELATORS' MEMORANDUM IN OPPOSITION TO RESPONDENTS'
MOTION TO DISMISS FIRST AMENDED COMPLAINT
FOR WRIT OF MANDAMUS WITH CLASS ACTION ALLEGATIONS¹**

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¹ Respondents' Motion to Dismiss should have been characterized as a Motion for Judgment on the Pleadings pursuant to Rule 12(C). Relators will therefore refer to Respondents' motion as a Motion for Judgment on the Pleadings, rather than a Motion to Dismiss, throughout this brief in opposition.

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MEMORANDUM IN OPPOSITION

I. INTRODUCTION.

Respondents have failed to meet their burden to prove that it is beyond doubt that Relators are not entitled to the requested writ of mandamus.

First, the affidavit of Antwan Sparks submitted in support of the First Amended Complaint meets the requirements of Supreme Court Rule of Practice 12.02(B). Regardless, Relators have, contemporaneously with this brief, filed a motion for leave to file a second amended complaint attaching a new affidavit specifically incorporating the factual allegations contained in the second amended complaint;

Second, no federal or state statute requires Respondents to provide fringe benefits or holiday pay to its employees. Such benefits are provided to Village employees solely through ordinances enacted pursuant to its constitutional home-rule authority. Thus, the six year statute of limitations contained in R.C. 2305.07 applicable to “liability created by statute” does not apply to Relators’ fringe benefits and holiday pay claims;

Third, R.C. 124.38 and R.C. 124.39 require that certain minimum sick leave benefits be provided to persons employed in the “municipal service”. The Village’s Charter and Ordinances clearly define relators as employed in the “municipal service” of the Village. Thus, they have been improperly deprived of such benefits; and,

Fourth, Respondents unquestionably have a legal duty to provide information relating to Relators’ application for OPERS benefits to the public employee retirement systems, but have failed and refused to do so.

For these reasons, which are more fully described herein, Respondents’ Motion for Judgment on the Pleadings should be denied.

II. PROCEDURAL HISTORY.

On July 24, 2014, Relators filed their Complaint seeking a Writ of Mandamus and damages based on the Respondents' failure to provide Relators and those similarly situated with certain payments and benefits. Relators attached an affidavit from Relator Antwan Sparks to its initial Complaint which verified the factual allegations.

On September 8, 2014, Respondents filed both an Answer and a Motion to Dismiss. In an attempt to streamline the issues, Relators elected to address Respondents' Motion to Dismiss by amending the Complaint to change the scope of some claims and remove others. Respondents consented to this amendment in writing.

The Relators filed their First Amended Complaint on September 18, 2014. Consistent with the desire to streamline issues and claims, the First Amended Complaint limited Relators' sick leave claims to six years and their claims for holiday pay and fringe benefits to ten years. Relators also removed their claim for OPERS contributions and federal tax payments and limited the request for unemployment tax and workers' compensation premium payments to six years.

Relators also removed an incorrect statement of law contained in the original Complaint. The original Complaint erroneously stated that the Village's fringe benefits ordinances were amended on October 22, 2012. In fact, the fringe benefits ordinances were not amended.

Because the factual allegations had only been reduced, and not enlarged, the affidavit from Antwan Sparks in support of the initial Complaint was also attached to the First Amended Complaint.

In response to the First Amended Complaint Respondents filed another Answer and another Motion to Dismiss on October 8, 2014. The Motion to Dismiss, in part, challenged the affidavit submitted by Antwan Sparks because it did not specifically reference the First

Amended Complaint, and, instead only confirmed the same factual allegations as presented in the original Complaint.

Out of an abundance of caution, and in an effort to ensure perfect compliance with the Supreme Court Rules of Practice, Relators have filed contemporaneous with this Memorandum a motion for leave to file a Second Amended Complaint, which will mirror the First Amended Complaint in substance, but will include an affidavit from Antwan Sparks that specially references the Second Amended Complaint.

The Parties are scheduled to mediate this matter and a related federal court matter on October 21, 2014.

III. BACKGROUND.

A. The Village's System of Government, Charter and Ordinances.

Under Ohio law, all municipal corporations are classified into cities and villages. OH Const. art. 18, § 1. Municipalities with populations over 5,000 are deemed cities, and all others are villages. *Id.* At all relevant times, the Village had a population of less than 5,000.

