[Cite as *State ex rel. Columbus v. Pub. Emp. Retirement Bd.*, 2009-Ohio-6321.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. City of Columbus, Ohio,	:	
Relator,	:	
v.	:	No. 08AP-807
Public Employees Retirement Board et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 3, 2009

Richard C. Pfeiffer, Jr., Columbus City Attorney, and *Alan P. Varhus*, for relator.

Richard Cordray, Attorney General, Hilary R. Damaser, and *Theodore L. Klecker*, for respondent Public Employees Retirement Board.

James K. Hunter, III, for respondents Linda Helms, Donna Hunter, Minnie Dixon, and Richard Pieplow.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, City of Columbus ("city"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Public Employees Retirement Board ("board"), to vacate its order holding that respondents Linda Helms,

Donna Hunter, Minnie Dixon, and Richard Pieplow ("claimants") were public employees during certain terms of their service to the city.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which is appended to this decision, including findings of fact and conclusions of law, and recommended that this court deny the city's request for a writ of mandamus. The city has filed objections to the magistrate's decision.

{¶3} The city presents no new issues in its objections and merely rehashes the same arguments presented to the magistrate. In its first objection, the city argues that, although the magistrate found the action of the board was "reasonable," the magistrate failed to consider whether the action of the board was "arbitrary" or "unconscionable." However, the standard of review for the magistrate was whether the city established that the board abused its discretion, which is defined as an "unreasonable," "arbitrary" or "unconscionable" attitude. *State ex rel. Davis v. Pub. Emp. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, ¶25. The magistrate here concluded there was no abuse of discretion. Thus, regardless of which of the three above words the magistrate used, the magistrate utilized the proper standard of review.

{¶4} Nevertheless, the city asserts that it was "arbitrary" for the board to determine over 30 years after the fact that its rules required the inclusion of provisions regarding participation or non-participation in the Public Employees Retirement System ("PERS") in order to constitute a valid personal services contract. We disagree this conclusion was arbitrary. It was not arbitrary for the board to determine that retirement provisions were among the "rights, obligations, benefits and responsibilities of both parties" that need to be included to constitute a personal services contract, as set forth in

Ohio Adm.Code 145-5-15(C)(3). A reviewing court must give deference to an administrative agency's interpretation of its own rules if such interpretation is consistent with the plain language of the rule itself. *Jones Metal Products Co. v. Walker* (1972), 29 Ohio St.2d 173, 181. Here, the board's interpretation that the retirement system under which an employee will be covered is a key term that must be included in a contract to be deemed a personal services contract is not inconsistent with the language of the rule. Therefore, we find the board's decision was not arbitrary in this respect.

{¶5} The city also asserts that the board's action was "unconscionable" because the parties to the contracts fully performed as required. The city points out that no one forced the claimants to perform the services or execute the agreements, and to repudiate the contract by administrative fiat is harsh and shocking to the conscience. We disagree that the board's action was unconscionable. The board's decision hinged upon whether the contracts in question included the rights, obligations, benefits, and responsibilities of both parties one would expect in a contract. That the claimants were not forced into servitude or into executing the agreements is immaterial to this determination. Simply put, Ohio Adm.Code 145-5-15(C) contains requirements, and the board determined these requirements were not met. Therefore, we cannot find the board acted arbitrarily, unreasonably or unconscionably in interpreting Ohio Adm.Code 145-5-15(C)(3) as it did. Thus, this objection is overruled.

{¶6} The city argues in its second objection that the magistrate erroneously adopted as a conclusion of law the statement of the hearing examiner that the use of contracts was an "expedient," in that it permitted the city to hire four professionals to perform services that had been previously performed by city employees, while keeping them off the city's payroll. Specifically, the city indicates that, to the extent the magistrate

and hearing examiner intended to criticize the city for the use of personal services contracts as an "expedient," the city objects. However, whether the board meant the word "expedient" as a subtle criticism does not affect our conclusion that the board's ultimate determination was not an abuse of discretion. Therefore, we overrule this objection.

{¶7} The city argues in its third objection that the magistrate erred when he adopted the hearing examiner's finding that the agreements entered into between the city and the claimants did not delineate the rights, obligations, benefits, and responsibilities of both parties. The city first reiterates the same argument addressed above that the magistrate erroneously adopted the hearing examiner's conclusion that the contracts, in order to be personal services contracts, had to address social security/PERS benefits and withholdings. However, we have addressed this argument, and the city presents no new argument in this objection.

