

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
LuAnn Bertaux,	:	
	:	
Relator,	:	
	:	
v.	:	No. 11AP-504
	:	
State Teachers Retirement System	:	(REGULAR CALENDAR)
Board of Ohio,	:	
	:	
Respondent.	:	

D E C I S I O N

Rendered on December 13, 2012

Cloppert, Latanick, Sauter & Washburn, and Sue A. Salamido, for relator.

Michael DeWine, Attorney General, and *Allan K. Showalter*,
for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, LuAnn Bertaux ("relator"), filed an original action seeking a writ of mandamus ordering respondent, State Teachers Retirement Board ("STRB"), to vacate its decision terminating relator's disability benefits and to enter a decision reinstating those benefits.

{¶ 2} In January 1991, relator, who was previously employed as a teacher, applied to STRB for disability retirement, asserting that she was suffering from post-traumatic stress syndrome. STRB granted relator's application, and she began receiving disability

retirement benefits. As detailed more fully in the magistrate's findings of fact, relator subsequently moved to Florida and later became employed by the school board of St. Lucie County, Florida, as a "behavior analyst." Relator reported this employment to STRB on the annual report required from disability recipients. STRB began an inquiry regarding relator's employment and determined that she was ineligible to continue receiving disability benefits because her position in Florida qualified as being employed as a "teacher." STRB terminated relator's disability benefits and informed her that she was required to reimburse STRB for benefits received from January 24, 2007 through May 31, 2008. Relator, acting through counsel, submitted additional materials and attempted to persuade STRB to reverse its decision. Relator then filed the present mandamus action.

{¶ 3} This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ.

{¶ 4} Relator timely filed two objections to the magistrate's decision:

1. Objection One to the Magistrate's Decision: The Magistrate's decision that Relator was a "teacher" in Florida is unreasonable and contrary to statute.

2. Objection Two to the Magistrate's Decision: The decision errs in finding that STRS' [State Teachers Retirement System's] interpretations that are applied as rules of practice need not be codified in the Ohio Administrative Code.

{¶ 5} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matters "to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law."

{¶ 6} In order to be entitled to a writ of mandamus, a relator must establish a clear legal right to the relief sought, a clear legal duty on the part of the respondent to perform the requested act, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶ 34; *State ex rel. Medcorp, Inc. v. Ryan*, 10th Dist. No. 06AP-1223, 2008-Ohio-2835, ¶ 8. Generally, a clear legal right exists where an administrative agency abuses its discretion by entering an

order not supported by any evidence on the record; however, when the record contains some evidence to support the agency's finding, there has been no abuse of discretion, and mandamus will not lie. *See State ex rel. Brown v. Indus. Comm.*, 13 Ohio App.3d 178 (10th Dist.1983).

{¶ 7} In her first objection, relator argues that the magistrate erred by finding that STRB's interpretation of the relevant statutes is reasonable. As explained in the magistrate's decision, R.C. 3307.01(B) defines the term "teacher" for purposes of Chapter 3307 of the Revised Code. R.C. 3307.64 provides, in relevant part, that a disability benefit terminates if the recipient of that benefit "becomes employed as a teacher in any public or private school or institution in this state *or elsewhere*." (Emphasis added.) However, the definitions contained within R.C. 3307.01(B) are limited by their own terms to persons working within the state of Ohio. In order to give effect to the "or elsewhere" portion of R.C. 3307.64, STRB cannot rely solely on the definitions contained in R.C. 3307.01(B).

{¶ 8} In this case, STRB interpreted the relevant statutes to mean that an individual will qualify as a "teacher" employed outside of Ohio for purposes of R.C. 3307.64 if employed in a position that, if performed in an Ohio school, would fit within the definition of R.C. 3307.01 and would contribute to the State Teachers Retirement System ("STRS"). The magistrate concluded that this was a reasonable interpretation of the statutory scheme. In her objections, relator offers an alternative interpretation, focusing on the requirement of licensure for teachers in R.C. 3307.01(B). Relator argues that the statutes should be read together to provide that an individual is a "teacher" when she is under a contract and is issued a license by the employing state's department of education.

{¶ 9} The Supreme Court of Ohio has held that " '[a] court must give due deference to [an] agency's reasonable interpretation of the legislative scheme.' " *State ex rel. Gill v. School Emps. Retirement Sys.*, 121 Ohio St.3d 567, 2009-Ohio-1358, ¶ 28, quoting *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 287 (2001). The magistrate followed this principle in determining that STRB's interpretation of the relevant statutes was reasonable. The fact that relator can offer an alternative interpretation does not make STRB's interpretation unreasonable. Moreover, even if we agreed that relator's proposed interpretation was equally reasonable, STRB's

interpretation would be entitled to deference, and we would focus only on the question of whether the STRB interpretation was reasonable. *Frisch's Restaurants, Inc. v. Conrad*, 170 Ohio App.3d 578, 2007-Ohio-545, ¶ 21 (10th Dist.) ("[R]egardless of whether alternative interpretations more satisfactory to appellants might be substituted, we apply the principle of administrative deference under *Northwestern*, and consider only the reasonableness of the interpretation applied by the bureau." (Internal citation omitted.)). We agree with the magistrate's conclusion that STRB's interpretation is a reasonable way to reconcile the statutes and give effect to the "or elsewhere" portion of R.C. 3307.64.