Article 18, Section 7 of the Ohio Constitution permits municipalities to adopt and operate under a Charter and thereby exercise local self-government. On May 4, 1994, the Village of Lincoln Heights' electorate approved a Charter for the Village. VLH Charter art. I, § 1.01. Through its Charter, the Village reserved "all powers of local self-government and home rule now or hereafter by the Constitution and general laws of the State of Ohio". *Id.*

An essential part of the Village's constitutionally vested "home rule" authority is the power to enact laws in the form of ordinances for purpose of self-government. The Village's power to pass such laws is limited only to the extent that such laws do not conflict with laws of general application. OH Const. art. 18, §18.03.

Here, the Village has exercised its constitutionally vested “home rule” authority to create a municipal civil service system and to provide holiday pay to all of its employees and fringe benefits to many of its employees.

a. The Village’s Municipal Civil Service System.

Pursuant to Article VIII of its Charter, the Village established a municipal civil service system with corresponding rights and responsibilities.

Pursuant to Section 8.08 of the Charter, the Village Manager was required to prepare a Personnel Policy outlining the “rules and regulations necessary to carry out the system of merit employment.” Until that Personnel Policy was adopted, the Charter specified that “the present Civil Service laws, and the Municipality’s existing personnel policy will remain in effect”. It appears that the required personnel policy was completed, and now appears as Chapter 37 of the Village’s Code of Ordinances.

Throughout Article VIII of the Charter, and Chapter 37 of the Code of Ordinances, the Village consistently refers to its employees as being employed in the “municipal service”.

b. The Village’s Holiday Pay and Fringe Benefits Ordinances.

Through separate ordinances, the Village provides Holiday Pay to all of its employees, and certain fringe benefits to employees who work an average of thirty (30) hours per week or more.

Ordinance No. 37.15, entitled “Holidays” states “[e]ffective January 1, 1976, **all** village employees shall observe [ten specific holidays and certain others] and be granted a paid leave of absence therefore....”

Ordinance No. 37.21, entitled “Benefit Plans” applies to all Village employees and states “[e]ach employee who works more than 30 hours per week averaged over a 52 week period shall

receive hospitalization, medical and dental insurance coverage, disability and death benefits, and any other benefits in amounts established by the Village Manager in accordance with the limitations set forth in the annual budget approved by Council”.

Ordinance No. 33.03, entitled “Fringe Benefits” applies to members of the Police Department and states “a police officer who is a regular employee and works more than 30 hours per week averaged over a 52 week period shall receive hospitalization, medical and dental insurance coverage, disability and death benefits, and any other benefits in amounts established by the Village Manager in accordance with the limitations set forth in the annual budget approved by Council”.

B. The Village’s Failure to Provide Required Information to OPERS.

Relators were each improperly classified as independent contractors by the Village. (First Amended Complt. at ¶14). Because Relators were improperly classified, the Village did not make OPERS contributions on their behalf. (*Id.* at ¶44, 46). Accordingly, every realtor filed a timely request with OPERS to determine eligibility to participate in OPERS. (*Id.*). In response, OPERS requested certain information and a certification from the Village. (*Id.*). As of the date of this brief, the Village has refused to provide the requested information and certification for some of the Relators. (*Id.*).

IV. LAW AND ARGUMENT.

a. Standard of Review.

Under S. Ct. Prac.R 12.04 and Ohio Rule of Civil Procedure 12(C), dismissal of a mandamus complaint is only appropriate if it appears beyond doubt, after presuming the truth of all material factual allegations and making all reasonable inferences in favor of the relators, that they are not entitled to the requested extraordinary relief. *State ex rel. Grendell v. Davidson*, 86

Ohio St.3d 629 (1999). If, on the other hand, the complaint may have merit, an alternative writ should issue. *State ex rel. Dist. 1199 v. Lawrence County Gen. Hosp.*, 83 Ohio St.3d 351 (1998). And, if it appears beyond doubt that the realtors are entitled to the requested relief, a peremptory writ should issue. *Id.*

b. The Affidavit Attached to the First Amended Complaint Complies With S. Ct. Prac. R. 12.02(B).

