

termination of relator's employment as head custodian, and to issue instead a 60 work day suspension.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who considered the action on its merits and issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate examined five specific issues including the appropriate date from which back pay should begin, the affect of unemployment compensation on this award, whether the state has the duty to make contributions to the State Employees Retirement System ("SERS") for the period of back pay awarded, and whether pre or post judgment interest should be awarded on such award. The magistrate determined that back pay should be awarded to relator beginning May 1, 2007 to November 14, 2007, and that respondent does have a statutory duty to make contributions to SERS for that time period. The magistrate also determined that post judgment interest should run from the date the common pleas court rendered its judgment affirming the entry of the commission's order and that the relator is not entitled to prejudgment interest on the back pay award. Finally, the parties agreed, and the magistrate determined, that the unemployment compensation benefits in the amount of \$10,582 received by relator should be subtracted from the back pay award awarded to relator. Accordingly, the magistrate recommended this court issue a writ of mandamus.

{¶3} No objections have been filed to the magistrate's decision.

{¶4} Having conducted an independent review of the record in this matter, and finding no error of law or other defect in the magistrate's decision, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law

therein. In accordance with the magistrate's decision, a writ of mandamus is issued ordering the respondent to render an award of back pay and benefits in a manner consistent with the magistrate's decision.

Writ of mandamus granted.

TYACK, P.J., and BRYANT, J., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Clinton Prysock,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-790
	:	
Columbus City School District	:	(REGULAR CALENDAR)
Board of Education,	:	
	:	
Respondent.	:	
	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on August 25, 2010

Matthew M. Banal, for relator.

Wanda T. Lillis, for respondent.

IN MANDAMUS

{¶5} In this original action, relator, Clinton Prysock, requests a writ of mandamus ordering respondent, Columbus City School District Board of Education ("respondent" or "CCS"), to render a back pay award following a common pleas court judgment affirming an order of the Columbus Municipal Civil Service Commission ("commission") that ordered respondent to vacate its termination of relator's employment as head custodian, and to issue instead a 60 work day suspension.

Findings of Fact:

{¶6} 1. On October 16, 2009, the parties filed stipulated evidence containing 15 enumerated paragraphs:

1. Clinton Prysock began working full-time for Columbus City Schools (CCS) in 1999 as a Custodian II.

2. In 2003, Prysock was promoted to the position of head Custodian I.

3. On December 1, 2006, Prysock was absent from work on an approved vacation leave. However, he did not return to work after that date. CCS held a disciplinary hearing on January 31, 2007. Prysock attended that hearing.

Prysock provided information regarding his past criminal convictions during his termination hearing as well as the fact that an incarceration was the reason he was not at work after December 1, 2006. CCS terminated Prysock's employment based upon neglect of duty and job abandonment. The payroll effective date of the termination was November 30, 2006.

4. While employed with CCS, Prysock was convicted of a felony for Attempted Intimidation of Crime Victims/Witnesses (R.C. 2921.04) in July 2005 and a felony for Carrying a Concealed Weapon (R.C. 2923.12) in December 2006.

5. Prysock appealed his termination to the Columbus Municipal Civil Service Commission (Commission). On March 31, 2008, after a hearing on the merits, the Commission found Prysock guilty of neglect of duty but not guilty of job abandonment and ordered that Prysock's termination be modified to a 60 work day suspension. * * *

6. The CCS Board of Education rescinded Prysock's termination and instituted a 60 work day suspension effective February 1, 2007 through May 1, 2007. Because Prysock was a CCS employee after that date, he was required to complete a federal and state criminal background check in accordance with R.C. 3319.391, which became effective on November 14, 2007. The Ohio Department of Education (ODE) required all school district classified staff to be fingerprinted on or before September 5, 2008.

7. All CCS classified employees were given the opportunity to be fingerprinted at their workplaces by a contracted vendor (Ascertain). Fingerprinting through Ascertain occurred between April 1, 2008 and June 5, 2008. Classified staff were required to submit proof of fingerprinting to CCS by July 15, 2008. * * *

8. Prysock was notified by letter dated April 8, 2008 that he was required to be fingerprinted as part of the criminal background check for all classified employees. Prysock was fingerprinted on April 25, 2008. On May 13, 2008, CCS received the results of his state criminal background check from the Bureau of Criminal Identification and Investigation. That check revealed a felony criminal conviction for carrying a concealed weapon in 2006. * * *

O.A.C. 3301-20-01, which is promulgated under R.C. 3319.391, prohibits a school district from employing a person who has been convicted of a felony less than five years previously. Therefore, Prysock could no longer be employed by CCS.

