[Cite as *Fouty v. Ohio Dept. of Youth Services*, 2005-Ohio-177.]

**IN THE COURT OF CLAIMS OF OHIO**

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| CLIFTON J. FOUTY | : | |
| Plaintiff | : | CASE NO. 2002-07118<br>Judge J. Warren Bettis |
| v. | : | <u>DECISION</u> |
| OHIO DEPARTMENT OF YOUTH SERVICES, et al. | : | |
| | : | |
| Defendants | | |

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**{¶ 1}** Plaintiff brought this action against defendants, the Ohio Department of Youth Services (DYS) and the Ohio Department of Health (ODH), alleging claims of breach of contract and negligence. The case is before the court for determination following a trial on the issues of liability and damages.

**{¶ 2}** Plaintiff was employed by DYS as a deputy superintendent at the Circleville Juvenile Correctional Facility from November 1, 2000, to September 7, 2001.[1] As such, plaintiff was a member of the unclassified civil service and was, in essence, an "at-will" employee. However, plaintiff contends that DYS altered the at-will status by entering into a Last Chance Agreement and an Employee Assistance Program (EAP) Participation Agreement.

**{¶ 3}** Plaintiff executed the aforementioned documents in April 2001, after he had submitted to a random drug test in accordance with DYS' Drug Free Workplace policy. On the date of his

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1 Plaintiff transferred to that position after more than 13 years in state government employment with the Department of Rehabilitation and Correction.

particular test, plaintiff was recovering from a minor illness. It is not clear whether plaintiff's health affected his ability to produce an acceptable drug test sample. Plaintiff did produce a sample but because it was too warm, it was not within the required temperature guidelines. As a result, plaintiff was given 36 ounces of water to drink and was instructed that he had three hours to produce another sample. Approximately one hour later plaintiff produced a second sample, but that sample was too cold. Having been at the testing site for approximately three hours, plaintiff explained to the monitor that he needed to return to DYS for an important meeting. Unbeknownst to him, the act of leaving the test facility was considered to be a "refusal" to consent to the procedure and, consequently, his test was deemed "positive."

**{¶ 4}** On April 4, 2001, two days after the random drug test, plaintiff received a "Notice of Pre-Disciplinary Hearing, Positive Drug and/or Alcohol Test." The pre-disciplinary hearing was scheduled for April 6, 2001, and was to be conducted by Bradley Rahr, the senior labor relations officer for DYS. In lieu of proceeding with that hearing, Rahr offered plaintiff the Last Chance Agreement that is at issue in this case. The agreement refers to, and includes, the EAP Participation Agreement. Rahr explained to plaintiff that he would recommend that plaintiff's employment be terminated unless he executed the agreements. One of plaintiff's first responsibilities under the agreements was to maintain contact with Debbie Shutt, a field services coordinator for the EAP and plaintiff's assigned case monitor. Upon initial contact, Shutt referred plaintiff to Dr. Gerlach for an assessment.

**{¶ 5}** Plaintiff met with Dr. Gerlach on April 18, 2001. Dr. Gerlach found that plaintiff did not have a drug problem, and opined that there had probably been a "screw up." However, Dr. Gerlach also questioned plaintiff about his alcohol consumption.

According to plaintiff, he related to Dr. Gerlach that after work he consumed between two to five beers per evening while he was waiting for dinner to be prepared. He also stated that his father had been an alcoholic. Plaintiff did not relate that he considered his own pattern of consumption to be a problem, or that it had resulted in any particular problems for him. Dr. Gerlach apparently felt otherwise; he recommended that plaintiff receive intensive out-patient treatment for alcoholism. That type of treatment would consist of three treatment sessions per week, with each session being at least three hours in length.

**{¶ 6}** Plaintiff took issue with Dr. Gerlach's determination because he had not been tested for alcohol abuse; did not realize that alcohol use was an issue; and did not feel that it was any of Dr. Gerlach's concern whether he drank beer in the privacy of his own home. Plaintiff expressed these concerns to Shutt when he contacted her after the appointment. However, Shutt's role was to refer plaintiff to a treatment center, Pickaway Area Recovery Services (PARS), for the treatment recommended by Dr. Gerlach.