{¶8} The city next argues that the magistrate erroneously adopted the hearing examiner's conclusion of law that the contracts must be sufficiently clear to permit the parties to understand its terms without reference to supplemental evidence. The city maintains there is no evidence in the record that the parties did not understand the terms of the contract. The city misconstrues the hearing examiner's statement. The hearing examiner did not find that the parties did not understand the terms of the contract. The hearing examiner said that, in order for there to be an enforceable, written, bilateral contract, the terms in the contract must be clear without any supplemental evidence. Here, the terms in the contract were not clear, as many terms were missing. Although the parties may have understood the terms of employment, the contract must still spell out these terms and not rely upon the collective memories of the parties, which would

constitute a type of unreliable supplemental evidence to which the hearing examiner was referring. This objection is overruled.

{¶9} The city argues in its fourth objection that the findings in the magistrate's decision, as well as the reports and recommendations of the hearing examiner, beg the question at issue and contain circular reasoning. The city contends that the magistrate assumed the claimants are in the retirement system, so the agreements with the city cannot be "personal service contracts," and, therefore, the claimants are in the retirement system. The city's argument is flawed. It is true that the claimants were presumed to be in the retirement system, as the city is a public employer under R.C. 145.01(D), and the claimants were "public employees" under R.C. 145.01(A)(1). It is also true that a public employee who is employed under a personal service contract is not a member of PERS. However, the reason that the agreements could not be "personal service contracts" was not because the claimants were in the retirement system, as claimed by the city. Rather, the reason the agreements were not personal service contracts was because they did not meet the definition of a personal service contract, as provided in former Ohio Adm.Code 145-5-15. Therefore, we find the magistrate's and hearing examiner's decisions were not based upon circular reasoning, and the city's fourth objection is overruled.

{¶10} The city argues in its fifth objection that the magistrate failed to conduct an independent review of the agreements entered into between the city and the claimants to determine whether they constituted personal service contracts, as defined by Ohio Adm.Code 145-5-15. The city claims that the magistrate afforded "blind acquiescence" to the board's interpretation of Ohio Adm.Code 145-5-15, instead of due deference. We disagree. Initially, this court has held that due deference should be given to a reasonable construction by the PERS board when interpreting its own rules. *McAuliffe v. Bd. of Pub.*

Emp. Retirement Sys. of Ohio (1994), 93 Ohio App.3d 353, 360. Here, while affording due deference to the board's interpretation, the magistrate undertook his own analysis of the word "delineate," as used in Ohio Adm.Code 145-5-15(C), and then went on to address the reasonableness of the board's construction. The magistrate found it was not unreasonable for the board to conclude that employer contributions to the appropriate retirement system is a term of employment that one would expect to be included in a personal services contract that must delineate the rights, obligations, benefits, and responsibilities of the parties. Thus, although the magistrate did properly afford due deference to the board's definition of "delineate," the magistrate's analysis was not "blind acquiescence." Therefore, the city's fifth objection is overruled.

{¶11} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of the city's objections, we overrule the objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law based upon the reasons set forth above, and we deny the city's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

TYACK and CONNOR, JJ., concur.

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[Cite as *State ex rel. Columbus v. Pub. Emp. Retirement Bd.*, 2009-Ohio-6321.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] City of Columbus, Ohio,	:	
Relator,	:	
v.	:	No. 08AP-807
Public Employees Retirement Board et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on August 27, 2009

Richard C. Pfeiffer, Jr., Columbus City Attorney, and *Alan P. Varhus*, for relator.

Richard Cordray, Attorney General, and *Laura Erebia Parsons*, for respondent Public Employees Retirement Board.

James K. Hunter, III, for respondents Linda Helms, Donna Hunter, Minnie Dixon and Richard Pieplow.

IN MANDAMUS

{¶12} In this original action, relator, city of Columbus, requests a writ of mandamus ordering respondent Public Employees Retirement Board ("PERB" or "board") to vacate its order holding that respondents Linda Helms, Donna Hunter, Minnie Dixon

and Richard Pieplow ("claimants") were public employees during certain terms of their service to the city of Columbus.

