IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

State of Ohio, ex rel. Tad Lockard,	:	
Relator,	:	Case No. 14CA5
v.	:	
Wellston City School District Board of Education,	:	DECISION AND JUDGMENT ENTRY
Respondent.	:	**RELEASED: 5/29/2015**

APPEARANCES:

Sue A. Salamido, Cloppert, Latanick, Sauter & Washburn, Columbus, Ohio, for Relator.

Sandra R. McIntosh, Freund, Freeze & Arnold, Columbus, Ohio for Respondent.

McFARLAND, A.J.,

{¶1} The Relator Tad Lockard filed a petition for writ of mandamus seeking to compel the Respondent Wellston City School District Board of Education to provide him with salary schedule service credit for his active duty military service and to provide back wages for the years he was not properly placed on the salary schedule. Lockard claims that he has been employed as a full-time teacher with Wellston since the 2007-2008 school year. Prior to his employment there, he served as a member of the Army Reserve and National Guard and he continues to serve in the National Guard. Lockard alleges that when he was hired by Wellston, he provided documentation of his military service, but was notified by Wellston that his service in the Army Reserve and National Guard did not qualify him for any service credit.

{¶2} During the 2013-2014 school year, however, he alleges that an administrator for Wellston informed him that his service in the Army Reserve and National Guard did entitle him to military service credit. Lockard alleges that military service credit may also be purchased through the State Teachers Retirement System ("STRS") for retirement service credit. He contends that he contacted STRS and provided documentation of his military service and was told that he was entitled to purchase 2.44 years of service credit for retirement purposes. Lockard alleges that he contacted his union representative to determine if Wellston had provided him with false information concerning his military service credit and then retained counsel to contact Wellston. He contends that Wellston informed him that unless active duty service was for at least eight consecutive months, he had no right to receive any military service credit. Because Lockard's active duty service was performed in increments of less than eight months, Wellston argues that he is not entitled to any military service credit.

{¶3} Wellston filed an answer and a motion for judgment on the pleadings pursuant to Civ.R. 12(C). Wellston argues that Lockard is not entitled to a writ of mandamus because he has no clear right to the relief requested and Wellston has no duty to provide the relief as Lockard's longest period of continuous active duty service was 134 days, or approximately four and a half months, and they interpret R.C. 3317.13(A)(1)(d) to require eight continuous months or more of active military service for a partial year to be counted as a full year. Wellston also contends that Lockard failed to exhaust his administrative remedies under the applicable collective bargaining agreement before filing the complaint. Therefore, Wellston contends that Lockard has a

plain and adequate remedy in the ordinary course of law. Last, Wellston argues that the complaint is barred by laches.

{¶4} Lockard opposes Wellston's motion for judgment on the pleadings, arguing for a different statutory interpretation of R.C. 3317.13(A)(1)(d). He also contends that questions involving the statutory interpretation of R.C. 3317.13(A)(1)(d) fall outside the scope of the collective bargaining agreement.

{¶5} We find that Lockard's grievance is governed by the collective bargaining agreement, which provides a grievance procedure and arbitration. Therefore, Lockard has an adequate remedy in the ordinary course of law and is not entitled to the extraordinary judicial remedy of mandamus. Thus, we **GRANT** Wellston's motion and **DISMISS** Lockard's petition for a writ of mandamus.

Standard of Review

{¶6} A motion for judgment on the pleadings is governed by Civ.R. 12(C). Civ. R. 12(C) provides: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "A copy of any written instrument attached to a pleading is a part of the pleading for all purposes." Civ.R. 10(C). Determination of a motion for judgment on the pleadings is restricted solely to the allegations in the pleadings and any writings attached to the complaint. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165, 297 N.E.2d 113 (1973). When considering a defendant's Civ.R. 12(C) motion for judgment on the pleadings, "the trial court is required to construe as true all the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party." *Whaley*

v. Franklin Cty. Bd. of Commrs., 92 Ohio St.3d 574, 581, 752 N.E.2d 267(2001) (citing *Peterson v. Teodosio, supra*). As the court explained in *Case W. Res. Univ. v. Friedman*, 33 Ohio App.3d 347, 515 N.E.2d 1004 (11th Dist. 1986):