**{¶ 7}** On May 23, 2001, plaintiff attended his first appointment at PARS. He was interviewed there by Greg Adams, a substance abuse counselor. Mr. Adams conducted his own assessment of plaintiff and concluded that he did not have a substance abuse or alcohol problem and did not need any further treatment. Plaintiff immediately communicated that information to Shutt, and also related that he was considering taking legal action. Shutt told plaintiff that she would review the information from PARS and get back to him later.

**{¶ 8}** Approximately six days later, Shutt sent plaintiff a certified letter dated May 29, 2001. The letter notes that the PARS assessment was diametrically opposed to Dr. Gerlach's initial assessment. The letter goes on to state: "I would remind you that part of your responsibility for maintaining compliance with the

[EAP] Participation Agreement is following through with treatment recommendations made at the time of the assessment. Your options at this point are to contact Dr. Gerlach to schedule another appointment to reassess his recommendations or to have your case closed with EAP. If you do schedule another appointment with Dr. Gerlach and he concurs with your second assessment that treatment is not indicated at this time, we will consider you to be in compliance with your Participation Agreement. If he still believes that treatment is indicated, you will need to follow through with his recommendations in order to maintain compliance. *** I hope to hear from you by June 4, 2001, so we can discuss your decision."

**{¶ 9}** Plaintiff did not receive the May 29, 2001, letter; it was returned to Shutt unclaimed. Shutt then sent a second certified letter, dated June 29, 2001, wherein she stated that she hoped to hear from plaintiff by July 9, 2001. The second letter was also returned unclaimed. Approximately ten days later, Shutt sent a third certified letter that was identical to the first two except that it stated that she hoped to hear from plaintiff by August 3, 2001, and added: "If we have not heard from you by that time, your case will be closed as noncompliant." That letter was also sent to plaintiff via regular mail. Plaintiff's spouse signed for the certified letter on July 30, 2001, and received the regular-mail letter that same day.

**{¶ 10}** Plaintiff's spouse testified at trial that she put the letters in a drawer where she routinely placed the couple's mail for plaintiff to review and to pay bills on Saturday mornings after pay days. Plaintiff found the letters on a Saturday morning after the August 3rd response deadline. The following Monday, August 13, 2001, he went to work and discussed the matter with Mary Tipton, a labor relations officer II, and a subordinate of Bradley Rahr. Tipton told plaintiff not to worry about it and advised him to contact Shutt's supervisor, Sanford Weinberg, Executive Director for the EAP. Acting upon that advice, plaintiff drafted a letter to Weinberg, dated August 16, 2001, explaining his circumstances and voicing his frustration with the EAP process. At about this same time, Shutt posted a letter to plaintiff stating that "we have determined that you are out of compliance with your Participation agreement." A copy of that letter was sent to Rahr. (Plaintiff's Exhibits 21 and 21a.) By the time that Weinberg responded to plaintiff's letter, DYS had initiated removal of plaintiff and the process was well under way.

**{¶ 11}** On August 21, 2001, after receiving his copy of Shutt's letter, Rahr issued an interoffice memo to Mona Reed, deputy director of human resources at DYS, advising her and other staff that plaintiff was not in compliance with his Last Chance and EAP Participation Agreements. On August 27, 2001, plaintiff received a notice that a pre-disciplinary hearing had been scheduled for August 31, 2001, as a result of an allegation that he had violated his Last Chance Agreement.

**{¶ 12}** On August 28, plaintiff was placed on administrative leave with pay pending investigation of the alleged violation. On this same date, plaintiff contacted Shutt and asked her if there was anything he could do to save his job, and whether it would be beneficial at that point to return to PARS for another assessment. Shutt advised plaintiff that if he did return to PARS he should request an assessment by Melissa Martin, the clinical director. Plaintiff did contact PARS and scheduled an appointment, which he attended, on September 4, 2001.

**{¶ 13}** On August 31, 2001, the pre-disciplinary hearing was held. Rahr was again scheduled to serve as hearing officer; however, plaintiff objected. As a result, Barry Braverman, also a labor relations officer, presided at the hearing. Braverman had not been involved in any of the events that led to the proceeding. Plaintiff testified at the hearing, explaining why he had not received Shutt's first two letters and why he had not responded to the third. He also offered a copy of his August 16, 2001, letter to Weinberg. On September 4, Braverman prepared a report (Plaintiff's Exhibit 29) for Michael Randle, the new superintendent for the Circleville facility. Randle had been plaintiff's supervisor for only a short time and, thus, also had not been involved in any of the events that led to the proceeding. Randle apparently accepted at face value the contents of the report, including the statement that: "[t]here was nothing presented to refute the allegations" against plaintiff. The report concluded that "*** the employer can support the just cause standard and disciplinary action is appropriate."