Findings of Fact:

{¶13} 1. By letters dated March 23, 2007, relator was informed by the general counsel of the Ohio Public Employees Retirement System ("OPERS") that senior staff had determined that claimants were performing services as public employees during certain specified periods when relator had failed to remit the employer contributions to OPERS as required by statute. The disputed time periods span from September 1975 to January 1989.

{¶14} 2. The letters ask relator to complete a "Certification of Unreported Public Service" form for each employee so that relator could be billed for the unreported services. The letters also informed relator that the determinations were subject to administrative appeal to PERB.

{¶15} 3. By letters dated May 8, 2007, relator administratively appealed the final staff determinations. Each letter specified the grounds for the appeal as follows:

> * * * It is the position of the City of Columbus that this determination is in error, as [claimant] was utilized pursuant to a personal services contract during this period and was statutorily excluded from membership in the Public Employees Retirement System pursuant to R.C. Chapter 145.

{¶16} 4. Relator's appeals were assigned to a hearing examiner who heard the matter on September 26, 2007. The hearing was recorded and transcribed for the record.

{¶17} 5. On January 22, 2008, the hearing examiner issued a lengthy report and recommendation ("R & R"). On the report's final page, the hearing examiner recommends:

> * * * [T]he Board deny the Petitioner's appeals challenging the decisions of the Board's senior staff, and implement in full the terms set forth in the Board's letters of March 23, 2007, finding Richard Pieplow was a public employee from March 5, 1980 to July 1, 1986; Linda Helms was a public employee from April 9, 1987 to January 30, 1989; Minnie Dixon was a public employee from February 23, 1987 to January 30, 1989, and Donna Hunter was a public employee from September 5, 1975, to February 4, 1982; and finding the City liable for these employees' unreported service pursuant to R.C. § 145.483.

{¶18} 6. Relator filed objections to the R & R.

{¶19} 7. At a May 21, 2008 board meeting, PERB voted to remand the matter to the hearing examiner for further analysis.

{¶20} 8. On July 1, 2008, without further hearing, the hearing examiner issued another lengthy report captioned "Report and Recommendation upon Remand." The hearing examiner concluded:

> * * * Because the Claimants each met their respective burdens of proving they were public employees working for a public employer, and because the City did not sustain its burden of proving the Claimants were hired pursuant to personal service contracts, I recommend the Board deny the City's appeals and grant the Claimants' claims.

{¶21} 9. At a July 16, 2008 board meeting, PERB voted to accept the findings of fact and conclusions of law contained in the January 22, 2008 R & R.

{¶22} 10. By letter dated July 17, 2008, the OPERS executive director informed the parties:

> The OPERS Retirement Board has instructed me to officially inform you of its action taken at the Board's July 16, 2008, meeting.
>
> The Board voted to accept the findings of fact and conclusions of law of the January 22, 2008 Report and Recommendation to find that Linda Helms, Donna Hunter,

> Minnie Dixon, and Richard Pieplow were public employees while employed by the City of Columbus and therefore are eligible for OPERS coverage for the relevant time periods. The City will be billed under separate cover.

{¶23} 11. On September 17, 2008, relator, city of Columbus, filed this mandamus action.

Conclusions of Law:

{¶24} The issue is whether respondent PERB abused its discretion in determining that claimants were public employees during the relevant time periods.

{¶25} Finding no abuse of discretion, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

The Relevant Statute and Rule

{¶26} Pursuant to Amended Substitute House Bill No. 268 ("Am.Sub.H.B. 268"), effective August 20, 1976, the Ohio General Assembly added language to R.C. 145.03 to limit the definition of a public employee so that one "who is employed under a personal service contract, does not become a member of the public employees retirement system."

{¶27} Effective December 12, 1976, PERB promulgated Ohio Adm.Code 145-5-15(C) which stated:

> "Employed under a personal service contract" means that an individual so employed would:
>
> (1) Not appear on a public payroll.
>
> (2) Not be eligible for sick leave, vacation, hospitalization, or other fringe benefits extended to "regular" employees.
>
> (3) Be a party to a formal bilateral written contract delineating the rights, obligations, benefits and responsibilities of both parties.

Hearing Examiner's Conclusion

{¶28} In his R & R dated January 22, 2008, the hearing examiner determined that relator failed to show that claimants met the third requirement under the rule, i.e., that they "[b]e a party to a formal bilateral written contract delineating the rights, obligations, benefits and responsibilities of both parties."

