[Cite as *Ohio Pub. Emps. Retirement Sys. v. Akron Gen. Med. Ctr.*, 2013-Ohio-944.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Public Employees Retirement System,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-993 (C.P.C. No. 07CVH11-15705)
Akron General Medical Center,	:	(REGULAR CALENDAR)
Defendant-Appellee,	:	
Summit County, Ohio et al.,	:	
Defendants-Appellants.	:	

D E C I S I O N

Rendered on March 14, 2013

Michael DeWine, Attorney General, and *Dennis P. Smith, Jr.*, for Ohio Public Employees Retirement System.

Squire Sanders, *Gregory J. Viviani*, and *David W. Alexander*, for Akron General Medical Center.

Fisher & Phillips LLP, Robert E. Dezort, and *R. Scot Harvey*, for Summit County, Ohio and Edwin Shaw Hospital for Rehabilitation.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} Summit County, Ohio ("Summit County") and Edwin Shaw Hospital For Rehabilitation ("Shaw"), defendants-appellants, appeal from the judgment of the Franklin County Court of Common Pleas, in which the court granted the motion for summary

judgment filed by Ohio Public Employees Retirement System ("OPERS"), plaintiff-appellee. Akron General Medical Center ("Akron General"), defendant-appellee, has also filed a brief in this matter.

{¶ 2} Shaw was a publicly operated hospital located in Summit County, Ohio. As public employees, Shaw's employees participated in the retirement system for public employees operated by OPERS. The retirement system itself is also referred to as "OPERS." Akron General is a private, non-profit corporation that operates hospital facilities. As private sector employees, Akron General's employees do not participate in OPERS.

{¶ 3} On May 14, 2003, Shaw and Summit County entered into two agreements with Akron General: an asset purchase agreement ("APA") and a management services agreement ("MSA"). Pursuant to the APA, Akron General purchased most of Shaw's assets and provided a closing date of May 14, 2005, at which time Shaw's assets would transfer to Akron General. The APA further provided that, pursuant to the MSA, Akron General would manage the operations of Shaw between May 14, 2003 and May 14, 2005. The APA also provided that any of Shaw's employees that Akron General decided to hire would be hired under Akron General's own terms and conditions and would be treated as newly hired employees. The APA also provided that Summit County and Shaw would cooperate with and support Akron General with respect to any claim any employee of Summit County and Shaw who was hired by Akron General made with respect to the employee's right to continue to participate in OPERS as an employee of Akron General.

{¶ 4} On January 19, 2005, Akron General contacted OPERS and asked whether R.C. 145.01(A)(2) applied with respect to Akron General's employment of the former Shaw employees following Akron General's purchase of some of Shaw's assets. R.C. 145.01(A)(2) provides that an employee who worked for a public employer and who continues to perform the same or similar duties under the direction of a contractor who has contracted to take over what before the date of the contract was a publicly operated function may continue to participate in OPERS. Employees falling within the definition of R.C. 145.01(A)(2) are referred to as "carryover employees." R.C. 145.034 grants carryover employees 90 days to opt out of their carryover status. Thus, Akron General sought a

determination of whether the former Shaw employees it hired would be considered carryover employees so as to continue participation in OPERS.

{¶ 5} On January 24, 2005, an OPERS compliance officer sent a letter to Akron General informing it that any Shaw employee hired by Akron General would continue to be a public employee under R.C. 145.01(A)(2). There is no evidence in the record that Summit County and Shaw ever received a copy of this letter, and no party contested the compliance officer's determination.

{¶ 6} On May 9, 2005, OPERS mailed Summit County the employee election forms necessary to comply with R.C. 145.034. Around the closing date of the business sale on May 14, 2005, Akron General hired some of Shaw's employees. After May 14, 2005, Akron General began withholding OPERS employee contributions from the pay of the carryover employees, but neither Akron General nor Shaw paid the employee contributions to OPERS.

{¶ 7} On August 8, 2005, Summit County requested an opinion from the Ohio Attorney General as to whether Summit County or Akron General would be responsible for employer contributions on behalf of the former Shaw employees who were subsequently hired by Akron General. The attorney general's office indicated it could not render an opinion as to who was responsible for the employer contributions because OPERS was still considering the threshold issue of whether the Akron General employees were still public employees.