> A motion for judgment on the pleadings is the same as a motion to dismiss filed after the pleadings are closed and raises only questions of law. The pleadings must be construed liberally and in a light most favorable to the party against whom the motion is made, and every reasonable inference in favor of the party against whom the motion is made should be indulged. *Vaught v. Vaught* (1981), 2 Ohio App.3d 264, 2 OBR 293, 441 N.E.2d 811; *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 297 N.E.2d 113. The motion should be denied if it cannot be determined from the face of the pleadings that the pleading does not state a claim upon which relief can be granted.

Id., 33 Ohio App.3d at 348, 515 N.E.2d at 1005; *see, also, Shockey v. Winfield*, 97 Ohio App.3d 409, 411-412, 646 N.E.2d 911 (4th Dist. 1994); *JP Morgan Chase Bank, N.A. v. Belden Oak Furniture Outlet, Inc.,* 5th Dist. Stark App. No. 2010CA49, 2010-Ohio-4444, ¶ 20 ("The main difference between a Civ.R. 12(B)(6) motion and a Civ.R. 12(C) motion is timing and the material which may be considered. A Civ.R. 12(B)(6) motion is ordinarily filed prior to the answer and consideration of the motion is limited solely to the complaint * * * Civ.R. 12(C) allows the court to consider both the complaint and the answer."). Dismissal is appropriate under Civ.R. 12(C) when, after construing all material allegations in the complaint, along with all reasonable inferences drawn therefrom in favor of the nonmoving party, the court finds that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *State ex rel. Midwest Pride IV, Inc. v. Pontius*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996).

{¶7} Both Lockard and Wellston have attached a number of documents to their complaint and answer. To his complaint, Lockard attached an affidavit of verification,

documentation of his military service, his STRS application for military credit, and the STRS documentation informing him he was entitled to purchase 2.44 years of service credit. To its answer, Wellston attached copies of the applicable collective bargaining agreements in support of its defense that Lockard must pursue arbitration through the collective bargaining agreement.

{¶8} In analyzing whether to consider documents attached to the complaint or the answer, we note that Civ.R. 10(C) allows a written instrument attached to a complaint or an answer to be part of the pleadings for all purposes. In *State ex rel. Vandenbos v. Xenia*, 2nd Dist. Greene App. No.14CA14, 2015-Ohio-35, the court analyzed whether a document attached to a pleading is a "written instrument" to be properly considered on a Civ.R.12(C) motion:

> This court considers the allegations in the complaint and the answer when deciding a motion for judgment on the pleadings. *Pontious* at 569. Pleadings are defined by rule as a complaint, answer, reply to a counterclaim, answer to a cross-claim, third-party complaint, and a third-party answer. Civ.R. 7(A). In this case, the record contains a verified complaint and an answer.
>
> Civ.R. 10(C) provides that a "copy of any written instrument attached to a pleading is a part of the pleading for all purposes." This court has not construed "written instrument" to mean any document attached to a pleading. Rather,
>
> > the term "written instrument" in Civ.R. 10(C) has primarily been interpreted to include documents that evidence the parties' rights and obligations, such as negotiable instruments, "insurance policies, leases, deeds, promissory notes, and contracts." 1 Klein & Darling, Baldwin's Ohio Practice (2004), 744–45. We conclude that a trial court's opinion in another matter is not the sort of written instrument proper for designation as "a part of the pleading" in the context of a motion for judgment on the pleadings.

Inskeep v. Burton, 2d Dist. Champaign No.2007CA11, 2008–Ohio–1982, ¶ 17. *But see Toman v. Humility of Mary Health Partners*, 7th Dist.

