

[Cite as *Calloway v. Wasik*, 2009-Ohio-6215.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92304

CHARLES E. CALLOWAY, SR.

RELATOR

VS.

JOMARIE WASIK, ET AL.

RESPONDENTS

**JUDGMENT:
WRIT GRANTED IN PART**

WRIT OF MANDAMUS

ORDER NO. 428424

RELEASE DATE: November 24, 2009

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COLLEEN CONWAY COONEY, A.J.:

{¶ 1} This is an original action in mandamus whereby the relator, Charles E. Calloway, Sr., seeks to compel the respondents, city of Cleveland, Jomarie Wasik, Director of the Dept. of Public Service, and Robert Mavec, Acting Commissioner of the Division of Engineering and Public Service, to reinstate him to his former position as a city employee and to recover back-pay and benefits owed from the date of termination to the date of reinstatement, prejudgment interest, post-judgment interest, attorney fees, and costs. For the following reasons, we grant Calloway's request for a writ of mandamus in part.

I. Facts

{¶ 2} Calloway was employed by the city of Cleveland as a Deputy Project Director until his employment was terminated on October 12, 2007, for improperly using a city trailer to haul lumber in aid of a personal side business. Calloway, prior to his termination, was earning an hourly rate of \$21.64 plus benefits in his capacity as a Deputy Project Director.¹ Calloway appealed his termination to the Cleveland Civil Service Commission. On June 27, 2008, the Cleveland Civil Service Commission conducted a hearing and determined that Calloway should be reinstated to his position as Deputy Project Director.² On July 11, 2008, the Cleveland Civil Service Commission approved the minutes of the hearing of June 27, 2008, and on July 14, 2008, forwarded a letter to Calloway that provided that the “Commission at its’ [sic] meeting on Friday, June, 27, 2008, approved your appeal of termination from the classification of Project Director, Department of Public Service.”

¹ Respondents state that Calloway, prior to his termination, was earning \$21.64 per hour as a Deputy Project Director. See p. 3 of the respondents’ merit brief filed on May 4, 2009 and p. 5 of respondents’ final merit brief filed on August 13, 2009. See, also, exhibit F attached to Calloway’s initial merit brief of May 1, 2009.

² The Cleveland Civil Service Commission’s order of reinstatement provided that: “I am moving that we grant the appeal of an employee with the recommendation that his suspension be limited to the time that he’s already been off.” See transcript of proceedings had before the Cleveland Civil Service Commission on June 27, 2008, p. 31.

{¶ 3} On October 23, 2008, Calloway filed his complaint for a writ of mandamus, seeking reinstatement to his position as a Deputy Project Director, back-pay from November 11, 2007 to the date of reinstatement, credit for all lost employment benefits, attorney fees and costs.³ On October 24, 2008, Calloway was reinstated to his position as Deputy Project Director.

{¶ 4} On December 1, 2008, the respondents filed a joint motion to dismiss. On February 24, 2009, we denied the motion to dismiss and also ordered that the parties “* * * provide this court with stipulations, and any other evidentiary material permissible under the Ohio Rules of Civil Procedure and the Ohio Rules of Evidence, which establish the exact amount of back wages due the relator.” Calloway, on May 1, 2009, filed his initial merit brief with sworn affidavit and other exhibits. On May 4, 2009, the respondents filed their initial merit brief with exhibits. Calloway, on August 13, 2009, filed his supplemental merit brief with sworn affidavit and other exhibits. On August 13, 2009, the respondents also filed their supplemental merit brief with attached exhibits.

³On December 29, 2008, this court granted Calloway leave to amend his complaint for a writ of mandamus, *instanter*, in order to correct a defective caption. With the exception of the correction of the caption and the statement that Calloway returned to employment with the city of Cleveland in his position as Deputy Project Director, which negated Calloway’s claim for reinstatement, no other amendments were made with regard to the complaint or with regard to the prayer for relief.

II. Mandamus: Standard of Review

{¶ 5} In order for this court to issue a writ of mandamus, Calloway must establish a clear legal right to back-pay, a clear legal duty on the part of the respondents to remit back-pay and benefits, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658; *State ex rel. Nichols v. Cuyahoga Cty. Bd. of Mental Retardation & Dev. Disabilities* (1995), 72 Ohio St.3d 205, 648 N.E.2d 823. Mandamus is an extraordinary remedy that is to be employed with caution and only when the right is clearly established and should not be issued in doubtful cases. *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 364 N.E.2d 1; *State ex rel. Connoles v. Cleveland Bd. of Edn.* (1993), 87 Ohio App.3d 43, 621 N.E.2d 850; *State ex rel. Karmasu v. Tate* (1992), 83 Ohio App.3d 199, 614 N.E.2d 827.

