

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE EX REL. MICHAEL T. NICHOLS	:	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. John W. Wise, J.
	:	
Relator	:	
	:	
-vs-	:	Case No. 2009-CA-00204
	:	
OHIO DEPARTMENT OF YOUTH SERVICES	:	<u>OPINION</u>
	:	
Respondent	:	

CHARACTER OF PROCEEDING:	Writ
JUDGMENT:	Issued in part; Denied in part
DATE OF JUDGMENT ENTRY:	September 17, 2010
APPEARANCES:	
For Relator	For Respondent
ROBERT J. TSCHOLL JENNIFER ARNOLD 220 Market Avenue S. Suite 1120 Canton, OH 44702	TIMOTHY A. LECKLIDER POOJA ALAG BIRD Employment Law Section 150 East Gay Street, 22nd Fl. Columbus, OH 43215-3167

Gwin, P.J.

{¶1} Relator, Michael T. Nichols, has filed a Verified Complaint for Writ of Mandamus requesting this Court order the Respondent, the Ohio Department of Youth Services, to award him back wages and benefits based upon his years of service in the Ohio National Guard. Respondent has filed an Answer to the Complaint. Both parties have submitted briefs in support of their positions as well as an Agreed Statement of Facts.

{¶2} Relator raises the following Propositions of Law:

{¶3} “RELATOR MICHAEL T. NICHOLS IS ENTITLED TO RETROACTIVE SERVICE CREDIT FOR HIS TIME SERVED IN THE OHIO NATIONAL GUARD.

{¶4} “RELATOR MICHAEL T. NICHOLS IS ENTITLED TO RETROACTIVE SERVICE CREDIT FOR PAY AND OTHER BENEFITS AS A RESULT OF RESPONDENT’S FAILURE TO IMMEDIATELY CREDIT HIS OHIO SERVICE TIME UPON HIS HIRE.”

{¶5} Relator was a member of the Ohio National Guard from April 2, 1987 to April 2, 1993. In 1995, Relator began his employment with Respondent, the Ohio Department of Youth Services, as a Juvenile Corrections Officer. At the time of his hiring, Respondent was informed of Relator’s service in the Ohio National Guard, however, Relator was not given service credit for those years until 2005. It was in 2005 Relator learned from a fellow employee that the fellow employee had been given service credit for his service in the Ohio National Guard. Relator brought the issue to the attention of Respondent who adjusted his seniority in December 2005 to reflect Relator’s National Guard service.

{¶6} Relator is a member of the union for Ohio civil service employees. After receiving credit for the Ohio National Guard service, Relator filed a grievance with the union requesting back pay and benefits on October 14, 2005. Relator claims this grievance was lost, so he filed a second grievance on September 22, 2007 with the same allegations. The second grievance was denied as untimely. The union chose not to arbitrate the decision.

{¶7} Thereafter, Relator filed an unfair labor practices complaint with the State Employment Relations Board (SERB) against both the union and the Respondent. Both complaints were denied as untimely. Relator then filed an appeal with the Court of Common Pleas, however, the appeal was voluntarily dismissed by Relator. The instant Mandamus Complaint was filed subsequent to the voluntary dismissal of the common pleas court case.

{¶8} I. and II.

{¶9} A relator is entitled to a writ of mandamus if the following conditions are satisfied: (1) the relator demonstrates a clear legal right to the relief prayed for; (2) the respondent is under a corresponding legal duty to perform the actions that make up the prayer for relief; and, (3) the relator has no plain and adequate remedy in the ordinary course of law. *Doss Petroleum, Inc. v. Columbiana Cty. Bd. of Elections*, 164 Ohio App.3d 255, 2005-Ohio-5633, 842 N.E.2d 66, citing to *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, 451 N.E.2d 225.

{¶10} There are two issues which are presented in this case. First, whether Relator is entitled to credit relative for longevity. Second, whether Relator is entitled to credit relative to the issue of vacation.

{¶11} The only statute cited by Relator is R.C. 9.44 which provides in relevant part,

{¶12} “9.44 Public employees' anniversary of service for vacation leave computation; determination of prior service

{¶13} “(A) Except as otherwise provided in this section, a person employed, other than as an elective officer, by the state or any political subdivision of the state, earning vacation credits currently, is entitled to have the employee's prior service with any of these employers counted as service with the state or any political subdivision of the state, for the purpose of computing the amount of the employee's vacation leave.”

{¶14} It is undisputed Respondent credited Relator with his Ohio National Guard service in December 2005. Respondent's action in crediting Relator is a concession Respondent has a clear legal duty to credit Relator for Ohio National Guard Service and a concession as to Relator's clear legal right to have the credit. However, we must determine whether Relator has a duty to extend the credit retroactively for both the purposes of determining longevity and vacation accrual. We must also consider whether Relator has or had an adequate remedy at law to enforce any clear legal duty.

{¶15} Relator contends R.C. 9.44 requires Respondent to credit him with his service in the Ohio National Guard. Respondent contends Relator has or had an adequate remedy at law by way of the grievance procedure outlined in the Collective Bargaining Agreement (CBA) between Respondent and the union.

{¶16} Respondent avers vacation is covered by the CBA which makes the grievance procedure outlined in the CBA the sole avenue of redress i.e., it would be Relator's adequate remedy at law. Nowhere in the portions of the CBA provided by the

parties does the CBA mention vacation. For this reason, we find Respondent has failed to prove the CBA covers vacation. We find the absence of the topic in the record before us makes R.C. 9.44 applicable to Relator. Under R.C. 9.44, Relator is entitled to vacation credit. We limit the vacation credit to six years prior to the filing of the petition for Writ of Mandamus based upon the Supreme Court's ruling in *State ex rel. N. Olmsted Fire Fighters Assn. v. N. Olmsted* (1992), 64 Ohio St.3d 530, 531, 597 N.E.2d 136, 138 wherein the Court held six years prior to the filing of the mandamus complaint was the appropriate relief based upon the statute of limitations found in R.C. 2305.07.

{¶17} With regard to longevity, Relator has not demonstrated a clear legal duty to apply the Ohio National Guard credit retroactively. Neither the Petition nor Relator's brief points to any statute or authority for the proposition longevity must be awarded retroactively. For this reason, we find Relator has failed to demonstrate he is entitled to the issuance of a writ of mandamus on this issue.

{¶18} For the foregoing reasons, we issue a writ of mandamus and require Respondent to adjust Relator's vacation accrual for a period of six years prior to the filing of the mandamus complaint.

{¶19} WRIT ISSUED IN PART AND DENIED IN PART.

{¶20} ONE HALF OF THE COSTS ASSESSED TO RELATOR.

{¶21} REMAINING COSTS WAIVED.

{¶22} IT IS SO ORDERED.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

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