{¶29} Specifically, the hearing examiner determined that "[t]he lack of delineation of the rights, obligations, benefits, and responsibilities of the parties in these contracts is both substantial and determinative."

Richard Pieplow

{¶30} According to the R & R, Pieplow applied to the city of Columbus for the position of real estate negotiator. He began working for the city under contract dated March 5, 1980. The contract provided that Pieplow would negotiate for the acquisition of properties, rights of entry and easements needed for various city projects. The contract set compensation at $6 per hour, not to exceed $11,280 for all services during the contract period ending January 31, 1981.

{¶31} According to the R & R:

> While the agreement thus described the kind of work Mr. Pieplow was hired to do, and provided the rate of pay and source of funding, there were a number of terms not addressed by the agreement. Notably, the agreement did not delineate whether Mr. Pieplow had the right to be a public employee; whether he had the right to sick leave, vacation leave, hospitalization, or participation in the state's retirement system; it did not address any terms of benefits – either to state there would be benefits, or that no benefits were being provided; it did not address whether Mr. Pieplow would be responsible to contribute to Social Security or, if he was a PERS member, to contribute the employee's share to PERS; and it did not address whether the City had the obligation to contribute the employer's share of PERS

> contributions for this term of service. Thus, while it was a bilateral agreement between Mr. Pieplow and the City, it did not delineate the rights, obligations, benefits and responsibilities of both parties.

{¶32} In fact, Pieplow entered into a series of similar contracts between 1980 and 1986. Regarding those contracts, the hearing examiner observes:

> Although the series of contracts in effect between 1980 and 1986 are silent about it, Mr. Pieplow explained that as a Real Estate Negotiator, he was provided an office, secretarial support, instructions on how to negotiate, the forms needed for these negotiations, the files used in the process of negotiations; and he was expected to work a regular forty-hour work week. He stated that if he did not work forty hours, he would not get paid for a full week's work; he got no hospitalization or sick leave benefits; he was paid by vouchers and not through the payroll system, and received a 1099 form for reporting his income to the IRS. None of these details, however, are addressed by the bilateral contract he entered into with the City.

(Footnotes omitted.)

Donna Hunter

{¶33} According to the R & R, Hunter began working for the city of Columbus after signing a contract to work as a real estate negotiator in 1975.

{¶34} According to the R & R:

> * * * The first contract she signed appears to have been cut from the same cloth as that used by the City for Mr. Pieplow[.] * * * Like the one used in Mr. Pieplow's case, the 1975 contract does not delineate whether Mrs. Hunter had the right to be a public employee; whether she had the right to sick leave, vacation leave, hospitalization, or participation in the state's retirement system; it did not address any terms of benefits – either to state there would be benefits, or that no benefits were being provided; it did not address whether Mrs. Hunter would be responsible to contribute to Social Security or, if she was a PERS member, to contribute the employee's share to PERS; and it did not address whether the City had the obligation to contribute the employer's share

> of PERS contributions for this term of service. The same is true for each of the successor contracts through 1981[.] * * * The evidence then established that Mrs. Hunter's service starting in 1982 was through a corporate entity, and the parties stipulated that she was limiting her claim to the time period starting September 5, 1975, and ending February 4, 1982.

(Footnotes omitted.)

Linda Helms

{¶35} Prior to entering into a series of consecutive contracts to serve as a real estate negotiator, Helms was a city employee working as a legal secretary in the development department. She transferred to another position with the city, was laid off, and then ran into Donna Hunter who told her there might be work opportunities in the city attorney's office, because a legal secretary had recently had a heart attack.

{¶36} According to the R & R:

> * * * When Ms. Helms applied for the position, they told her "they had to make me a Negotiator in order to take that." She said she was offered a contract as a Negotiator "and I accepted because that was the only thing I was offered. I was not offered to be a City employee." Even though the contract she signed was to provide services as a Real Estate Negotiator, she said "I performed the duties as a legal secretary for several months while Pat Bland was off, and then I went on to assist Donna [Hunter] in managing projects as her assistant, putting things together."
>
> Ms. Helms said she "continued on under that contract, as a Negotiator performing non-negotiation duties until January of 1987, [when] I was offered the position of a City employee." She said the change wasn't something she sought – "the City Attorney's office decided that I should be a City employee. And they offered me paperwork to sign to become a City employee. Nothing changed from the day before or the day after, besides the fact that I now received a payroll check instead of receiving pay through a warrant." The contracts for the term of service between April 9, 1987, and January 30, 1989, are substantially the same as those

> used for Mr. Pieplow[.] * * * The evidence establishes, however, that the contracts do not reflect the work Ms. Helms actually performed during the relevant time period.