**{¶ 14}** Although Braverman's report is dated September 7, 2001, it was delivered to the appropriate personnel, a removal letter was processed, and plaintiff received the notice of his termination on September 5, 2001. The notice was presented to him by a DYS administrator in the parking lot of a Bob Evans restaurant. The person who gave plaintiff the notice told him that he would pray for him.

**{¶ 15}** Plaintiff contends that DYS breached the Last Chance Agreement by removing him on the basis of the alleged noncompliance with the EAP Participation Agreement. He further contends that the determination was both a breach of contract and an act of negligence for which DYS should be held liable. In addition, plaintiff maintains that ODH is also liable to him as a result of its handling of his EAP case. Specifically, plaintiff asserts that ODH erred in informing DYS that he was not in compliance with his EAP agreement and that, as a result of such misinformation, DYS was induced to breach the Last Chance Agreement with him. Plaintiff has alleged tort claims of inducement of breach of contract and negligence against ODH.

**{¶ 16}** In response to plaintiff's claims, defendant asserts that the only relevant issue in this case is that, in accordance with the Last Chance and EAP Participation Agreements that plaintiff voluntarily signed, he was required to complete a treatment program and he failed to do so. In short, defendant contends that plaintiff is a stereotypical alcoholic who was in denial about his problems and his need for treatment and, as stated in its post-trial brief, "all the excuses in the world will never change that fact." This court disagrees.

**{¶ 17}** Upon review of the evidence, testimony, and arguments of counsel, this court makes the following determination.

**{¶ 18}** At the outset, the court recognizes that as an unclassified employee plaintiff could be terminated at any time, for any reason not contrary to law. *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 103. However, as plaintiff has correctly asserted, the terms of such employment can be altered by express or implied contract. Id. at 103. See, also, *Chubb v. Ohio Bureau of Workers' Compensation* (1999), 115 Ohio Misc.2d 1. In this case, the Last Chance and EAP Participation Agreements were clearly contracts that expressly modified the terms of plaintiff's employment with DYS. Defendant has not argued otherwise. Accordingly, the terms of the contracts control.

I. THE CONTRACTS

A. The Last Chance Agreement

**{¶ 19}** The Last Chance Agreement (Plaintiff's Exhibit 7) provides, in pertinent part, that:

**{¶ 20}** "The Department agrees to ***:

**{¶ 21}** "Hold the removal order to be signed by the Director in abeyance pending successful completion of the EAP Participation agreement, and successful completion of the last chance agreement for the next five (5) year period.

**{¶ 22}** "The Employee agrees to ***:

**{¶ 23}** "1) Enter into, sign, and successfully complete an EAP Participation and Last Chance Agreements.

**{¶ 24}** "***.

**{¶ 25}** "It is agreed by all of the parties that if the employee violates the Last Chance Agreement, The EAP Participation Agreement, or if there is continued violation of the Random Drug Testing Policy; the appropriate discipline shall be termination from his/her position. *The Department need only prove that the employee violated the above agreement(s)/rule(s)* and the [SPBR] shall have no authority to modify the discipline issued by the Department. All parties acknowledge the waiver of the contractual due process rights to the extent stated above.

**{¶ 26}** "This Last Chance Agreement is in force and effect for five (5) years ***." (Emphasis added.)

**{¶ 27}** In addition to the above, the Last Chance Agreement set forth six additional requirements that plaintiff had to commit to, including at least six randomly scheduled follow-up tests within 12 months, or for up to 60 months, if required by the EAP provider. The cost of each test was to be paid by plaintiff, within three working days of the test. A positive test result on any test would result in termination. The agreement further provided that plaintiff would also be subject to "the normal random drug and/or alcohol tests."

**{¶ 28}** The EAP Participation Agreement

**{¶ 29}** The EAP participation agreement provides, in pertinent part, that plaintiff and DYS:

**{¶ 30}** "*** agree to enter into a contract wherein the employee *voluntarily* agrees to seek assistance from a Health Care

Provider under the Ohio Employee Assistance Program (Ohio E.A.P.), to deal with the 'problem of having tested positive on a random drug test by a refusal to test.'