9. CCS appealed the decision of the Commission to the Franklin County Court of Common Pleas. The Court's November 20, 2008 decision upheld the decision of the Commission. * * *

10. Because Prysock could no longer be employed by CCS due to his criminal conviction, he was discharged effective November 14, 2007. This discharge was approved by the Columbus City Schools Board of Education at its February 3, 2009 meeting. * * *

11. CCS offered Prysock back pay consisting of his salary from May 1, 2007 through November 14, 2007. The gross amount was \$23,586.48. Once federal, state and local deductions were made, Prysock's net pay was \$12,507.22. CCS prepared a check in that amount but Prysock refused to accept that amount based upon his belief that the amount did not represent full payment of back pay owed. * * *

12. Prysock filed a Motion for Finding of Contempt against CCS with the Franklin County Court of Common Pleas. That motion was in regard to the recovery of back pay from CCS. On July 22, 2009, the Court denied the motion. * * *

13. From the time period of May 19, 2007 through November 10, 2007, Prysock received unemployment compensation in the amount of \$407.00 per week. Prysock received a total of \$10,582.00 in 2007. Prysock received a total of \$6,919.00 in unemployment compensation in 2008.
* * *

14. Prysock earned no taxable income from May 19, 2007 through August 31, 2009.

15. The Collective Bargaining Agreement between Columbus City Schools Board of Education and the Columbus School Employees Association, effective March 1, 2004 through February 29, 2008 specifies the applicable pay rates for custodians, including any incremental pay changes. * * *

{¶7} 2. On August 18, 2009, relator, Clinton Prysock, filed this mandamus action.

Conclusions of Law:

{¶8} It is the magistrate's decision that this court issue a writ of mandamus ordering respondent to render a back pay award in a manner consistent with this magistrate's decision. The magistrate shall address five issues presented by the parties.

{¶9} A reinstated public employee may maintain an action in mandamus to recover compensation due for a period of wrongful exclusion from employment, "provided the amount recoverable is established with certainty." *State ex rel. Martin v. Bexley City School Dist. Bd. of Edn.* (1988), 39 Ohio St.3d 36, 37, quoting *Monaghan v. Richley* (1972), 32 Ohio St.2d 190, syllabus. The term "with certainty" generally refers to "whether a particular amount has been precisely determined as to its value in dollars and cents" and at times "also refer[s] to the quality of proof, in order for an employee to demonstrate that he has a clear legal right to the relief for which he prays." *State ex rel. Hamlin v. Collins* (1984), 9 Ohio St.3d 117, 120.

{¶10} The first issue requires this court to determine the time period that relator was wrongfully excluded from his employment. A back pay award shall be calculated based upon this time period.

{¶11} Relator contends that the time period for the back pay award should begin February 23, 2007, which marks the end of 60 work days following the November 30, 2006 effective termination date set by respondent following the January 31, 2007 disciplinary hearing.

{¶12} Respondent contends that the time period for the back pay award should begin May 1, 2007, because the commission-ordered 60 work day suspension was established by respondent to run from February 1 through May 1, 2007. According to respondent, relator could have returned to work at anytime prior to the January 31, 2007 disciplinary hearing, but he chose not to do so. Thus, relator cannot claim that he was wrongfully excluded from his employment during the period December 1, 2006 through January 31, 2007.

{¶13} As to the start date for the time period upon which the back pay award shall be calculated, the magistrate agrees with respondent that May 1, 2007 must be the start date.

{¶14} Respondent imposed the commission-ordered 60 work day suspension to run February 1 through May 1, 2007, inclusive. Beginning the 60 work day suspension on February 1, 2007 was logical because the CCS disciplinary hearing occurred one day earlier on January 31, 2007. Thus, the 60 work day suspension began to run immediately after the disciplinary hearing date.

{¶15} Relator argues that starting the suspension on February 1, 2007 improperly creates "a two-month 'limbo period' where [relator] was off payroll yet not subject to any discipline." (Relator's brief, at 12.) According to relator, had he been given a 60 work day suspension in the first place, i.e., by CCS on January 31, 2007, he would have returned to work on February 23, 2007. However, relator does not actually deny respondent's claim that respondent did nothing to prevent him from returning to work until the January 31, 2007 disciplinary hearing. In fact, relator was incarcerated from December 1, 2006 until his release on January 19, 2007. Thus, his absence from work was due to his own culpability relating to the criminal conviction. Accordingly, the magistrate concludes that respondent is correct in its contention that the time period upon which the back pay award shall be calculated must begin May 1, 2007.¹

{¶16} Relator contends that the time period for the back pay award should end January 7, 2009, which is the date respondent completed the discharge paperwork that officially records relator's discharge as approved at respondent's board meeting on February 3, 2009.