(Footnotes omitted.)

Minnie Dixon

{¶37} From 1980 to 1987, Dixon worked for the city as a relocation counselor in the department of development. Hunter approached Dixon in 1987 and encouraged her to take a position in the land acquisitions office.

{¶38} According to the R & R:

> * * * She agreed, understanding that she would get paid more but would get no benefits if she made this move. Ms. Dixon testified that during the two years when she was paid through contracts instead of as an employee, Mrs. Hunter assigned her duties, she was paid for a regular 40-hour work week, and that when she finally was treated as a City employee in 1989, "there was no change in anything I did except the type of check I received."

(Footnotes omitted.)

The Hearing Examiner's Legal Analysis

{¶39} In a section of the R & R captioned "Analysis," the hearing examiner wrote:

> Under the City's construction of the law, the sole question before the Board is whether there was, or was not, a written contract to which the claimants and the City were parties. Under this construction, discussions of the actual circumstances of the engagement "are not relevant or probative," according to the City. Neither the statute nor a plain reading of the Board's rules, however, support this narrow construction of the Board rule concerning employment under a personal service contract.
>
> As amended in 1976, R.C. 145.03 provided that "a public employee … who is employed under a personal service contract [] does not become a member of the Public Employees Retirement System." Because of this change in the law, the Board adopted the rule cited by the City, providing a definition of what it means to be "employed

> under a personal service contract." Thus, the position by the City that the legal question here can be resolved by establishing the mere existence of a contract between the claimants and the City is not well-taken. The Board must look beyond the fact that there is a contract between these parties. It must then examine the contract to see if it qualifies as a "personal service contract," using the definition found in the 1976 version of the Board's rules[.] * * *
>
> The Board's rules in 1976 provided that three conditions had to be present in order for the agreement between a public employee and a public employer to constitute "employ[ment] under a personal service contract": First, payment for the services of the person must "not appear on a public payroll." Here, the evidence establishes that the City kept these payments off of its public payroll, so this condition is met. Second, the person working for the City under the terms of the contract must "not be eligible for sick leave, vacation, hospitalization, or other fringe benefits extended to 'regular' employees." * * * The testimony * * * established that the claimants received none of the benefits described in the rule. Accordingly, the City met this condition.
>
> In order to meet the third requirement found in the Board's rule, the Claimant needed to "be a party to a formal bilateral written contract delineating the rights, obligations, benefits, and responsibilities of both parties." Thus, while it is a necessary condition for there to be a written agreement between the parties, that alone is not sufficient. * * *
>
> * * *
>
> A review of the evidence now in the record demonstrates that the agreements entered into between the City and these Claimants did not satisfy these requirements. The contracts do not address whether the City will provide fringe benefits, they do not state whether the Real Estate Negotiator will be a member of PERS or will be responsible for contributing to Social Security instead of PERS; and they do not address whether the City will bear any responsibility for paying either the employer or employee's share of PERS withholdings.
>
> The absence of these critical terms cannot be glossed over, as the City did when the claimants first brought this to its attention in 1999. In order for terms of a written, bilateral agreement to be enforceable, the terms must be sufficiently

> clear as to permit the parties to understand the terms of the contract, without reference to the supplemental evidence. That did not happen here, not with any of the Claimants' contracts. The use of contracts here was an expedient – it permitted the City to hire four professionals to perform services that had been performed by city employees, while keeping them off the City's payroll. The evidence established that immediately before the first Negotiator was hired, the work was being done by a full-time employee (who was later found guilty of embezzling from the City, prompting his termination and Ms. Hunter's being hired). The contract Ms. Hunter entered into addresses none of the key responsibilities and benefits that, to that date, were part of the position. The same is true with each of the subsequent contracts, for each of the Claimants.
>
> * * * The broad command of R.C. 145.01(A), required participation in PERS for such employees. If the City sought to circumvent the broad command of inclusion found in R.C. 145.01(A), then it needed to produce a contract that met each of the requirements found in the Board's rules. The evidence establishes that the City failed to do so when it proposed this series of contracts to these four Claimants. Accordingly, there is substantial evidence establishing that each of the four Claimants were public employees throughout the course of service relevant to this administrative review; and the evidence further establishes that the Claimants were not parties to a personal service contract with the City, as that term is used in the relevant version of O.A.C. 145-5-15.