**{¶ 31}** "The employee agrees to participate in a plan for a period of 365 days. Said plan will be developed by the Health Care Provider. The employee agrees to meet all of the requirements set forth in that plan. The employee also agrees to verification as to whether or not the employee is keeping scheduled appointments and is in compliance with the agreed to plan. Said verification will be made by the Case Monitor assigned in accordance with the employee's health plan contract.

**{¶ 32}** "*A Participation Outline*, *including the lengths of the various aspects of service and the frequency of appointments or treatment sessions, shall be attached to and made a part of this agreement as soon as possible, but not later than thirty (30) days from the date of signing.*

**{¶ 33}** "***.

**{¶ 34}** "The employee by signing this contract acknowledges that s/he has received a copy of this contract, and *** hereby *voluntarily* enters into said contract ***.

**{¶ 35}** "DYS further agrees that if the employee successfully completes the agreed to plan as certified by the Ohio E.A.P. or its designee, *DYS will review the proposed discipline and seriously consider modification of the discipline imposed.*" (Emphasis added.)

**{¶ 36}** Before turning to more substantive questions, several matters bear consideration. First, the genesis of this entire case is a questionable drug test. Plaintiff's uncontroverted testimony was that he gave his urine samples while standing in a restroom stall with the door open and a monitor present. There is no explanation for the reported temperature irregularities other than defendant's positing that individuals with substance abuse problems frequently attempt to cheat the system by warming up a "clean" sample obtained from someone else, or produced at a time when the individual had not been using drugs or alcohol.[2] In this case, the evidence fails to demonstrate that plaintiff resorted to such measures himself.

**{¶ 37}** The court found plaintiff to be in all respects a very candid, credible and persuasive witness. He testified that he had a residual high fever after having had the flu the previous few days. Plaintiff further testified that when he explained to the individual at the test site that he had to get back to work after providing the second sample, he was not told at any time that leaving the facility would be considered a refusal or that it would qualify as a positive test. However, DYS' testing policy does state that employees are required to report for testing "*regardless* of work assignment." (Plaintiff's Exhibit 2.) While employees are responsible for reading and understanding the terms of that policy, this court cannot conceive of a reason why the test monitor would not, as a matter of duty, or at the very least as a simple courtesy, have cautioned plaintiff about the consequences of his leaving after two, unexplained, unsuccessful, test results. In any event, the testing facility was a private entity and, as such, was not a party to this action. The court is persuaded that, for whatever reason, plaintiff was not apprised of the consequences of his actions.

**{¶ 38}** In addition, while there was testimony at trial to the effect that alcohol is widely recognized as a "drug," and that treatment methods are the same for both drug and alcohol abuse

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[2] Otherwise, the only evidence on this issue was Dr. Gerlach's comment that the test results had probably been a "screw-up."

problems, the evidence established that DYS had abandoned the practice of randomly testing for alcohol use. In fact, the document that plaintiff received on April 2, 2001, was captioned "Notification of Random Drug Testing Appointment." (Plaintiff's Exhibit 4.) The portion of the caption that read: "and/or alcohol" was crossed out. Two other references to alcohol were crossed out in the body of the notice. The evidence is clear that plaintiff was tested only for drug use. The work-rule violation he was charged with was "DYS Directive B-19, Rule# 18c, Misuse of Drugs-Violation of the Drug-Free Workplace Policy."[3] (Plaintiff's Exhibit 6.) Nevertheless, it is plaintiff's use of alcohol that is at issue in this case.

**{¶ 39}** Further, the court finds that it is at best a misnomer to characterize the first document as a "Last Chance" agreement. Under the circumstances, it was clearly an "only" chance.[4] Plaintiff had never previously had any problems of this nature nor had he been subject to any discipline; his work record was unblemished; there were no allegations that he had ever been observed to be under the influence while on duty, or that his work product or habits were suspect in any way. Early on in the process, plaintiff submitted to a "return-to-duty" drug test, the results were negative, and he resumed his position with DYS on or

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There is a separate work rule regarding "Possession/Consumption of Alcoholic Beverages."