{¶ 10} Relator also argues in her first objection that, even under STRB's interpretation of the statutes, the magistrate erred in concluding that relator qualified as a teacher in Florida. The magistrate found that there was some evidence in the record to support STRB's conclusion that relator was employed as a teacher in Florida. Specifically, the magistrate found that the job description for a behavior analyst submitted to STRB by the school board of St. Lucie County, Florida, constituted some evidence to support the STRB's determination.

{¶ 11} The Supreme Court of Ohio has ruled that STRB has no clear legal duty cognizable in mandamus to specify the evidence relied upon or explain the reasoning for a decision denying an application for disability retirement benefits under R.C. 3307.62. *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, ¶ 22. This court has applied the *Pipoly* decision in a case where STRB terminated an existing disability benefit under R.C. 3307.64. *See State ex rel. Kelly v. State Teachers Retirement Sys.*, 10th Dist. No. 11AP-527, 2012-Ohio-4613, ¶ 56.¹ Nevertheless, this court has previously held as well that, when STRB chooses to explain the reasoning and evidence relied upon for a decision, the decision is reviewable in mandamus. *State ex rel. Pretzer v. State Teachers Retirement Bd.*, 10th Dist. No. 05AP-1162, 2006-Ohio-4984, ¶ 32; *State ex rel. Torres v. State Teachers Retirement Bd.*, 10th Dist. No. 03AP-25, 2003-Ohio-5449, ¶ 14; *State ex rel. Bruce v. State Teachers Retirement Bd.*, 153 Ohio App.3d 589, 2003-Ohio-4181, ¶ 97 (10th Dist.).

¹ See also *State ex rel. Morgan v. State Teachers Retirement Bd.*, 10th Dist. No. 07AP-115, 2008-Ohio-2796, ¶ 55. However, for different reasons, we did not adopt the magistrate's conclusions of law.

{¶ 12} Here STRB, through STRS's correspondence with relator, did explain its reasoning and the evidence on which it relied. On May 12, 2008, Beth Derstine, Manager of the Disability Department, sent a letter to relator explaining that "[t]eacher is defined in Section 3307.01(B) of Ohio Revised Code (ORC) as any position performed in a public or private setting that, *if performed in Ohio public schools or institutions of higher education, would contribute to STRS Ohio.*" (Emphasis added.) Later, in a letter sent by STRS Associate General Counsel, Kimberley K. Haines ("Haines") to relator's counsel on July 18, 2008, Haines described relator's duties and the qualifications for her position in Florida:

Under section 3307.64 of the Ohio Revised Code, disability benefits terminate if a disability benefit recipient becomes employed as a teacher in any public or private school or institution in this state or elsewhere. As you know, Ms. Bertaux has been employed by the School Board of St. Lucie County as a Behavioral Analyst since January 24, 2007. In that capacity, Ms. Bertaux provides direct behavior service to students and teachers through the use of behavioral analysis and compliance training, and the qualifications for her position require a master's degree in exceptional education, psychology, social work, counseling, behavior analysis or related field. The title of Ms. Bertaux's position does not control whether or not she is employed as a teacher for purposes of section 3307.64. STRS Ohio considers all of the facts and circumstances surrounding her employment. The fact is that Ms. Bertaux has been working in a school, contributing to the Florida Public Retirement System, *and performing duties that, if performed in Ohio, would fall within the definition of teacher in section 3307.01 of the Ohio Revised Code.* For these reasons, STRS Ohio determined that Ms. Bertaux's employment as a teacher in a public school in Florida required termination of her disability benefits under section 3307.64 of the Ohio Revised Code.

(Emphasis added.) We have reviewed R.C. 3307.01(B), as well as 3319.22 to 3319.31, 3311.77, and 3319.08 to which 3301.01(B) refers. It is not clear how this evidence, relied upon by STRB, fit within the definition of teacher under R.C. 3307.01(B).

{¶ 13} The magistrate points to a subsequent letter sent by Haines to relator's counsel On May 28, 2009. This letter reiterates the position that relator "perform[ed]

duties that, if performed in Ohio, would fall within the definition of teacher in section 3307.01 of the Ohio Revised Code." As further explanation for this, Haines states "STRS Ohio has teachers who perform the duties of Behavior Specialists in schools in Ohio that are active members that currently contribute to STRS Ohio." We first note that there is no evidence in the record to support this statement. Furthermore, even if such evidence were in the record, we do not follow the logic that, just because there are teachers who perform similar duties in Ohio, all persons who perform such duties consequently fit the definition of teacher.

{¶ 14} With all of this in mind, we conclude that, having provided an explanation, STRB's determination is reviewable in mandamus. We find STRB failed to support why relator qualified as a "teacher" under its interpretation of R.C. 3307.01 and 3307.64 based on her employment in Florida. The reasoning and evidence cited in STRS's correspondence with relator is insufficient to allow this court to adequately determine whether STRB abused its discretion. Therefore, we grant a writ of mandamus for the limited purpose of clarifying if and how relator's job duties, if performed in Ohio, would meet the definition of teacher under STRB's interpretation.