> Mahoning No. 13MA105, 2014–Ohio–4417, ¶ 9 (considering "any documents attached to those pleadings").
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> Here, Xenia and Norris have attached a number of documents to their answer, several of which are orders and opinions filed in the previous matters. We do not consider those opinions and orders. *See Inskeep*. Similarly, we do not consider pleadings filed in those other actions. We further conclude that the remaining attachments (excerpts of civil service rules, civil service meeting notes and transcript, and a memorandum concerning Xenia's position on Vandenbos's seniority credit) are more like a trial court's opinion than a negotiable instrument, insurance policy, deed, or contract, and likewise not the sort of written instrument proper for designation as "part of the pleading" under *Inskeep*. Thus, we consider the allegations contained in the verified complaint and the answer in deciding Respondents' motion for judgment on the pleadings.

Id. at ¶ 12-14.

{¶9} We agree with the analysis in *Vandenbos*; not everything attached to a pleading is a "written instrument" under Civ.R. 10(C). However, in reviewing the parties' attachments, we believe that all of the documents attached to the complaint and the answer are documents that may be properly considered by this court in rendering a judgment on Wellston's motion for judgment on the pleadings under Civ. R. 12(C). Lockard's exhibits establish his military service period and set forth his entitlement to purchase STRS service credit. Wellston's exhibits are the four collective bargaining agreements applicable to Lockard's employment period. Thus, we will consider the pleadings and their attachments in deciding Wellston's motion under Civ.R. 12(C).

{¶10} Mandamus actions are governed by Ohio Revised Code Chapter 2731. A mandamus is a writ to enforce performance of a specific act by a public official or agency and will only be issued where there is a clear legal duty to act. A writ of mandamus will not be issued when there is a plain and adequate remedy in the ordinary course of law. See R.C. 2731.05. In order for the court to grant a writ of mandamus, the

relator must show that: (1) the relator has a clear legal right to the relief prayed for; (2) respondents are under a clear legal duty to perform the acts; and (3) relator has no plain and adequate remedy in the ordinary course of law. *See State ex rel. Boardwalk Shopping Ctr., Inc. v. Ct. Apps. for Cuyahoga Cty.*, 56 Ohio St.3d 33, 34, 564 N.E.2d 86, 87 (1990); *State ex rel. Hodges v. Taft*, 64 Ohio St.3d 1, 3, 591 N.E.2d 1186, 1188 (1992), citing *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41, 374 N.E.2d 641 (1978); *see, also, State ex rel. Lewis v. Bd. of Cty. Commrs. of Jackson Cty.,* 4th Dist. Jackson App. No. 98CA830, 2002-Ohio-1424; *Conley v. Corr. Reception Ctr.*, 141 Ohio App.3d 412, 415, 2001-Ohio-2365, 751 N.E.2d 528, 530 (4th Dist. 2001).

{¶11} The dispute between Lockard and Wellston involves whether Lockard has the right to compel Wellston to provide him with salary schedule service credit for his active duty military service and to provide back wages for the years he was not properly on the salary schedule as set forth in R.C. 3317.13(C). Wellston argues that under Article 15, Section 15.01(B) of the collective bargaining agreement, a teacher is entitled to military credit as set forth in R.C. 3317, but Lockard cannot establish that he qualifies for military credit under R.C. 3317.13(A)(1)(d). Therefore, Wellston argues that Lockard does not have a clear legal right to the relief prayed for in the petition. Additionally, Wellston argues that Lockard is not entitled to a writ of mandamus because he has a plain and adequate remedy in the ordinary course of law: the parties' collective bargaining agreement requires Lockard to arbitrate his grievance.

Legal Analysis

{¶12} We first address whether Lockard has a plain and adequate remedy in the

ordinary course of law to pursue his claim through arbitration under the collective bargaining agreement ("Agreement"). Our resolution of this issue in favor of arbitration would render the parties' other arguments moot. *See Jones v. Wheelersburg Local School Dist.,* 4th Dist. Scioto App. No. 12CA3523, 2013-Ohio3685, ¶ 63 ("'It is not the duty of the court to answer moot questions.'" *Tschantz v. Ferguson,* 57 Ohio St.3d 131, 133, 566 N.E.2d 655 (1991), quoting *Miner v. Witt,* 82 Ohio St. 237, 92 N.E. 21, syllabus (1910).).