{¶ 8} On November 16, 2007, OPERS filed the present declaratory judgment action against Shaw, Summit County, and Akron General requesting the court to declare who was liable for the OPERS employer contributions on behalf of the carryover employees. Akron General filed a cross-claim against Shaw and Summit County seeking the court to declare that Shaw and Summit County are solely responsible for the employer contributions. Shaw and Summit County filed a motion to dismiss Akron General's cross-claim.

{¶ 9} On August 22, 2008, Akron General filed a motion for summary judgment on OPERS's action and on its own cross-claim against Shaw and Summit County. On October 21, 2008, the court denied Shaw and Summit County's motion to dismiss Akron General's cross-claim. On June 22, 2009, the trial court granted Akron General's motion

for summary judgment, finding Akron General was not liable for employer contributions related to the carryover employees, and this determination has not been appealed. Summit County and Shaw filed a cross-motion for summary judgment on July 2, 2009, while OPERS filed a cross-motion for summary judgment on July 6, 2009.

{¶ 10} On August 5, 2009, Shaw and Summit County filed a request for an administrative appeal of the OPERS compliance officer's January 24, 2005 determination. On September 14, 2009, OPERS denied the appeal as being untimely filed.

{¶ 11} On October 23, 2009, Summit County filed a request for a writ of mandamus in the Supreme Court of Ohio seeking a determination of whether the employees were carryover employees. The Supreme Court dismissed the request on January 27, 2010, finding the action pending before the trial court would determine whether the employees were carryover employees.

{¶ 12} On September 22, 2011, the trial court issued a decision granting OPERS' motion for summary judgment and denying Shaw and Summit County's motion for summary judgment. The trial court found that the opinion rendered on January 24, 2005 by OPERS' compliance officer was a "final determination" that the employees were carryover employees and that determination was not an abuse of discretion. The trial court issued a journal entry on October 14, 2011. Appellants appeal the judgment of the trial court, asserting the following assignment of error:

> The trial court erred to the prejudice of Edwin Shaw Hospital for Rehabilitation and Summit County, Ohio in granting the motion for summary judgment of the Ohio Public Employees Retirement System on its claim for declaratory judgment, and in denying the motion for summary judgment of Edwin Shaw Hospital for Rehabilitation and Summit County, Ohio on the Ohio Public Employees Retirement System's claim for declaratory judgment.

{¶ 13} Appellants argue that the trial court erred when it granted OPERS' motion for summary judgment and denied their motion for summary judgment. Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom

the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. *McKay v. Cutlip*, 80 Ohio App.3d 487, 491 (9th Dist.1992). The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of genuine issue of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. *Id*. Once this burden is satisfied, the non-moving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id*. The non-moving party may not rest upon the allegations or denials in the pleadings, but must affirmatively demonstrate the existence of a genuine issue of material fact to prevent the granting of a motion for summary judgment. Civ.R. 56(C); *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988).

{¶ 14} Appellants first argue that the trial court erred when it found OPERS had established all of the essential elements of a claim for declaratory judgment. Under Ohio law, three elements are necessary to obtain a declaratory judgment, pursuant to R.C. 2721.02(A), as an alternative to other remedies: (1) a real controversy between adverse parties exists, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to the preservation of rights which may be otherwise impaired or lost. *Fairview Gen. Hosp. v. Fletcher*, 63 Ohio St.3d 146, 149 (1992), citing *Herrick v. Kosydar*, 44 Ohio St.2d 128, 130 (1975), and *Buckeye Quality Care Ctrs., Inc. v. Fletcher*, 48 Ohio App.3d 150, 154 (10th Dist.1988).

{¶ 15} For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties. *Stewart v. Stewart*, 134 Ohio App.3d 556, 558 (4th Dist.1999), citing *State v. Stambaugh*, 34 Ohio St.3d 34, 38 (1987). In order for a justiciable question to exist, the danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events, and the threat to his position must be actual and genuine and not merely possible or remote. *League for Preservation of Civ. Rights & Internal Tranquility v. Cincinnati*, 64 Ohio App. 195, 197 (1st Dist.1940).