{¶ 15} Accordingly, relator's first objection is overruled in part and sustained in part.

{¶ 16} In relator's second objection, she argues that the magistrate erred by concluding that STRB's statutory interpretation was not a rule that required promulgation through the Ohio Administrative Code. Relator asserts that, because STRB's interpretation is applied to all members of STRS, it is effectively a rule and must be set forth in the Ohio Administrative Code. We note that, under R.C. 3307.04, STRB is authorized to "adopt rules necessary for the fulfillment of its duties and responsibilities" and that those rules must be adopted under the procedures established pursuant to R.C. 111.15. However, relator offers no authority in support of its assertion that STRB's interpretation of these statutes effectively constitutes an administrative rule that may not be applied to her unless promulgated through the administrative code. A relator seeking mandamus relief bears the burden of demonstrating by clear and convincing evidence that she is entitled to relief. *See State ex rel. Stevens v. Indus. Comm.*, 10th Dist. No. 10AP-1147, 2012-Ohio-4408, ¶ 7. With respect to her argument that STRB's statutory

interpretation was required to be promulgated as a rule, relator has failed to meet that burden.

{¶ 17} Accordingly, relator's second objection is overruled.

{¶ 18} Following an independent review of the record, we find that the magistrate has properly determined the facts and in part applied the appropriate legal standards. However, we find that the magistrate erred in finding STRB did not abuse its discretion in concluding that relator was employed as a teacher in Florida. Therefore, we adopt the magistrate's findings of fact and adopt in part the magistrate's conclusions of law. We decline to adopt the conclusions of law reflected in ¶ 70, 72, and 74 and the recommendation set forth in ¶ 51 and 75 of the attached appendix. We grant a writ of mandamus for the limited purpose of directing STRB to clarify if and how relator's job duties, if performed in Ohio, would meet the definition of "teacher" under its interpretation of the relevant statutes.

*Objections sustained in part and overruled in part;
limited writ of mandamus granted.*

KLATT, J., concurs.
FRENCH, J., dissents.

FRENCH, J., dissenting.

{¶ 19} I agree with the majority's resolution of relator's second objection. I disagree, however, with a portion of its resolution of her first objection. Specifically, I do not agree that STRB failed to support its conclusion that relator qualified as a teacher under its interpretation of R.C. 3307.01 and 3307.64.

{¶ 20} This court has stated previously that STRB "is deemed to know what a teaching job entails and whether the recipient is disabled from it." *State ex rel. Kelly v. State Teachers Retirement Sys. of Ohio*, 10th Dist. No. 11AP-527, 2012-Ohio-4613, ¶ 9. Here, I agree with the magistrate that the record contains evidence that defines relator's duties and supports STRB's conclusion that performance of those duties qualifies relator as a teacher under Ohio law. Requiring more of STRB under these circumstances is inconsistent with longstanding precedent holding that mandamus relief is unavailable to an applicant if there is some evidence in the record to support STRB's decision, which STRB need not explain. *See State ex rel. Marchiano v. School Emps. Retirement Sys.*, 121

Ohio St.3d 139, 2009-Ohio-307, ¶ 21; *State ex rel. Schaengold v. Ohio Pub. Emps. Retirement Sys.*, 114 Ohio St.3d 147, 2007-Ohio-3760, ¶ 19. Therefore, I dissent.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
LuAnn Bertaux,	:	
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Relator,	:	
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v.	:	No. 11AP-504
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State Teachers Retirement System	:	(REGULAR CALENDAR)
Board of Ohio,	:	
	:	
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on June 26, 2012

Cloppert, Latanick, Sauter & Washburn, and Sue A. Salamido, for relator.

Michael DeWine, Attorney General, and *Catherine J. Calko*, for respondent.

IN MANDAMUS

{¶ 21} In this original action, relator, LuAnn Bertaux, requests a writ of mandamus ordering respondent State Teachers Retirement Board ("STRB") to vacate its decision terminating a disability benefit under R.C. 3307.64 on grounds that relator began

employment as a teacher in the state of Florida as of January 24, 2007, and to enter a decision that reinstates the disability benefit.

Findings of Fact:

{¶ 22} 1. In 1985, relator became a member of the State Teachers Retirement System ("STRS") through her employment with the Columbus Public Schools.

{¶ 23} 2. In January 1991, relator filed with STRS an application for disability retirement on a form provided by STRS. Relator claimed that she was suffering from post-traumatic stress syndrome and that this condition prevented her from performing her duties as a teacher.

{¶ 24} 3. Pursuant to R.C. 3307.62, STRS appointed psychiatrist Daniel Tetirick, M.D., to examine relator. Following a March 14, 1991 examination, Dr. Tetirick issued a report in which he opined that relator was "incapacitated for the performance of duty as a teacher * * *." Dr. Tetirick recommended continuing treatment and reassessment in July 1991.

{¶ 25} 4. In April 1991, the STRS medical review board ("MRB") decided to delay a determination of the application so that relator could secure psychiatric treatment for a three-month period followed by a re-examination.