{¶13} Under Article 3 of the Agreement, a grievance is defined as, "a claim that there has been a violation, misinterpretation, or misapplication of any provisions of this agreement." Under the grievance procedures outlined in Article 3.03, claims of violations, misinterpretations, or misapplications of the Agreement proceed through a four-level process, culminating with arbitration before the American Arbitration Association. Experience credit, including active military credit, is governed by Article 15.01. Subpart B provides, "Experience granted on the salary schedule will be given only for credit allowed by the State Foundation Programs including up to five (5) years military credit." The State Foundation Program referenced in Article 15.01(B) is detailed in R.C. 3317.13, with the provisions concerning military credit found in R.C. 3317.13(A)(1)(d).[1]

{¶14} Lockard concedes that his grievance with Wellston concerns its decision not to provide him with experience credit under Article 15.01(B) of the Agreement, but argues that he is not required to follow the grievance procedures. He contends that

[1] Although there are four different collective bargaining agreements applicable to the relevant time period, the relevant provisions under Article 3 and Article 15 are identical in each of the four agreements.

even though his grievance concerns the alleged misinterpretation or misapplication of experience credit, the parties' underlying legal argument involves a statutory interpretation and therefore his grievance falls outside the grievance procedures. Lockard cites *State ex rel. Walker v. Lancaster City School Dist. Bd. of Edn.*, 79 Ohio St.3d 216, 1997-Ohio-396, 680 N.E.2d 993 (1997) and *Tapo v. Columbus Bd. of Edn.*, 31 Ohio St.3d 105, 509 N.E.2d 419 (1987) to support his argument that disputes concerning statutory interpretation fall outside of the collective bargaining agreement. However, neither *Walker* nor *Tapo* stand for such a broad proposition of law.

{¶15} In *Walker*, the Court found that the collective bargaining agreement did not address calculation of days of substitute teaching experience for service credit purposes, therefore the parties' dispute concerning service credit for substitute teaching experience was not covered by the collective bargaining agreement or the grievance procedures set forth therein. The Court also found no place in the agreement that addressed the school board's authority to revoke previously granted service credit. Thus, the Court did not base its decision on whether the dispute involved the interpretation of a statute, but on whether the "grievable issue" – service credit for substitute teaching and the revocation of it – fell within the scope of the collective bargaining agreement. Finding no provisions governing the grievance, the Court held that the arbitration procedure in the agreement did not constitute an adequate legal remedy in the ordinary course of law.

{¶16} Likewise, in *Tapo*, the parties had stipulated that the plaintiff-teachers were qualified for placement in a higher paying category on the salary schedule and that

the collective bargaining agreement did not address corrections of erroneous placement on the salary schedule. As a result, the Court found that there was no grievance arising under the provisions of the collective bargaining agreement that could be submitted to arbitration. Again, as in *Walker,* the Court did not base its decision on whether the dispute concerned a statutory interpretation. Instead, the Court held that the plaintiffs did not have to exhaust the grievance arbitration procedure because the dispute did not involve the provisions of the collective bargaining agreement.

{¶17} Here, the Agreement specifically provides for "Experience Credit" and incorporates the terms for the calculation of military credit in Article 15.01(B) by expressly referencing the State Foundation Program for military credit, which is set forth in R.C. 3317.13. Therefore, Lockard's grievance with Wellston's determination of military credit is covered by the Agreement. The fact that the dispute may ultimately require an arbitrator to interpret a statutory provision does not cause the grievance to fall outside of scope of the Agreement. *State ex rel. Williams v. Belpre City School Dist. Bd. Of Edn.,* 41 Ohio App.3d 1, 9, 534 N.E.2d 96 (4th Dist. 1987)("A 'question is suitable for arbitration even though it may require the interpretation of statutory law as being incorporated into the collective bargaining agreement.'"). "A decision by an impartial arbitrator provides a suitable alternative remedy so as to preclude mandamus." *State ex rel. Williams,* 41 Ohio App.3d at 11.