{¶ 16} The basis of appellants' argument is that there exists no real and justiciable controversy because the OPERS compliance officer's January 24, 2005 letter was not a "final determination" under former Ohio Adm.Code 145-1-11(A). Former Ohio Adm.Code 145-1-09 provided, in pertinent part:

> 145-1-09 Staff authority
>
> (A) The public employees retirement board authorizes its staff to make determinations required under Chapter 145. of the Revised Code, including, but not limited to, membership, exemptions or exclusions from membership, earnable salary, benefits, and employer reporting. Such determinations may be appealed to the retirement board pursuant to rule 145-1-11 of the Administrative Code.

{¶ 17} Former Ohio Adm.Code 145-1-11 provided, in pertinent part:

> 145-1-11 Appeal of staff determination
>
> (A) Except as provided in rule 145-2-23 of the Administrative Code, any affected person may appeal a final determination of the staff of the public employees retirement board as provided in this rule.
>
> (B) An appeal shall be submitted to the executive director in writing. It shall state the determination to be reviewed and the basis for the review.
>
> (C)(1) Unless the staff determination is mandated by statute, the retirement board may delegate its authority to hear an appeal to an independent hearing examiner prior to the retirement board making its final decision on the appeal.
>
> (a) The independent hearing examiner must be licensed to practice law in the state of Ohio. The independent hearing examiner shall conduct a hearing and issue a report and recommendation to the retirement board.
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> * * *
>
> (c) The original report and recommendation shall be sent to the retirement board. Copies of the report and recommendation shall be provided to the parties to the appeal and to staff. Within fifteen days of the date of issuance of the report and recommendation by the hearing examiner, the

> parties to the appeal and staff may submit written objections to the report and recommendation. The written objections shall be submitted to the retirement board. Copies of the written objections shall be sent to the parties to the appeal and to staff.
>
> * * *
>
> (4) The retirement board shall review the report and recommendation, any objections to the report and recommendation, and submitted documentation in determining whether to uphold the staff determination. The retirement board may accept, reject, or modify the report and recommendation and may remand to the hearing examiner for further findings before making its final decision.
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> * * *
>
> (D) The retirement board's decision on any determination conducted pursuant to this rule shall be final and determinative.

{¶ 18} Appellants argue that because OPERS compliance officer's January 24, 2005 opinion was not a "final determination of the staff of the public employees retirement board," pursuant to former Ohio Adm.Code 145-1-11(A), that could have been appealed to the OPERS board via the board's executive director, pursuant to former Ohio Adm.Code 145-1-11(B) and (C), it could not form the basis of a declaratory judgment finding appellants responsible for OPERS payments for the carryover employees. Without the January 24, 2005 opinion, appellants contend, there existed no administrative authoritative order commanding appellants to remit OPERS contributions.

{¶ 19} We are very troubled by the procedure and notice that occurred, or did not occur, in this case. Initially, the letter bears no heading, caption, title, or text indicating that it is a "final determination," which is the term used in Ohio Adm.Code 145-1-11(A). Also, the compliance officer's January 24, 2005 letter contains no notice regarding the right to appeal the determination to the OPERS board pursuant to Ohio Adm.Code 145-1-11(A). The letter states, "If you have further questions, please write us and we will respond accordingly." Merely "writ[ing] us" and "respond[ing]" does not seem to describe or refer to the specific appellate procedure outlined in Ohio Adm.Code 145-1-11(A) and (B), which

requires that an appeal must be submitted to the executive director in writing, the appeal must state the determination to be reviewed and the basis for the review, and an appointed hearing officer must issue a report and recommendation to the OPERS board, which must then address any objections to the report and recommendation and issue a final decision. In fact, the next sentence in the following paragraph indicates that, "OPERS has procedures for such situations," and goes on to describe the next steps in the process, none of which include an opportunity to appeal. Thus, the January 24, 2005 letter from the compliance officer does not appear to be the type of "final determination" described in Ohio Adm.Code 145-1-11(A).