{¶ 26} 5. Upon receiving additional reports from relator's treating doctors, the MRB recommended that the application for a disability benefit be granted.

{¶ 27} 6. On May 17, 1991, STRB approved relator's application.

{¶ 28} 7. By letter dated June 28, 1991, STRS informed relator:

A member receiving a disability retirement benefit from this System is ineligible for any further teaching service. However, she may secure employment other than as a teacher.

{¶ 29} 8. Pursuant to R.C. 3307.64, a disability benefit recipient is required to submit "an annual statement of earnings, current medical information on the recipient's condition, and any other information required in rules adopted by the board." Pursuant to the statute, STRS requires the disability benefit recipient to annually complete and file a form affidavit captioned "Statement of Employment and Earnings after Receipt of a Disability Benefit." See Ohio Admin.Code 3307:1-7-07.

{¶ 30} 9. In March 2008, STRS mailed to relator the form affidavit requesting employment and earnings information for calendar year 2007. The form affidavit asked the disability recipient to "[l]ist your 2007 employer(s) * * * and describe your duties." In the space provided, relator wrote "St. Lucie County School Board — records review, collecting/graphing behavioral data, writing behavior plans."

{¶ 31} The form also asks the disability recipient to disclose the number of hours worked per week and the employment-related earnings during 2007. Relator responded that she worked approximately 37.5 hours per week and she earned \$30,545.97.

{¶ 32} The form affidavit was executed by relator on April 23, 2008 and received by STRS on April 29, 2008.

{¶ 33} 10. In May 2008, STRS began an inquiry regarding the information relator reported on the form affidavit. On May 2, 2008, STRS received a letter from Steve Valencia, an official of "the School Board of St. Lucie County." In the letter, Valencia wrote:

Luann Bertaux has been employed in St. Lucie County, Florida, as a Behavioral Analyst since January 24, 2007. A copy of her job description was previously faxed to your office.

{¶ 34} 11. The job description for a "Behavior Analyst" referred to by Valencia, states:

Job Goal

To provide direct behavioral service to students and teachers through the use of behavioral analysis and compliance training.

Qualifications

[One] Master's degree in exceptional education, psychology, social work, counseling, behavior analysis or related field. Florida Certification in behavior analysis (CBA) must be obtained within two years of date of hire; or

[Two] Bachelor's degree and current Florida certification as a behavior analyst (CBA).

[Three] Ability to perform the essential functions of the position.

Duties and Responsibilities

[*One] To act as a direct service professional to E.S.E. students who need behavioral training.

[*Two] To assist teachers in developing behavioral plans for E.S.E. students who exhibit extreme disruptive or non-compliant behavior.

[*Three] To provide inservice for teachers and other professionals who work with students with behavioral difficulties.

[*Four] To develop a district-wide behavior management system for EH and SED classes at all levels.

[*Five] To develop and implement guidelines for the use of time out procedures.

[*Six] To develop and implement a data based management system for teachers of students with behavioral difficulties.

[*Seven] To assist in the development of alternatives to suspension for E.S.E. students.

[Eight] To attend relevant workshops and conferences that focus on children with behavioral difficulties.

[*Nine] To assist in program specialists in the development of behavioral I.E.P.'s.

[Ten] To perform assigned tasks in a timely and efficient manner.

[Eleven] To perform assigned tasks with a high standard of quality.

[Thirteen] To perform other duties as required by the Director.

{¶ 35} 12. By letter to relator dated May 7, 2008, STRS manager, disability department, Beth Derstine, informed relator:

STRS Ohio is governed by the Ohio Revised Code (ORC) and must abide by the statute. Section 3307.64 clearly states, "A disability benefit shall terminate if the disability benefit recipient becomes employed as a teacher in any public or private school or institution in this state or elsewhere." The statute does not provide any exceptions. A copy of this section of the statute is enclosed.

We received information from St. Lucie County Schools that you returned to employment on January 24, 2007. This action effectively terminated your disability benefits and health care coverage paid through STRS Ohio.

Since you received the benefits through May 31, 2008, you are required to return disability and health care benefits for the time you both worked and received benefits. At this time STRS Ohio is receiving claim information on your health care and prescription benefits. Once we have received final information, we will provide you with a letter explaining the amount owed to STRS Ohio.

Your case will be presented to the STRS Ohio Retirement Board for official action at its meeting scheduled for May 16, 2008.

{¶ 36} 13. By letter to relator dated May 12, 2008, Derstine informed relator:

This letter is in response to your phone call on May 12, 2008 regarding your employment with St. Lucie County School Board.

A disability benefit recipient is not permitted to become employed as a teacher while receiving disability benefits from STRS Ohio. Teacher is defined in Section 3307.01(B) of Ohio Revised Code (ORC) as any position performed in a public or private setting that, if performed in Ohio public schools or institutions of higher education, would contribute to STRS Ohio. Please see the enclosed section of the ORC.