The affidavit of Antwan Sparks attached to the First Amended Complaint complies with the Ohio Supreme Court's Rules of Practice, as it is based on personal knowledge and confirms all of the factual premises of Relators' claims. Rule 12.02(B) requires that original action complaints must be accompanied by an affidavit specifying the details of the relators' claims. S. Ct. Prac. R. 12.02(B). The affidavit must be based on personal knowledge. *Id.*

Mr. Sparks' affidavit incorporates the details of Relators' claims, as they were stated in Relators' original Complaint. As Respondents point out, it is the same affidavit that Relators attached to the original Complaint. Respondents agree that Mr. Sparks' affidavit was sufficient when it was attached to the original Complaint. But they object to the sufficiency of Mr. Sparks' affidavit as support for the First Amended Complaint, even though the underlying facts of the claims have not changed. In fact, the same facts support the same claims, which have changed only in temporal scope. *Compare* Complaint at ¶¶14-36 with First Amended Complaint at ¶¶14-32.

Indeed, the only objection that Respondents have to the re-use of the affidavit is that the fringe benefits claims are now asserted through the present, as opposed to through October 22, 2012. That change is not based on any changed new factual allegations, however. Rather, it is based solely on revised legal analysis. When the original Complaint was drafted, undersigned counsel initially understood that the fringe benefits ordinances had been amended. Upon further

legal review, however, it became abundantly clear that is not the case. Relators therefore, in amending the original complaint, corrected the statement of the law contained in the original Complaint that the fringe benefits ordinances had been amended.

Thus, because the original Complaint is identical to the First Amended Complaint with regard to its factual allegations, and the only differences are with regard to the temporal scope of the asserted claims and one legal conclusion, the same affidavit used to support the original Complaint is likewise sufficient to support the First Amended Complaint. Relators therefore complied with Supreme Court Practice Rule 12.02(B).

Regardless, out of an abundance of caution and out of due deference to the Court's rules of practice, Relators have filed, contemporaneously with this brief, a motion for leave to file a Second Amended Complaint. The Second Amended Complaint will be identical in every aspect to the First Amended Complaint, except that it will attach an affidavit of Antwan Sparks that specifically references the Second Amended Complaint, as opposed to the allegations contained in the original Complaint.

c. The Six Year Limitations Period In R.C. 2305.07 Does Not Apply To Relators' Fringe Benefits and Holiday Pay Claims.

The Parties agree that the six year limitations period contained in R.C. 2305.07 only applies to obligations created by either a contract not in writing or "upon a liability created by **statute**". The Parties also agree that an ordinance enacted by the Village is not a statute, as the term "statute" refers only to laws passed by the General Assembly and signed into law by the Governor. Thus, by its own express terms, R.C. 2305.07 does not apply to the ordinances passed by the Village.

In order to get around the express language of R.C. 2305.07, Respondents cite to cases in which courts have applied R.C. 2305.07's six year limitation period to claims for compensation

that “stem from rights created by statute”. For example, *Miller v. Village of Lincoln Heights* involved a claim for wages owed pursuant to R.C. 5923.05 and *Harville v. City of Franklin* involved a claim for statutory sick leave pursuant to R.C. 124.38 and R.C. 124.39. Other cases involve rights to vacation created by R.C. 9.44 or overtime rights created by Ohio and federal law. But all of Respondents’ cases are inapposite.

Every case cited by the Respondents directly involves a right to compensation derived from a statute and not an ordinance. Here, however, the Village is not compelled by any statute (state or federal) to offer holiday pay or fringe benefits to its employees. Respondents seem to concede this point by failing to identify any alleged statutory basis for such claims. This also explains why Respondents have failed to cite any case in which R.C. 2305.07 has been applied to claims for holiday pay or fringe benefits.

Holiday pay and fringe benefits are benefits that the Village decided to provide to its employees solely pursuant to its constitutional “home rule” authority. Because Relators entitlement to holiday pay and fringe benefits is not derived in any manner from any statute, R.C. 2305.07’s six year limitations period does not apply.

d. Relators Are Entitled to Benefits Pursuant to R.C. 124.38 and 124.39.

All persons employed in the “municipal...service” are entitled to 4.6 hours of sick leave for every 80 hours of completed service. R.C. 124.38. Such sick leave may be accumulated “without limit”. *Id.* And, upon retirement, “municipal service” employees are entitled to cash-out accumulated sick leave upon certain conditions and limitations. R.C. 124.39.