{¶ 20} Importantly, timely notice of the "determination" made in the January 24, 2005 letter is wholly lacking. There is no evidence that the January 24, 2005 letter was sent to appellants, and appellants deny they ever received such. Further, the January 24, 2005 letter indicates that "[w]e will write the public employer informing them of our determination that the employees are public employees and are subject to contributing OPERS membership." The record contains no evidence that OPERS ever mailed a subsequent letter informing appellants of its "determination." Although OPERS claims that appellants were informed of the compliance officer's January 24, 2005 determination in a May 9, 2005 letter from OPERS, the May 9, 2005 letter does not mention the January 24, 2005 determination. The May 9, 2005 letter merely indicates that the enclosed employee election forms must be given to the employees. There is no indication or implication that any final determination had been rendered. Likewise, although OPERS's general counsel indicated in an October 8, 2009 letter that the January 24, 2005 determination was communicated to appellants via multiple correspondences between January and May 2005, counsel failed to cite any such correspondences in the letter, and OPERS fails to direct us to any in this appeal.

{¶ 21} Furthermore, it appears that OPERS also did not believe the January 24, 2005 opinion was a "final determination," at least according to the Ohio Attorney General's office. In a letter dated September 20, 2005, the attorney general responded to a formal opinion requested by Summit County. The attorney general deferred its determination of whether Shaw or Akron General was the employer of the employees for purposes of making employer contributions because:

> Legal counsel at PERS have informed us that the question whether former employees of Edwin Shaw Hospital are "public employees" for purposes of R.C. Chapter 145 is still under consideration by the administrative staff of the Public Employees Retirement Board. We would rather not interfere with the exercise of such authority as has been lodged with the Public Employees Retirement Board and its administrative staff. * * * Rather, we believe that the proper course of action is to afford PERS and the Retirement Board the opportunity to make a final administrative determination about (1) the status of former Edwin Shaw Hospital personnel as "public employees" under R.C. 145.01(A)(2).

According to the Ohio Attorney General, the compliance officer's January 24, 2005 determination letter was not a final determination, as OPERS now claims. Instead, the staff of OPERS was still considering the issue. Although Akron General contends that this statement does not negate the finality of the compliance officer's determination because an administrative agency has the inherent power to reconsider its own determination, the context of the statement in the Ohio Attorney General's letter clearly communicates that OPERS had yet to make a "final administrative determination" and such was forthcoming. No final determination from OPERS was ever issued.

{¶ 22} In addition, in a September 28, 2005 letter to Akron General, assistant counsel for OPERS suggests that the compliance officer's January 24, 2005 opinion was not the type of final determination appealable to the OPERS board pursuant to Ohio Adm.Code 145-1-11(A). In the letter, OPERS' counsel encouraged Akron General "to exercise its full administrative rights by appealing the staff determination that the former Edwin Shaw employees are carryover public employees as permitted by Ohio Administrative Code 145-1-11." Although, at first blush, this sounds like the same procedure permitted by Ohio Adm.Code 145-1-11(A), the letter then goes on to describe:

> Upon receipt of your formal appeal of the staff determination of January 24, 2005, OPERS' General Counsel will review any new or additional information provided in support of your appeal and issue a senior staff determination. The non-prevailing party has the ability to appeal the senior staff determination to the OPERS Board and request a hearing before a hearing examiner. The OPERS Board's decision is the final administrative remedy at your disposal.

{¶ 23} The procedure set forth in the above block describes the appellate procedure permitted by Ohio Adm.Code 145-1-11(B) and (C). Subsections (B) and (C) provide that an appeal from an OPERS staff member's final determination shall be submitted to the OPERS board, and a hearing examiner may then hold a hearing and issue a report and recommendation. Parties may then submit objections to the hearing examiner's report and recommendation to the OPERS board, whose decision is final under Ohio Adm.Code 145-1-11(D). Thus, in the present case, it is clear that OPERS, via the compliance officer's January 24, 2005 letter, added an initial level of evaluation that is not included in the procedure outlined in Ohio Adm.Code 145-1-11. Former Ohio Adm.Code 145-1-11 clearly does not provide for a preliminary determination to be made by an OPERS staff member that may then be appealed to another "senior staff" member. Thus, it is apparent that OPERS believed that the "final determination" referred to in Ohio Adm.Code 145-1-11(A) would be the later determination by a senior OPERS staff member after that senior staff member reviewed the compliance officer's January 24, 2005 opinion, but that "final determination" never occurred here. The opinion set forth by the compliance officer in the January 24, 2005 letter can only be construed as some type of determination other than the "final determination" described in Ohio Adm.Code 145-1-11(A), and OPERS fails to reconcile the procedure used in this case with the procedure allowed by that section.