Enclosed is also a copy of the *Helpful Information Regarding Your Disability Benefits* form[.] This form has been sent to you the last three years with the *Statement of Employment and Earnings After Receipt of a Disability Benefit* form which STRS Ohio mails each March. This form also outlines the STRS Ohio policy for employment while receiving disability benefits.

Our files indicate that you called the STRS Ohio Member Services Center on December 6, 2006 to inquire about reemployment while receiving disability benefits. You were advised to send in a job description for review by the disability department. While sending in a job description is not a requirement, it is advised because it offers pre-approval of employment so that a violation of disability benefits does not occur.

{¶ 37} 14. By letter to relator dated May 21, 2008, Derstine informed relator:

In a letter dated May 7, 2008 you were notified that the Retirement Board at its meeting on Friday, May 16, 2008, would take action to terminate your disability benefits. On the basis of this action, your disability benefits were terminated effective January 23, 2007.

Since you received benefits through May 31, 2008, you are required to return the disability and health care benefits for the time you both worked and received benefits. The amount owed to STRS Ohio for disability benefits from January 24, 2007 through May 31, 2008 is \$30,919.59.

* * *

The total amount you owe to STRS Ohio is \$31,443.18 (\$30,919.59 in monthly benefits and \$523.59 for prescription drug costs). Below are the payments options available to you. The check should be made payable to STRS Ohio and returned in the courtesy envelope provided.

{¶ 38} 15. By letter to relator dated July 17, 2008, Derstine informed relator:

STRS Ohio sent a letter to you dated May 21, 2008, explaining the repayment options available to you following the termination of your disability benefits. You owe \$31,443.18 to STRS Ohio for the overpayment of your disability benefits from January 24, 2007 through May 31, 2008.

Below are the payments options available to you.

* * *

Please notify us of your repayment option in writing by August 15, 2008.

This letter will serve as notice that failure to repay the final \$31,443.18 will result in this amount being deducted from your future service retirement benefits, or a lump sum payment if you were to withdraw your account from STRS Ohio.

{¶ 39} 16. Earlier, in June 2008, relator retained counsel.

{¶ 40} 17. In a three-page letter dated June 23, 2008 to STRS general counsel, relator's counsel set forth relator's position regarding the matter.

{¶ 41} 18. In a letter to relator's counsel dated July 18, 2008, Kimberley K. Haines, STRS Associate General Counsel, responded to the June 23, 2008 letter from relator's counsel:

Under section 3307.64 of the Ohio Revised Code, disability benefits terminate if a disability benefit recipient becomes employed as a teacher in any public or private school or institution in this state or elsewhere. As you know, Ms. Bertaux has been employed by the School Board of St. Lucie County as a Behavioral Analyst since January 24, 2007. In that capacity, Ms. Bertaux provides direct behavior service to students and teachers through the use of behavioral analysis and compliance training, and the qualifications for her position require a master's degree in exceptional education, psychology, social work, counseling, behavior analysis or related field. The title of Ms. Bertaux's position does not control whether or not she is employed as a teacher for purposes of section 3307.64. STRS Ohio considers all of the facts and circumstances surrounding her employment. The fact is that Ms. Bertaux has been working in a school, contributing to the Florida Public Retirement System, and performing duties that, if performed in Ohio, would fall within the definition of teacher in section 3307.01 of the Ohio Revised Code. For these reasons, STRS Ohio determined that Ms. Bertaux's employment as a teacher in a public school in Florida required termination of her disability benefits under section 3307.64 of the Ohio Revised Code.

{¶ 42} 19. On July 28, 2008, relator's counsel wrote to Haines as follows:

Thank you for your response to my letter dated June 23, 2008 regarding Ms. Bertaux. I understand that the title of Ms. Bertaux's position does not necessarily control whether she is considered to be employed as a teacher for purposes of section 3307.64. Nevertheless, in my letter I cited R.C. § 3307.01, which defines teacher, and set[s] forth in great detail why Ms. Bertaux should not be considered a teacher. In response, you simply indicated that disability benefits through STRS terminate if "a disability benefit recipient becomes employed as a teacher in any public or private school or institution in this state or elsewhere." You did not cite any Revised Code or Administrative Code section to support this interpretation. Moreover, your explanation fails to indicate from where you obtained your definition of the term "teacher."

Thus, I would appreciate it if you would provide a specific citation for your statement that disability benefits through STRS terminate if a disability benefit recipient "becomes employed as a teacher in any public or private school or institution in this state or elsewhere." I would also appreciate a specific citation for the authority you rely upon to define "teacher."

Your letter seems to indicate that since there is "direct behavior service to students and teachers," Ms. Bertaux's position as a Behavioral Analyst is considered by STRS as employment as a teacher. I assume that you are relying upon the job description that was sent to your office. This job description is simply a boiler plate and does not accurately reflect Ms. Bertaux's employment responsibilities. Within the next few weeks, I will forward you a letter from Ms. Bertaux's employer indicating that Ms. Bertaux does not provide direct behavior service to students.