{¶18} In *State ex rel. Williams*, *supra*, a teacher brought a mandamus petition seeking to compel the school district to issue her a continuing contract. She argued that her grievance was statutorily excepted from the collective bargaining agreement under

the exceptions enumerated in R.C. 4117.10(A), therefore her grievance was not governed by the agreement. First, we determined that the collective bargaining agreement governed her grievance and was not one of the issues statutorily excepted from collective bargaining process.

{¶19} Next we addressed the question of whether the grievance procedures contained in the collective bargaining agreement provided her a plain and adequate remedy in the ordinary course of the law. We held that for a remedy to be adequate, "[t]he remedy should be complete in its nature, beneficial and speedy." *Id.* at 8. The fact that the teacher had failed to pursue her right to arbitrate her grievance and was then precluded from doing so did not render her right to arbitrate inadequate. *Id.* If a party to an arbitration agreement could use their own delay to exempt themselves from arbitration and avail themselves of court, no arbitration agreement would be enforceable – a party could simply wait it out until the right to arbitrate expired and pursue a claim in court.

{¶20} We also noted that arbitration has been favored by the courts from early times and that most often "unions demand binding arbitration of grievances arising under the contract." *Id.* at 9. "Because of the speed, low cost and the general competence, indeed expertise, of most arbitrators, arbitration is the most favored means of contract enforcement available to educational institutions." *Id.* We noted that in Williams's case, the grievance procedure governed her dispute, "even though it may require the interpretation of statutory law as being incorporated into the collective bargaining agreement." *Id.* The grievance procedure outlined in *State ex rel. Williams*

contained a provision which stated that nothing in the procedure "shall be construed as limiting the rights of any teacher from using other professional or legal rights in resolving a complaint or problem." We held that while such nonexclusive remedy clauses would not be a general bar to judicial intervention, "mandamus is an extraordinary remedy which cannot be used as a substitute for available administrative or legal remedies, absent special circumstances." *Id.* at 10. We found no "special circumstances" existed which would waive the exhaustion requirement in the agreement. *Id.* at 11.

{¶21} Here, Lockard and Wellston agree that the Agreement contains provisions governing experience credit and military credit under the State Foundation Programs set forth in chapter 3317 of the Ohio Revised Code. The fact that an arbitrator will be called upon to interpret the statutory provisions contained in R.C. 3317.13(A)(1)(d) does not, as Lockard argues, render the grievance outside the scope of the Agreement. And, unlike the agreement in *State ex rel. Williams*, the parties have pointed to no nonexclusive remedy clause in the grievance procedures that would require us to analyze whether "special circumstances" exist sufficient to waive an exhaustion requirement. Thus, we find that "[a]ny holding that the arbitration remedy herein was inadequate would effectively under cut that which union lobbyist themselves strongly advocated, the favored arbitration process." *Id.* at 11. Lockard has a plain and adequate remedy in the ordinary course of the law through the grievance procedure outlined in the Agreement and is not entitled to a writ of mandamus.

Conclusion

{¶22} We find that Lockard's grievance is governed by the parties' collective

bargaining agreement and the grievance procedures set forth in it provide a plain and adequate remedy in the ordinary course of law. Therefore, we **GRANT** Wellston's motion for judgment on the pleadings pursuant to Civ.R. 12(C). We hereby **DISMISS** Lockard's petition for a writ of mandamus.

{¶23} The clerk shall serve a copy of this order on all counsel of record and any unrepresented parties at their last known addresses by ordinary mail.

MOTION GRANTED. PETITION DISMISSED. IT IS SO ORDERED. COSTS TO RELATOR.

Harsha, J. & Abele, J.: Concur.

FOR THE COURT

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Matthew W. McFarland
Administrative Judge

NOTICE

This document constitutes a final judgment entry and the time period for appeal commences from the date of filing with the clerk.

Pursuant to Civ.R. 58(B), the clerk is ORDERED to serve notice of the judgment and its date of entry upon the journal on all parties who are not in default for failure to appear. Within three (3) days after journalization of this entry, the clerk is required to serve notice of the judgment pursuant to Civ.R. 5(B), and shall note the service in the appearance docket.