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In an analogous case, the Third District Court of Appeals held that a Last Chance Agreement was invalid where it was executed with an employee who, of his own volition, and with no prior knowledge or disciplinary action taken on the part of the employer, entered into a drug treatment program. The court compared the facts to the employer's use of a Last Chance Agreement with another employee who had entered treatment after a staged "intervention," planned in part by the employer, and who was not presented with a Last Chance Agreement until after he had two subsequent drug-abuse relapses. See *DePalma v. City of Lima et al.*, 155 Ohio App.3d 81, 2003-Ohio-5451, aff'd on appeal *City of Lima v. DePalma*, 2004-Ohio-6401.

about April 25, 2001. He worked without incident until his termination in September of that year. He continued to receive praise for his work. On July 9, 2001, he received a "Letter of Appreciation" from Ernie Moore, Bureau Chief of Operations, concerning his role in "transitioning the populations of two of [DYS'] facilities." The letter speaks of plaintiff's hard work and professionalism and concludes that: "[w]e are fortunate to have you as an employee in this agency." (Plaintiff's Exhibit 32.) As late as August 15, 2001, Michael Randle issued a memo notifying all DYS staff that plaintiff would be the acting superintendent in Randle's absence. (Plaintiff's Exhibit 34.) In short, plaintiff's work record contains no indication that alcohol was affecting his job performance. There was, however, some suggestion at trial that there was animosity toward plaintiff because long-time DYS employees had resented "outsiders" coming in and taking the department's top-ranking positions.

**{¶ 40}** Finally, the court finds that it is ludicrous to maintain that plaintiff "voluntarily" entered into the agreements in question. Plaintiff was an unclassified employee; he either had to sign the agreements or be fired from a high-ranking and well-paid position for which there could be no replacement, especially in light of the purported reason for his termination.

I. THE LAW

**{¶ 41}** It is axiomatic that "[a] contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty." *Ford v. Tandy Transp., Inc.* (1993), 86 Ohio App.3d 364, 380, citing Restatement of the Law 2d, Contracts (1981) 5, Section 1. Contracts are to be construed so as to give effect to the intentions of the parties. *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244. It is well-settled that the intentions of the parties are to be ascertained from the language of the instrument." *System Automation Corporation v. Ohio Department of Administrative Services,* Franklin App. No. 04AP-97*,* 2004-Ohio-5544, citing *Blosser v. Enderlin* (1925), 113 Ohio St. 121, paragraph one of the syllabus. In reviewing the language, common words appearing in a written instrument will be given their ordinary meaning. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, at paragraph two of the syllabus.

**{¶ 42}** A contract that is, by its terms, clear and unambiguous requires no real interpretation or construction, and courts will enforce such contracts as written. *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority*, 78 Ohio St.3d 353, 1997-Ohio-202. However, where the terms of a contract are unclear or ambiguous, or when circumstances surrounding the agreement give the plain language special meaning, extrinsic evidence is admissible to ascertain the intent of the parties. *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635, 638. Generally, a contract is to be construed against the party who drew it. *Cent. Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411.

**{¶ 43}** Where the language of a contract is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 1996-Ohio-393.

**{¶ 44}** It is also fundamental that: "[a]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expedience and faithfulness, the thing it agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract." *Scioto Memorial*

*Hosp. Ass'n v. Price Waterhouse & Co.* (Dec. 21, 1993), Franklin App. No. 90AP-1124, quoting 38 American Jurisprudence, 662, Section 20.

I. ANALYSIS

**{¶ 45}** Initially, it is noted that in attempting to apply the law to the facts of this case, the court was reminded of an oft-quoted passage from a case that addresses intentional infliction of emotional distress. Although this case involves distinctly different legal principles, the court finds the following description to be equally applicable here: "the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous'!" *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 374-375.

**{¶ 46}** That sentiment aside, the court finds for the reasons that follow that the agreements contain conflicting terms; that both defendants breached their agreements with plaintiff; and that both failed to perform their duties under the agreements with care, skill, reasonable expedience, and faithfulness. In so doing, defendants essentially created a "no chance" agreement for plaintiff.

**{¶ 47}** Plaintiff was required to successfully complete both the Last Chance and EAP Participation Agreements. Of the two, the crux of the documents is the EAP Participation Agreement. That is the document which plaintiff allegedly failed to comply with, and which led to Shutt's August 17, 2001, letter stating that plaintiff had failed to "follow through with treatment recommendations."