For a variety of reasons, Ms. Bertaux's position as a behavior analyst is in no way equivalent to that of a teacher. First, the position does not require any type of teaching certificate or teaching license. Second, Ms. Bertaux does not work directly with students as her position is not a direct service position. Third, Ms. Bertaux's office is not even located in a school building but rather, an administration office. Fourth and finally, Ms. Bertaux does not "teach" students. Instead, she collects, develops and analyzes data, and then develops behavior plans to be implemented by teachers. Ms. Bertaux does not implement these plans herself.

I look forward to hearing from you soon.

{¶ 43} 20. By letter to relator dated November 26, 2008, Derstine informed relator:

As of the date of the letter, we have not received a response from you as to your choice of repayment option, nor have we received a payment. If the balance due is not repaid by the time you are eligible and apply for service retirement benefits, your entire monthly benefit will be withheld each month until the total overpayment is satisfied.

{¶ 44} 21. On March 4, 2009, relator's counsel wrote to Haines as follows:

In a letter dated July 28, 2008, I responded that R.C. §3307.01 defines teacher, and referred you to my letter dated June 23, 2008 which set forth in great detail why Ms. Bertaux should not be considered a teacher. I also noted that I could not locate any statutory authority for your position that "teacher" is defined as "any position performed in a public or private setting that, if performed in Ohio public schools or institutions of higher education, would contribute to STRS Ohio." I also asked you to provide a specific citation for your definition of "teacher" and also requested that you provide a citation for you[r] position that disability benefits through STRS terminate if a disability benefit recipient "becomes employed as a teacher in any public or private school or institution in this state or elsewhere."

I never received a response to my letter though STRS continued sending letters directly to Ms. Bertaux indicating that she was obligated to reimburse STRS.

In an effort to clear of [sic] up the confusion once and for all, I asked Bill Tomlinson, the Director of Exception[al] Student Education and Ms. Bertaux's supervisor to provide an explanation of Ms. Bertaux's responsibilities. Mr. Tomlinson's response is enclosed for your review.

{¶ 45} 22. The record contains a letter dated February 19, 2009 from Bill Tomlinson, Director, Exceptional Student Education St. Lucie County Public Schools, addressed to relator's counsel. The Tomlinson letter states:

Luann Bertaux is employed as a Board Certified Behavior Analyst by the St. Lucie County Public Schools. As the Director of Exceptional Student Education, I am her direct supervisor and assign her duties and responsibilities within her level of credentials.

Mrs. Bertaux's employment by the St. Lucie County School Board as a Behavior Analyst requires neither a teaching degree nor teaching certification. Nor are her duties that of a teacher. As a Behavior Analyst, Mrs. Bertaux assists school-based planning teams in conducting Functional Behavior Assessments and developing Behavior Intervention Plans for targeted students. She also works to develop and coordinate professional development activities for teachers of autism. It is the responsibility of school staff who work directly with students, primarily classroom teachers, behavior technicians, and paraprofessionals, to implement behavioral interventions. Mrs. Bertaux does not have direct, day-to-day responsibility for teaching students.

{¶ 46} 23. By letter to relator's counsel dated March 24, 2009, Haines informed:

I am writing in response to your March 4, 2009, letter following up your July 28, 2008, letter and forwarding a February 19, 2009, letter from Bill Tomlinson, Director, Exceptional Student Education, St. Lucie County Public Schools. The reason I did not reply to your July 28, 2008, letter was because you had indicated in that letter that you would forward a letter from Ms. Bertaux's employer within the next few weeks.

As I indicated in my July 18, 2008, letter to you, under section 3307.64 of the Ohio Revised Code, disability benefits terminate if a disability benefit recipient becomes employed as a teacher in any public or private school or institution in this state or elsewhere. As you know, section 3307.01(B) of the Ohio Revised Code defines "teacher" for purposes of STRS Ohio membership. Because Ms. Bertaux's employment occurred outside of Ohio, STRS Ohio considers the facts and circumstances surrounding her employment to determine whether employment in such a position, if it had occurred in Ohio, would have fit within the definition of teacher in section 3307.01 of the Ohio Revised Code. It is STRS Ohio's position that because Ms. Bertaux worked in a school, contributed to the Florida Public Retirement System, and performed duties that, if performed in Ohio, would fall

within the definition of teacher in section 3307.01 of the Ohio Revised Code, Ms. Bertaux's disability benefits terminated upon commencement of her employment pursuant to section 3307.64 of the Ohio Revised Code. For this reason, she is required to reimburse STRS Ohio for the amount of the overpaid benefits that she received.

{¶ 47} 24. On April 7, 2009, relator's counsel again wrote to Haines. The three-page letter will not be quoted from here.

{¶ 48} 25. On May 28, 2009, Haines responded to the April 7, 2009 letter from relator's counsel. Haines' May 28, 2009 letter will not be quoted here.

{¶ 49} 26. By letter to relator dated April 21, 2011, Lori Baker, a STRS Benefit Claims Coordinator, informed relator:

STRS Ohio has notified you previously you were responsible for remitting \$31,443.18 to our office for the ineligible disability benefit payments you received for the time period of February 2007 through May 2008 and medical prescriptions paid during the same time period. To date, no reimbursement has been received.