{¶17} The stipulated record contains the discharge paperwork which is on a CCS form captioned "Columbus Public Schools[,] Personnel Action Form[,] PA09 - Discharge."

The completed form states:

To: CLINTON L. PRYSOCK

This is to notify you that after a hearing on 11/20/2008 in the office of FRANKLIN CTY COMMON PLEAS CT you have been found Guilty of the following charge and specification.

¹ The magistrate notes that CCS set the 60 work day suspension from February 1 through May 1, 2007, inclusive. Thus, it would seem that respondent would contend that the start date began May 2, 2007. However, that is not what respondent contends, and relator understandably has not objected.

Charge :
HB 190

Specification:

Mr. Prysock won a civil service appeal of his discharge dated 11/30/06 on 11/20-2008. Instead[,] he was given a 60 day suspension, and reinstatement of employment. However, we are barred from re-employing him, due to HB 190, passed 11/14/07. Mr. Prysock is discharged as of 11/14/2007.

Previous Actions:

You are hereby discharged from your position as HEAD CUSTODIAN I of the Columbus Board of Education effective 11/14/2007.

In accordance with Section 149-1 of the City Charter, you may appeal this decision and order to the Civil Service Commission within ten calendar days from this date.

Date 1/7/2009 Signature [Cynthia Picciano] (Approving Authority)

{¶18} According to relator, respondent "chose to wait until January 7, 2009 to officially terminate [him]." (Relator's brief, at 12.)

{¶19} Respondent contends that the time period for the back pay award must end November 14, 2007, the effective date of R.C. 3319.391.

{¶20} R.C. 3319.391 states in part:

This section applies to any person hired by a school district, * * * in any position that does not require a "license" issued by the state board of education, as defined in section 3319.31 of the Revised Code, and is not for the operation of a vehicle for pupil transportation.

(A) * * * For each person to whom this division applies who is hired prior to November 14, 2007, the employer shall request a criminal records check by a date prescribed by the department of education * * *.

* * *

(C) Any person who is the subject of a criminal records check under this section and has been convicted of or pleaded guilty to any offense described in division (B)(1) of section 3319.39 of the Revised Code shall not be hired or shall be released from employment, as applicable * * *.

{¶21} Relator's argument for a January 7, 2009 end date for his back pay award appears to be premised upon the proposition that, had he not been disciplined by CCS, he would have been ultimately terminated from his employment on January 7, 2009. The argument is seriously flawed because relator is obviously not similarly situated to someone who was not disciplined, but hired prior to November 14, 2007 and terminated due to an R.C. 3319.391 criminal records check. Obviously, such person would have continued to work for pay for the school district until terminated by the criminal records check. Unlike the hypothetical person just described, relator seeks back pay for the period following the November 14, 2007 effective date of the statute when he performed no work for the school district and, by statute, was not permitted to work. To extend the back pay award beyond November 14, 2007 creates a windfall for relator.

{¶22} Based upon the above analysis, the magistrate concludes that respondent correctly determined that the time period for the back pay award must end at November 14, 2007.

{¶23} Accordingly, the magistrate finds that relator is entitled to receive a back pay award only for the period beginning May 1 to November 14, 2007.

{¶24} The second issue relates to the unemployment compensation benefits that relator received during the period of the back pay award. As earlier noted, the parties have stipulated that relator received \$10,582 of unemployment compensation in 2007. The parties actually agree that unemployment compensation benefits must be subtracted

from the back pay award. In its brief, respondent notes that respondent's settlement offer failed to account for the unemployment compensation received and that any recalculation of a settlement amount must account for the unemployment compensation received.

{¶25} In his brief, citing this court's decision in *Bertolini v. Whitehall City School Dist. Bd. of Edn.*, 10th Dist. No. 02AP-839, 2003-Ohio-2578, relator asserts "employment [sic] compensation benefits received by the wrongfully excluded employee must be subtracted from a back pay award." (Relator's brief, at 13.) The magistrate also notes that the legal proposition upon which the parties agree is supported by additional case law—most recently, *State ex rel. Couch v. Trimble Local School Dist. Bd. of Edn.*, 120 Ohio St.3d 75, 2008-Ohio-4910, ¶37 (the court ordered that unemployment compensation benefits be subtracted from the back pay award).

{¶26} Accordingly, the magistrate finds that the back pay award shall be reduced by unemployment compensation benefits received during the time period of the back pay award.