**{¶ 48}** Examination of the agreement reveals that it contains a provision that is in glaring conflict with the terms of the Last Chance Agreement. Specifically, the Last Chance Agreement explicitly states the removal order that was presented to plaintiff, but not signed by the director, would be held in abeyance pending successful completion of the agreements. The language is reiterated at the end of the document where it is stated that it was "agreed by all of the parties that if the employee violates the [agreements] the appropriate discipline shall be termination." By contrast, the EAP Agreement states in its conclusion that, if plaintiff successfully completed his obligations, DYS would "review the proposed discipline and seriously consider modification of the discipline imposed." In short, the Last Chance Agreement is a straightforward, no options, do-this-and-you-will-not-be-fired type of contract; whereas the EAP Agreement provides a loophole: even if plaintiff were to have successfully completed five full years of the agreements, DYS needed only to "seriously consider" whether plaintiff still should be fired, or be subject to some other discipline short of termination such as, perhaps, a demotion, pay-cut, or transfer.

**{¶ 49}** As a result of this conflict, the court must look beyond the "four corners of the contracts" to determine the intent of the parties. *Shifrin*, supra. For example, the EAP Policies and Procedures Manual states that:

**{¶ 50}** "The Ohio EAP Participation Agreement was designed to help State of Ohio employees whose job performance deficiencies are, at least in part, due to personal problems. The agreement, which is granted at management's discretion, allows an employee the opportunity to remediate job performance deficiencies [while] disciplinary action is held in abeyance. It shall therefore be the goal of all involved parties to have the employee's personal problems resolved and job performance brought to an acceptable standard."

**{¶ 51}** Although the evidence fails to demonstrate that plaintiff had personal problems, drug/alcohol abuse problems, or that his job performance was suffering in any way, DYS nevertheless offered him the EAP as a method of remediating the problem of allegedly testing positive by refusing to test. Based upon this document, and the evidence and testimony adduced at trial, the court concludes that the parties' objective was to preserve plaintiff's standing and position within the department, even though defendants' actions clearly belie any such intent.

**{¶ 52}** With respect to ODH's breach of contract, it is apparent its EAP Agreement turned upon plaintiff's participation in a "plan" as set forth in a to-be-developed participation outline. The language of the document states that the participation outline, including the lengths of the various aspects of service and the frequency of appointments or treatment sessions, "shall" be attached to and made a part of the agreement as soon as possible, but not later than 30 days from the date of signing.

**{¶ 53}** The evidence is clear that no plan or participation outline was ever developed, much less attached to the agreement within the specified time period. The participation "outline" prepared by Dr. Gerlach (Plaintiff's Exhibit 13) states that the recommended treatment plan was "intensive outpatient"; however, there was nothing indicated in the spaces provided "for days of attendance"; "times of attendance"; "estimated number of days"; or "estimated discharge date." Dr. Gerlach simply made the handwritten notation that those matters were "to be determined by EAP."

**{¶ 54}** EAP referred plaintiff to PARS for the recommended treatment. However, as stated previously, no treatment plan was developed there, or undertaken by plaintiff, because Adams found that no treatment was needed. Although defendant maintains that Adams was not a qualified substance abuse professional, and could not provide a binding assessment, there is nothing in the agreement that put plaintiff on notice of that fact; nor is there any logical reason why he should have questioned the credentials of the health care providers he was obligated to meet with. Plaintiff testified quite credibly that after he reported the outcome of the PARS assessment to Shutt, he asked if he "was done" and he relied on her representation that she would "get back to him" regarding the matter. Shutt never did; other than by sending certified letters, two of which she knew plaintiff did not receive. In the court's view, the duty of care, skill, reasonable expedience, and faithfulness would have mandated that after the 30 days had passed and there had been no resolution as to what type of participation, if any, was required, Shutt should have immediately intensified her efforts to contact plaintiff.