In order to avoid our office from forwarding this file to the Ohio Attorney General's office for collection, it is necessary you remit the entire \$31,443.18 to our office on or before May 19, 2011. Our records indicate you have been employed full-time for the 2010-2011 fiscal school year. As a result, if you are unable to remit the entire amount due by the above date, please contact me immediately to discuss repayment arrangements.

If we do not receive a response by May 20, 2011, this file may be forwarded to the Attorney General's office for collection. Interest as well as a substantial collection fee will be assessed to the total amount owed our office.

{¶ 50} 27. On June 7, 2011, relator, Luann Bertaux, filed this mandamus action.

Conclusions of Law:

{¶ 51} It is the magistrate's decision that this court deny relator's request for a writ of mandamus as more fully explained below.

{¶ 52} Chapter 3307 of the Revised Code sets forth the statutes applicable to STRS.

{¶ 53} R.C. 3307.01 sets forth definitions.

Thereunder, the following definitions appear:

As used in this chapter:

* * *

(B) "Teacher" means all of the following:

[One] Any person paid from public funds and employed in the public schools of the state under any type of contract described in section 3319.08 of the Revised Code in a position for which the person is required to have a license issued pursuant to sections 3319.22 to 3319.31 of the Revised Code;

[Two] Any person employed as a teacher by a community school or a science, technology, engineering, and mathematics school pursuant to Chapter 3314. or 3326. of the Revised Code;

[Three] Any person having a license issued pursuant to sections 3319.22 to 3319.31 of the Revised Code and employed in a public school in this state in an educational position, as determined by the state board of education, under programs provided for by federal acts or regulations and financed in whole or in part from federal funds, but for which no licensure requirements for the position can be made under the provisions of such federal acts or regulations;

[Four] Any other teacher or faculty member employed in any school, college, university, institution, or other agency wholly controlled and managed, and supported in whole or in part, by the state or any political subdivision thereof, including Central state university, Cleveland state university, and the university of Toledo;

[Five] The educational employees of the department of education, as determined by the state superintendent of public instruction.

In all cases of doubt, the state teachers retirement board shall determine whether any person is a teacher, and its decision shall be final.

* * *

(C) "Member" means any person included in the membership of the state teachers retirement system, which shall consist of all teachers and contributors as defined in divisions (B) and (D) of this section and all disability benefit recipients, as defined in section 3307.50 of the Revised Code.

* * *

(D) "Contributor" means any person who has an account in the teachers' savings fund or defined contribution fund.

{¶ 54} R.C. 3307.26 provides in part:

The contribution for all teachers shall be deducted by the employer on each payroll in an amount equal to the applicable per cent of the teachers' paid compensation for such payroll period or other period as the board may approve.

{¶ 55} R.C. 3307.64 states in part:

A disability benefit shall terminate if the disability benefit recipient becomes employed as a teacher in any public or private school or institution in this state or elsewhere.

{¶ 56} Analysis of the statutes begins with the observation that R.C. 3307.01(B)'s definition of "teacher" assists R.C. 3307.01(C)'s definition of "member." Moreover, R.C. 3307.01(B)'s definition of "teacher" assists R.C. 3307.26's command as to contributions.

{¶ 57} Given that R.C. 3307.01(B)'s definition of teacher does not include, by its terms, employment of a teacher "elsewhere" than any public or private school or institution in this state, the question arises as to R.C. 3307.01(B)'s impact upon the word "teacher" in R.C. 3307.64 which includes teachers not employed in this state.

{¶ 58} In the magistrate's view, it is clear that the word "teacher" used in R.C. 3307.64 has a broader scope than R.C. 3307.01(B)'s definition of teacher. To limit the meaning of R.C. 3307.64's use of the word teacher to R.C. 3307.01(B)'s definition, would effectively eliminate the phrase "or elsewhere" as contained in R.C. 3307.64.

{¶ 59} In order to give full effect to R.C. 3307.64's prohibition against employment as a teacher both in this state or elsewhere, while receiving a disability benefit, STRS has offered an interpretation of the statutes that is found in the record before this court.

{¶ 60} STRS' statutory interpretation can be found in the Haines letter of March 24, 2009:

Under section 3307.64 of the Ohio Revised Code, disability benefits terminate if a disability benefit recipient becomes employed as a teacher in any public or private school or institution in this state or elsewhere. As you know, section 3307.01(B) of the Ohio Revised Code defines "teacher" for purposes of STRS Ohio membership. Because Ms. Bertaux's employment occurred outside of Ohio, STRS Ohio considers the facts and circumstances surrounding her employment to determine whether employment in such a position, if it had occurred in Ohio, would have fit within the definition of teacher in section 3307.01 of the Ohio Revised Code.

{¶ 61} STRS' statutory interpretation can also be found in the May 12, 2008 Derstine letter:

A disability benefit recipient is not permitted to become employed as a teacher while receiving disability benefits from STRS Ohio. Teacher is defined in Section 3307.01(B) of Ohio Revised Code (ORC) as any position performed in a public or private setting that, if performed in Ohio public schools or institutions of higher education, would contribute to STRS Ohio. Please see the enclosed section of the ORC.