{¶ 24} In addition, Ohio Adm.Code 145-1-09 does not aid OPERS' position. Ohio Adm.Code 145-1-09 does authorize the OPERS staff to make membership determinations under R.C. 145; however, such staff determinations are appealable directly to the OPERS board pursuant to Ohio Adm.Code 145-1-11. Ohio Adm.Code 145-1-09 does not mention that OPERS staff may issue a determination that may then be appealed to another staff member before being appealed to the OPERS board. Thus, because OPERS believed the January 24, 2005 letter was appealable to a senior staff member and not directly to the OPERS board, the January 24, 2005 determination was not the type of staff determination authorized by Ohio Adm.Code 145-1-09 and referred to as a "final determination" in Ohio Adm.Code 145-1-11(A).

{¶ 25} We note that, although our review of other case law reveals that OPERS has been utilizing the same or similar determination and review procedures in the past in some cases, *see, e.g., State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio

St.3d 526, 2009-Ohio-1704, ¶ 4-7; *State ex rel. Lucas Cty. Bd. of Mental Retardation & Dev. Disabilities v. Pub. Emps. Retirement Bd.*, 179 Ohio App.3d 439, 2008-Ohio-5754, ¶ 23-35 (10th Dist.), but apparently not in others, *see, e.g., State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 174 Ohio App.3d 135, 2007-Ohio-6594 ¶ 12-15 (10th Dist.), none of these cases address the issues before this court in the present case. Therefore, they are not helpful here.

{¶ 26} Furthermore, although OPERS and Akron General claim that appellants waived their argument that the dispute was not a justiciable controversy because appellants did not argue in the trial court that the January 24, 2005 staff determination was not final, appellants did sufficiently raise this argument in the court below in several pleadings. For example, in appellants' August 11, 2009 reply brief in support of their motion for summary judgment, appellants asserted that the January 24, 2005 letter was not a "final determination." Appellants also stated in footnote one that they "again question whether there was a final decision rendered by OPERS staff given the statement by the Ohio Attorney General in September 2005 that 'the question of whether former employees of Edwin Shaw Hospital are "public employees" for purposes of R.C. Chapter 145 is still under consideration by the administrative staff of the Public Employees Retirement Board.' " Likewise, in its memorandum in opposition to Akron General's motion for summary judgment, appellants again assert no "final determination" was made by OPERS, citing the Ohio Attorney General's September 20, 2005 letter. Further, appellants stated in their answer that they "deny that any employees of [Akron General] are 'public employees' entitled to participate in OPERS by virtue of their former employment with [Edwin Shaw]. Defendants deny that OPERS has made a contrary determination." Therefore, we find appellants did not waive their argument that the January 24, 2005 letter was not a "final determination."

{¶ 27} It is based upon these reasons that we conclude that the January 24, 2005 letter by OPERS' compliance officer was not a "final determination" as contemplated by Ohio Adm.Code 145-1-11(A). Ohio Adm.Code 145-1-11(A) is very explicit about the need for a "final determination" and the appellate procedure for contesting a final determination, and the January 24, 2005 letter from the OPERS compliance officer does not fit within the description and procedure set forth in Ohio Adm.Code 145-1-11(A).

Because the January 24, 2005 letter was not a "final determination" under Ohio Adm.Code 145-1-11(A), and OPERS never issued any other determination, no justiciable controversy exists to form the basis for a declaratory judgment action. Therefore, the trial court erred when it granted OPERS' motion for summary judgment. For these reasons, appellants' assignment of error is sustained on this issue. Given this determination, appellants' remaining arguments are moot.

{¶ 28} Accordingly, appellants' single assignment of error is sustained in part and rendered moot in part, and the judgment of the Franklin County Court of Common Pleas is reversed.

Judgment reversed.

SADLER and DORRIAN, JJ., concur.

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