**{¶ 55}** Further, the EAP Participation Agreement itself states that verification of the employee's participation is required and that it is the case monitor's duty to make such verification. Here, Shutt testified that her only attempt to verify plaintiff's participation was through the certified letters because she had consulted with her supervisor and determined that the information they wanted to communicate would be better stated in writing. Shutt stated that she made that decision, in part, because plaintiff had threatened legal action. As to why she continued to send certified letters even after discovering that the first and second letters had not been claimed, Shutt gave no convincing explanation. While defendant contends that plaintiff deliberately avoided the certified letters, the court finds that the weight of the evidence demonstrates otherwise. Plaintiff gave reasonable explanations as to why he did not drive to the post office to pick up the first two letters, and the testimony of his spouse was entirely credible on the question of why she dropped the third letter in a drawer and thought nothing else of it.

**{¶ 56}** Beyond the common law duty and the terms of the agreement itself, EAP's internal policies and procedures clearly required more of an effort to verify plaintiff's participation than was made by Shutt. Defendant's witnesses attempted to ignore the existence of those policies by categorizing them as mere "guidelines"; however, the court made clear at trial that such efforts were disingenuous. The policies provide that:

**{¶ 57}** "AT FIRST INDICATION Of NON-COMPLIANCE WITH TX [TREATMENT] PLAN AND/OR WEEKLY CONTACT WITH OHIO EAP CASE MONITOR:

**{¶ 58}** "Contact employee immediately and establish the need for weekly contact. Explain to the employee why this is important.

**{¶ 59}** "If employee fails to follow schedule of checking-in attempt [to] reach him/her by phone calls to both the residence and worksite. After three attempts on alternate days (total of 5 work days), write employee immediately and send Certified Mail/ Return Requested.

**{¶ 60}** "Contact Union [or] Management Representative for assistance in notifying employee.

**{¶ 61}** "If no contact has been established after these efforts, staff case in clinical staff meeting for final disposition."

**{¶ 62}** Shutt acknowledged in her testimony that she did not follow these procedures with plaintiff. She stated that receiving back the first unclaimed certified letter raised a concern that plaintiff was noncompliant at that point. Yet, Shutt made no attempt, at that time or any other, to telephone plaintiff, either at work or at home, and made no attempt to contact a management representative regarding the matter. Even assuming that strict adherence to "guidelines" was not required, the court again finds that the common law duty of reasonable care, skill, expedience, and faithfulness demanded more of an effort from ODH, Shutt, and the

EAP staff. There is simply no satisfactory explanation for EAP's lack of performance.

**{¶ 63}** On the other hand, as defendants have argued, plaintiff also had an obligation to maintain contact with the EAP. However, in contrast with EAP's written procedures, neither the Last Chance nor the EAP Participation Agreements set forth any direction regarding when or how plaintiff was expected to meet this obligation other than the provision that: "the employee will keep in touch with the OHIO EAP consulting Intake Coordinator as often as is designated." Based upon the evidence and testimony presented, this court is persuaded that plaintiff was never told that he had to call Shutt on any regular, specific basis. Of the two times that he was given specific direction (to call after he had met with Dr. Gerlach and again after he had gone to PARS), he did as he was told. Shutt acknowledged the same at trial. Considering how the situation had developed and progressed, it is understandable that plaintiff may have been hesitant to take the initiative in maintaining contact. Based upon the language of the agreements and the internal policies and procedures of the EAP, the court finds that the burden was on defendant to establish the times and method of contact, and it breached its agreement with plaintiff by failing to develop a treatment plan (or to finalize the issue of whether one was needed) and to verify that plaintiff knew what was expected of him and how to comply with such expectations.

**{¶ 64}** In summary, the court concludes that ODH had a contract with plaintiff (the EAP Participation Agreement); that it negligently failed to perform its obligations under that contract and that it is liable in damages for breach of its obligations. Having so found, the court will not address plaintiff's theory of procurement of breach of contract.

**{¶ 65}** Turning to DYS' breach of contract, the court finds that this defendant failed to perform its obligations with care, skill, reasonable expedience, and faithfulness, when it accepted without question ODH’s determination that plaintiff was out of compliance.

**{¶ 66}** Given that the court has interpreted the objective of the parties to be working with plaintiff to preserve his standing and position in the department, the court finds that DYS had a duty under the contract and at common law to at least examine the circumstances and the EAP findings and give good faith consideration to whether termination was warranted for such a minor infraction as was at issue. The court appreciates that there may have been confidentiality reasons that prohibited interaction with EAP; however, DYS could certainly have made an effort to discuss with plaintiff the EAP findings and forewarn him that his behavior needed to change. The court also recognizes that DYS did conduct a pre-termination hearing; however, the evidence and testimony reveal that no genuine consideration was given to plaintiff’s explanation of the situation. Rather, the hearing appeared to be just one more step in the documentation process necessary for DYS to fire plaintiff without further ado.