Pursuant to R.C. 124.01(F), an “employee”, as that term is used in R.C. 124.38 and 124.39, includes “any person holding a position subject to appointment, removal, promotion, or reduction by an appointing office.” Relators are unquestionably “employees”. Likewise, Respondents are in persons employed in the “municipal service”. Indeed, the Village’s own

Charter and various ordinances specifically define them as such. *See, e.g.*, Village of Lincoln Heights Charter, 8.01 and 8.02; Ordinances 37.07, 37.12, and 37.29. Accordingly, per the plain language of R.C. 124.38 and R.C. 124.39, Relators are entitled to receive the benefits described therein. *State v. Porterfield*, 106 Ohio St.3d 5 (2005)(“When a statute’s language is plain and unambiguous and conveys a clear and definite meaning, no need exists to apply rules of statutory construction.”); *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78 (1997)(“We apply a statute as it is written when its meaning is unambiguous and definite.”).

Relators’ cited cases should be disregarded. The cited cases fail to recognize that, in enacting R.C. 124.38 and R.C. 124.39, the General Assembly chose to use the inclusive term “municipal” in reference to employees eligible to receive sick leave benefits, as opposed to the exclusive word “city”. This is important because the word “municipal” necessarily includes both village and city employees. *See*, OH Const., art. 18, § 1 (“Municipal corporations are hereby classified into cities and villages.”) The legislature certainly knew how to use the word “city” when it meant to reference only a city employees and it did so throughout Chapter 124. *See, e.g.*, R.C. 124.11(A)(11)(referencing “city directors of law”) *compared with* R.C. 124.341(A)(referencing “village solicitor[s]”). But it chose not to do so in R.C. 124.38 and R.C. 124.39. Instead, the General Assembly consciously chose to use the more inclusive word “municipal” which evidences a clear intent to provide both city and village employees with a minimum amount of sick leave benefits.

Further, both cases cited by Respondents involve non-charter villages. Accordingly, unlike the Village of Lincoln Heights, the villages in the Respondents’ cited cases did not have “municipal service” employees in the sense that the statutory village employees were not subject to and protected by any civil service system. To the contrary, the Village of Lincoln Heights has

established, through its “home rule” authority, an elaborate civil service system and recognizes its employees as being employed in the “municipal service”.

e. The Village Has Not Cooperated With OPERS Relating To Relators’ Claims For Benefits, But It Is Required To Do So.

Employees who were improperly classified as independent contractors on or before January 7, 2013, by a political subdivision, and who wished to be properly classified as an employee to receive OPERS benefits were required make an application for reclassification by August 7, 2014. R.C. 145.037. Following receipt of an application for reclassification, OPERS “shall obtain certification from the public employer prior to issuing a determination.” O.A.C. 145-1-10.

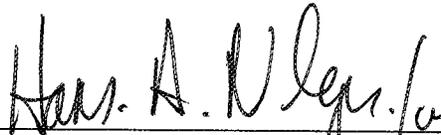
Relators each submitted a timely application for reclassification and, in response OPERS requested certification from the Village and provided form PED-1ER. Despite its clear legal obligation to provide the required certification, which is necessary for OEPRS to issue a determination, the Respondents have failed to provide the certification for all Relators. Thus, Relators are entitled to a Writ of Mandamus compelling Respondents to provide the certification and other information necessary for OPERS to process Relators’ applications for reclassification as public employees.

V. CONCLUSION.

For the foregoing reasons, Respondents Motion for Judgment on the Pleadings (incorrectly described as a Motion to Dismiss) should be denied and an alternative or peremptory writ should be issued.

Dated: October 20, 2014

Respectfully,



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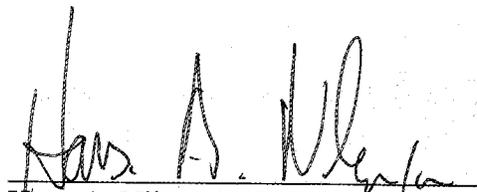
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CERTIFICATE OF SERVICE

Undersigned hereby certifies that a copy of the foregoing was served upon the following
via e-mail and regular mail on October 20, 2014:

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