Enclosed is also a copy of the *Helpful Information Regarding Your Disability Benefits* form[.] This form has been sent to you the last three years with the *Statement of Employment and Earnings After Receipt of a Disability Benefit* form which STRS Ohio mails each March. This form also outlines the STRS Ohio policy for employment while receiving disability benefits.

{¶ 62} It can be observed that Haines gave the word "teacher" as found in R.C. 3307.64 a broader scope than R.C. 3307.01(B)'s definition. The same can be said for Derstine.

{¶ 63} That the word "teacher" as found in R.C. 3307.64 is given a different or broader scope than R.C. 3307.01(B)'s definition is not necessarily impermissible. As the court noted in *State ex rel. Internatl. Paper v. Trucinski*, 106 Ohio St.3d 203, 2005-Ohio-4557, workers' compensation terms can have different meanings in different statutes. *Id.* at ¶ 7. This proposition would also be true with respect to the STRS statutory scheme.

{¶ 64} In enacting a statute, it is presumed that the entire statute is intended to be effective. R.C. 1.47(B). To determine legislative intent, significance and effect should be accorded to every word, phrase, sentence, and part thereof if possible. *State v. Wilson*, 77 Ohio St.3d 334 (1997), citing *Wachendorf v. Shaver*, 149 Ohio St. 231 (1948), ¶ 5 of the syllabus.

{¶ 65} Given the above authority for statutory construction, it is clear that STRS must give effect to the phrase "or elsewhere" as found in R.C. 3307.64. That is, STRS may not use R.C. 3307.01(B)'s definition of teacher to, in effect, delete the phrase "or elsewhere" from the statute. Moreover, even though STRS may have the authority to promulgate a rule setting forth a separate definition for the word "teacher" found in R.C. 3307.64, that it has not done so does not render it powerless to render a definition of the word "teacher" at R.C. 3307.64 that fits the statutory scheme and that gives effect to the phrase "or elsewhere."

{¶ 66} Also, that STRS may have placed its statutory interpretation of R.C. 3307.64 in a brochure does not render its statutory interpretation a rule that must be promulgated.

{¶ 67} Here, this court must give due deference to STRS' reasonable interpretation of its legislative scheme. *State ex rel. Gill v. School Employees Retirement Sys. of Ohio*, 121 Ohio St.3d 567, 2009-Ohio-1353, ¶ 28.

{¶ 68} Relator suggests here that STRS' interpretation of the R.C. 3307.64 provision at issue is an unpromulgated agency rule that cannot be applied to relator because it is allegedly an unpromulgated agency rule. Relator's suggestion is incorrect. Again, the statute at issue demands interpretation and interpretation is what STRS has provided. STRS' interpretation of the statute is not an agency rule or even an unpromulgated agency rule.

{¶ 69} Contrary to relator's suggestion, the statutory interpretation did not create a rule that requires promulgation even if it can be argued that promulgation of a rule would be helpful.

{¶ 70} Relator also seems to suggest that the record fails to provide some evidence to support the STRS determination that relator was employed in Florida as a teacher beginning January 24, 2007. This suggestion is also incorrect.

{¶ 71} The May 28, 2009 Haines letter sets forth the factual basis for STRS' determination that relator was employed as a teacher in Florida. That letter states:

Under section 3307.64 of the Ohio Revised Code, disability benefits terminate if a disability benefit recipient becomes employed as a teacher in any public or private school or institution in this state or elsewhere. As you know, section 3307.01(B) of the Ohio Revised Code defines "teacher" for purposes of STRS Ohio membership. Because Ms. Bertaux's employment occurred "elsewhere" and because the definition of teacher in section 3307.01 of the Ohio Revised Code applies to teachers employed in Ohio schools and institutions, STRS Ohio considers the facts and circumstances surrounding a disability benefit recipient's employment to determine whether employment in such a position, if it had occurred in Ohio, would have fit within the definition of teacher in section 3307.01 of the Ohio Revised Code. STRS Ohio has teachers who perform the duties of Behavior Specialists in schools in Ohio that are active members that currently contribute to STRS Ohio.

It is STRS Ohio's position that because Ms. Bertaux worked in a school, contributed to the Florida Public Retirement System, and performed duties that, if performed in Ohio, would fall within the definition of teacher in section 3307.01 of the Ohio Revised Code, Ms. Bertaux's disability benefits terminated pursuant to section 3307.64 of the Ohio Revised Code upon commencement of her employment.

{¶ 72} Significantly, relator does not dispute that STRS "has teachers who perform the duties of Behavior Specialists in schools in Ohio that are active members that currently contribute to STRS Ohio."

{¶ 73} Also, STRS was not required to accept a statement in the February 19, 2009 Tomlinson letter asserting that relator "does not have direct, day-to-day responsibility for

teaching students." In weighing the evidence before it, STRS could place emphasis upon the job description for a behavior analyst that was sent by Valencia. As earlier noted, that job description lists one of the duties — "[t]o act as a direct service professional to E.S.E. students who need behavioral training."

{¶ 74} In short, the magistrate finds that the record contains some evidence upon which STRS could determine that relator's job as a behavioral analyst in Florida meets STRS' definition of teacher under R.C. 3307.64.

{¶ 75} 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).