**{¶ 67}** Additionally, the court agrees with plaintiff’s contention that the contract itself places the burden on DYS to prove that plaintiff violated the agreements before action could be taken against him. Specifically, with respect to plaintiff’s appeal rights that DYS need only prove that the employee violated the agreements and the State Personnel Board of Review would have no authority to modify the discipline imposed. The court interprets that language to mean that DYS was required to prove the same at the pre-disciplinary hearing and to this court. It did not do so. DYS’ actions in general appeared to be geared only to removing plaintiff from his position, and to not helping him in any of the ways that the EAP program (which DYS offered to plaintiff of its own volition and discretion) was designed to provide. In short, the court finds that evidence demonstrates that DYS cannot avoid liability by deferring to ODH's determination.

**{¶ 68}** For the forgoing reasons, the court concludes that plaintiff has proven his breach of contract claims by a preponderance of the evidence.

I. DAMAGES

**{¶ 69}** As a result of his removal from employment, plaintiff has suffered lost wages, benefits, as well as various other losses associated with his withdrawals from retirement accounts. Plaintiff presented evidence on this issue (Plaintiff's Exhibit 36A) and offered the expert testimony of Jeff Ankrom, Ph.D., a professor of economics at Wittenberg University. Dr. Ankrom testified regarding the contents of his written report (Plaintiff's Exhibit 36) and explained plaintiff's past and future wage loss, as well as his lost benefits, and retirement withdrawals. There was no dispute concerning the past losses.

**{¶ 70}** With regard to the future items, plaintiff was removed from his position as deputy superintendent, earning approximately $61,297 per year and, at the time of trial, was working as an installer for a cable company. Defendants suggested that plaintiff could have mitigated his future losses by obtaining other state employment, which would have been at a higher rate of pay, rather than continuing to work in the installer position. The court was not persuaded by that argument, nor was Dr. Ankrom. In light of the negative employment record that defendants established for plaintiff by removing him from his position on the basis of a drug use violation, Dr. Ankrom opined, and this court agrees, that it was highly unlikely that plaintiff could find another state employment position of any kind, much less one of the same rank and pay scale.

**{¶ 71}** The court found Dr. Ankrom to be a credible and persuasive witness. Defendants did not present any evidence or testimony opposing his opinions. Therefore, based upon the totality of the evidence submitted, the court finds that defendants are liable in damages in the amount of $132,275 for past damages and $241,725 for future damages;[5] a total of $374,000. Plaintiff is also entitled to reimbursement for the $25 filing fee incurred to bring this action.

I. PREJUDGMENT INTEREST

**{¶ 72}** Plaintiff is also seeking prejudgment interest, at least on his award of past lost wages, based upon R.C. 2743.18(A)(1) and the rule of law set forth in *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 1995-Ohio-131. Plaintiff's argument also attempts to distinguish this case from *Chubb v. Ohio Bureau of Workers' Compensation*, supra, wherein the court relied upon *Royal Electric* in denying an award of prejudgment interest. Upon review, the court finds that here, just as in *Chubb*, the *Royal Electric* case is distinguishable because the award in that case could easily be fixed in time, by the date of "substantial completion" of the work. In this type of case, plaintiff's awards continue to grow on a daily basis up to the time of trial. Thus, the case law does not support an award of prejudgment interest in the instant case. Therefore, plaintiff's claim for prejudgment interest is denied and judgment shall be entered herein accordingly.

**IN THE COURT OF CLAIMS OF OHIO**

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[5] These amounts reflect mathematical corrections made upon suggestion of defendants' counsel.

CLIFTON J. FOUTY :

Plaintiff : CASE NO. 2002-07118
Judge J. Warren Bettis

v. :

JUDGMENT ENTRY

OHIO DEPARTMENT OF YOUTH :
SERVICES, et al.

:

Defendants

: : : : : : : : : : : : : : : : :

This case was tried to the court on the issues of liability and damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is hereby rendered in favor of plaintiff in the amount of $374,025, which includes the filing fee paid by plaintiff. Court costs are assessed against defendants. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. WARREN BETTIS
Judge

Entry cc:

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