{¶27} The third issue relates to the employer's statutory duty to make contributions to the State Employees Retirement System ("SERS"). In its brief, respondent does not object to relator's assertion that respondent has a statutory duty to make contributions to SERS for the period of the back pay award.

{¶28} Accordingly, the magistrate finds that respondent shall make its statutory contributions to SERS on behalf of relator for the time period of the back pay award.

{¶29} The fourth issue relates to post-judgment interest.

{¶30} The parties agree that respondent owes post-judgment interest on the back pay award, but they disagree as to when post-judgment interest begins to run. According

to relator, post-judgment interest begins to run as of March 31, 2008, the date the commission ruled that relator's job termination was improper. According to respondent, post-judgment interest begins to run as of November 20, 2008, the date of the common pleas court judgment entry that affirmed the commission's order.

{¶31} R.C. 1343.03(A) states in part:

* * * [W]hen money becomes due and payable * * * upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code * * *.

{¶32} Undisputedly, the November 20, 2008 entry of the common pleas court is a judgment of a judicial tribunal under the statute. The question here is whether the March 31, 2008 commission order (which the common pleas court entry affirms) can also be said to be an order of a "judicial tribunal" under the statute. The parties have provided no authority addressing this question.

{¶33} R.C. 124.40(A) provides for the "appointment" of municipal civil service commissions. It provides in part:

(A) The mayor or other chief appointing authority of each city in the state shall appoint three persons * * * who shall constitute the municipal civil service commission of that city and of the city school district and city health district in which that city is located. * * * A vacancy shall be filled by the mayor or other chief appointing authority for the unexpired term. At the time of any appointment, not more than two commissioners shall be adherents of the same political party.

The municipal civil service commission shall prescribe, amend, and enforce rules not inconsistent with this chapter for the classification of positions in the civil service of the city and city school district, and all the positions in the city health district; for examinations for and resignations from those

positions; for appointments, promotions, removals, transfers, layoffs, suspensions, reductions, and reinstatements with respect to those positions * * *. The commission shall exercise all other powers and perform all other duties with respect to the civil service of the city, city school district, and city health district, as prescribed in this chapter and conferred upon the director of administrative services and the state personnel board of review with respect to the civil service of the state * * *.

* * *

Upon the receipt of a report from the board charging the municipal civil service commission with violating or failing to perform the duties imposed upon it by law, or charging any member of the commission with willfully or through culpable negligence violating the law or failing to perform official duties as a member of the commission, along with the evidence on which the report is based, the chief executive authority of the city shall forthwith remove the municipal civil service commissioner or commissioners. In all cases of removal of a municipal civil service commissioner by the chief executive authority of any city, an appeal may be had to the court of common pleas, in the country in which the city is situated, to determine the sufficiency of the cause of removal. * * *

{¶34} Thus, according to the statute, a municipal civil service commission is appointed by the mayor or chief appointing authority of the city. Commissioners can be removed by the mayor or chief appointing authority of the city for failing to perform their duties imposed by law. Municipal civil service commissions are commanded by the statute to enforce the civil service rules including those rules applicable to removal and suspension of a civil service employee.

{¶35} It is abundantly clear from a reading of R.C. 124.40(A) that the commission at issue here is not a judicial tribunal. It is, rather, an administrative body that can be said to hold some quasi-judicial authority. *State ex rel. Fern v. Cincinnati*, 161 Ohio App.3d 804, 2005-Ohio-3168, ¶34, 66.

{¶36} Given the above analysis, the magistrate finds that post-judgment interest payable under R.C. 1343.03(A) shall begin to run as of November 20, 2008, the date of the common pleas court judgment entry that affirms the commission's order.

{¶37} The last issue is whether relator is entitled to prejudgment interest. Relator seems to suggest that he is entitled to prejudgment interest. However, as respondent correctly points out, it has been held that a board of education is not liable for payment of prejudgment interest on an award of back pay absent a statute requiring such payment or an express contractual agreement to make such payment. *Beifuss v. Westerville Bd. of Edn.* (1988), 37 Ohio St.3d 187. See also *State ex rel. Tavenner v. Indian Lake Local School Dist. Bd. of Edn.* (1991), 62 Ohio St.3d 88, 91 (concurring opinion). Here, relator cites to no statute requiring a board of education to pay prejudgment interest nor is there an express contractual agreement to make such payment. Accordingly, the magistrate finds that relator is not entitled to prejudgment interest on the back pay award.

{¶38} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering respondent to render to relator a back pay award in a manner consistent with this magistrate's decision.

/s/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).