(Footnotes omitted.)

{¶40} According to relator, the hearing examiner's analysis, in effect, misconstrues the ordinary meaning of the word "delineate" as used in former Ohio Adm.Code 145-5-15(C). According to relator, the rule's delineation requirement applies only to those rights, obligations, benefits and responsibilities that "exist." That is, there is no delineation requirement, according to relator, with respect to rights, obligations, benefits and responsibilities that do not exist. Relator describes the delineation requirement as an "affirmative" one rather than a "negative" one. (Relator's brief, at 14-

15.) Based upon this supposition, relator concludes that the rule's delineation requirement did not compel the city to place language into the contracts indicating that the claimants were not entitled to PERS membership or were not entitled to the fringe benefits that often come with employment. According to relator, because there is allegedly an "infinite number" of possible terms of employment, the city cannot be logically held to the hearing examiner's interpretation of "delineate."

{¶41} Relator's arguments regarding the rule's delineation requirement lack merit.

{¶42} To begin, the word "delineate" carries no special meaning in the rule because PERB's rules did not define the word. Consequently, the magistrate refers to the dictionary to determine the word's ordinary meaning.

{¶43} "Delineate" is defined by Webster's Third New International Dictionary Unabridged (G. & C. Merriam Company 1966) as follows: "to represent with accuracy and minute attention to detail."

{¶44} Nothing in the dictionary definition supports relator's hypothesis that the word "delineate" implies only the representation of the so-called "affirmative" rather than the "negative."

{¶45} Moreover, relator's affirmative/negative dichotomy is seriously flawed because what might be viewed as "negative" to the employee could be viewed as "affirmative" to the employer. For example, contractual language indicating the employee will not be viewed as a public employee for purposes of PERS can concomitantly be viewed as language bestowing upon the employer the right to forego monetary contributions to PERS.

{¶46} Furthermore, the hearing examiner's analysis implies that delineation of terms of employment does not involve "an infinite number" but only those terms that one would ordinarily expect to be included in an employment contract. Certainly, it is not unreasonable to conclude that employer contributions to the appropriate retirement system (PERS versus social security) is a term of employment that one would expect to be included in a "personal service contract" that, by definition, must delineate the rights, obligations, benefits and responsibilities of both parties.

{¶47} This court must accord PERB due deference to its reasonable interpretation of its statutes and administrative rules. *State ex rel. Schaengold v. Ohio Pub. Emps. Retirement Sys.*, 114 Ohio St.3d 147, 151, 2007-Ohio-3760 (citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 289, 2001-Ohio-190); see, also, *State ex rel. Gill v. School Emps. Retirement Sys. of Ohio*, 121 Ohio St.3d 567, 572, 2009-Ohio-1358.

{¶48} By accepting PERB's view of the rule's delineation requirement, this magistrate accords to PERB the deference that is due in its interpretation of its statutes and rules. Id.

{¶49} Relator argues that *McAuliffe v. Bd. of Pub. Emps. Retirement Sys. of Ohio* (1994), 93 Ohio App.3d 353, is "dispositive," compelling the issuance of a writ of mandamus in this case. (Relator's brief, at 12.) Relator's reliance upon *McAuliffe* is misplaced.

{¶50} Beginning April 1975, Don S. McAuliffe served under contract as a non-elected solicitor of law or law director for Pickerington, Ohio. Following enactment of Am.Sub.H.B. 268 in August 1976, he continued to serve in Pickerington after this change

in the law on a year-to-year basis. McAuliffe argued that he remained a public employee entitled to PERS membership after the enactment of Am.Sub.H.B. 268. The *McAuliffe* court disagreed that McAuliffe was "grandfathered" into PERS membership. "It is abundantly clear that he served under a personal service contract which was 'renewed on, or after August 20, 1976.' " Id. at 360.

{¶51} That McAuliffe served under a personal service contract, as declared by the court, was not a disputed issue in that case as is the situation here with the four claimants. Thus, the issue presented by relator here is not disposed of by reference to the *McAuliffe* decision. Again, relator's reliance upon *McAuliffe* is misplaced.

{¶52} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/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).