III. Back-Pay and Benefits

{¶ 6} A public employee who has been reinstated to his position of employment may maintain an action in mandamus to recover compensation and related benefits due for the period of wrongful exclusion from employment, provided the amount that is recoverable can be established with certainty. *State ex rel. Martin v. Bexley City School Dist. Bd. of Edn.* (1988), 39 Ohio St.3d 36, 528 N.E.2d 1250; *Monaghan v. Richley* (1972), 32 Ohio St.2d 190, 291 N.E.2d 462. “The term ‘with certainty’ generally refers to

‘whether a particular amount has been precisely determined as to its value in dollars and cents’ and at times ‘also refer[s] to the quality of proof, in order for an employee to demonstrate that he has a clear legal right to the relief for which he prays.’” *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 481, 2005-Ohio-2974, 829 N.E.2d 298, quoting *State ex rel. Hamlin v. Collins* (1984), 9 Ohio St.3d 117, 120, 459 N.E.2d 520. Thus, the formula that must be employed to determine the amount of back-pay due a reinstated employee is the amount of gross wages the employee would have earned, if not improperly terminated, minus the amount of interim wages the reinstated employee actually earned, or in the exercise of due diligence, could have earned in appropriate employment during the period of improper exclusion from employment. *Hamlin*, *supra*, at 118; *State ex rel. Wilcox v. Woldman* (1952), 157 Ohio St. 264, 105 N.E.2d 44.

{¶ 7} It must also be noted that the employee and the employer possess a different burden of proof with regard to the determination of the amount of back-pay. The employee bears the burden of establishing, with certainty, the total amount of wages and other benefits that would have been earned, had he or she not been improperly terminated. *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, *supra*. The employer bears the burden of establishing, with certainty, the amount of interim wages that the employee

earned or could have reasonably earned during the period of wrongful termination. Thus, the employer must establish mitigating damages.

{¶ 8} “The principle of mitigation of damages applicable in a suit to recover compensation for a period of wrongful exclusion from employment is an affirmative defense and the burden of proof on that issue resides upon the employer responsible for the wrongful discharge.” *State ex rel. Martin v. Columbus* (1979), 58 Ohio St.2d 261, paragraph three of the syllabus, 389 N.E.2d 1123.

{¶ 9} Finally, interim wages do not include supplemental income that was ordinarily earned by the relator prior to or during the wrongful termination. See *Cuyahoga Falls Edn. Assn. v. Cuyahoga Falls City School Dist. Bd. of Edn.* (1996), 112 Ohio App.3d 366, 678 N.E. 976, wherein the court held:

{¶ 10} “When [relator] testified before the referee, he stated that he had worked many summers and evenings during his tenure as a full time teacher prior to the layoff. He also testified that other teachers did the same and respondent had no prohibition against outside work that did not conflict with teaching responsibilities. Respondent did not controvert this evidence. Because respondent permitted outside work, such work was not incompatible with [relator’s] teaching duties. Thus any salary earned during the summers and evenings of the layoff could have been earned by [relator] while he was

employed in a full-time capacity by respondent. Consequently, *this court will subtract from [relator's] contractual salary only that portion of his actual salary that he earned during the time he would have been employed by respondent. This court therefore holds that the formula for calculating compensatory damages in this case is as follows: [Relator's] salary under the contract minus his actual salary during the layoff except wages earned during summer and evening hours.*" (Emphasis added.) Id. at 374.

IV. Legal Analysis

{¶ 11} Having established the legal precedent that is applicable to the claim for a writ of mandamus, we must now answer the following questions in order to determine the amount of back-pay due Calloway: (1) period of time of wrongful termination for which Calloway must be compensated; (2) hourly wage that Calloway would have earned during period of time of wrongful termination; (3) amount of deductible interim wages earned by Calloway; (4) other benefits that Calloway should have received during the period of wrongful termination; (5) award of prejudgment interest and post-judgment interest; and (6) award of attorney's fees.

A. Period of Wrongful Termination

{¶ 12} The following findings are based upon the briefs, answers to interrogatories, exhibits, and transcripts filed with this court. Calloway was terminated from his position as a Deputy Project Director on October 12,

2007, and reinstated to his original position of employment on October 24, 2008. The Cleveland Civil Service Commission, in its decision to reinstate Calloway, attempted to impose a suspension for a period of time that Calloway had been unemployed prior to reinstatement. See transcript of hearing held before the Cleveland Civil Service Commission on June 27, 2008, p. 31. Any suspension period, however, was limited to thirty days as permitted by §128(I) of the Cleveland City Charter. Accordingly, we determine that the period of time, for which Calloway should be compensated, is from November 26, 2007, through October 23, 2008. This period of time contained 239 working days, based upon the following calculation:

October 2007	0 days
November 2007	5 days
December 2007	21 days
January 2008	23 days
February 2008	21 days
March 2008	21 days
April 2008	22 days
May 2008	22 days

June 2008	21 days
July 2008	23 days
August 2008	21 days
September 2008	22 days
October 2008	17 days
Total Working Days	239 days

B. Calloway's Hourly Wage

{¶ 13} Based upon a total of 239 working days that Calloway was wrongfully excluded from employment, and an hourly rate of \$21.64, we determine that the gross wages that Calloway would have earned during the period of wrongful termination was \$41,375.68.⁴

239 days	x (\$21.64 x 8)	=	\$41,375.68
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C. Interim Wages earned by Calloway

{¶ 14} Having found that Calloway would have earned \$41,375.68 during the period of wrongful termination, we must next determine the amount of interim wages that must be subtracted from the gross wages. The

⁴The respondents, in their merit brief of May 4, 2009, state that Calloway was earning \$21.64 per hour as a Deputy Project Director. See, also, exhibit F, a copy of Calloway's earnings statement for the pay period ending April 15, 2009, attached to the brief on the merits filed May 1, 2009.

burden rests upon the respondents to establish the amount of interim wages that must be deducted from any gross wages awarded to Calloway.⁵ *State ex rel. Martin v. Columbus*, supra. Herein, the exhibits and other evidentiary material submitted by the parties demonstrate that Calloway had interim earnings from two separate sources prior to his wrongful termination and during the period of his wrongful termination. In addition, Calloway received unemployment compensation during the period of wrongful termination.

{¶ 15} The respondents, in their attempt to establish the amount of interim wages that must be deducted from Calloway's gross wages, presented the following documents: (1) respondents' request for production of documents; (2) W-2 wage and tax statements, provided to Calloway by the city of Cleveland for 2004 through 2008; (3) Calloway's 2008 1099-MISC income statement, provided by the Cuyahoga Metropolitan Housing Authority; (4) a summary of Ohio unemployment benefits received by Calloway between October 14, 2007, and October 11, 2008; (5) Calloway's 2006 federal tax return; (6) Calloway's 2006 state of Ohio tax return; (7)

⁵The respondents also argue that Calloway failed to make any efforts to mitigate damages during the period of time that he was wrongfully terminated. However, the respondents possess the burden of proof as to mitigation. See *Marshall v. Columbus* (1980), 61 Ohio St.2d 353, 402 N.E.2d 353. Herein, the respondents have presented no evidence that Calloway failed to mitigate his damages.

Calloway's 2006 municipal tax return; (8) Calloway's 2007 federal tax return; and (9) Calloway's 2008 federal tax return.

{¶ 16} An examination of the documents provided by the respondents, in an attempt to establish the amount of interim wages that must be subtracted from the gross wages that Calloway should have earned from the city of Cleveland during his period of wrongful termination, demonstrates two supplemental sources of income: (1) Calloway's operation of a deck-building business (his business") known as C.K. Contractors; and (2) rent received from the rental of a two-family dwelling located in Cleveland. In 2006, Calloway received supplemental income in the amount of \$7,200, as rent, and \$5,700, from his business. In 2007, Calloway received supplemental income in the amount of \$4,800, as rent, and no income from his business. In 2008, Calloway received supplemental income in the amount of \$4,135, as rent, and \$14,650, from his business. Calloway also received Ohio Unemployment Benefits in the total amount of \$15,132, during his period of wrongful termination.

	2006	2007	2008
Rent	\$7,200	\$4,800	\$4,135
Contractor	\$5,700	\$0	\$14,650
Unemployment Compensation	\$0	\$3,104	\$12,028

{¶ 17} Based on the 2006 federal tax return, it is evident that Calloway earned supplemental income from his contractor business and rental property. Thus, any interim wages, that must be deducted from Calloway's gross earnings, requires a setoff in the amount of the supplemental earnings that Calloway would have earned had he remained employed by the respondents. *Cuyahoga Falls Edn. Assn. v. Cuyahoga Falls City School Dist. Bd. of Edn.*, supra. Based upon the documents presented, we find that any rental income, earned in 2007 and 2008, was less than that received in 2006. The rental income does not constitute interim income.

{¶ 18} No supplemental income from the contractor business was earned by Calloway in 2007. The supplemental business income of \$14,650, earned by Calloway in 2008, constitutes interim income, but must be setoff by the amount earned in 2006. Thus, the amount of interim wages earned through Calloway's business, is \$8,950, based on contractor income of \$14,650 less \$5,700, the amount earned in 2006 while Calloway was fully employed by the respondents. In addition, the full amount of \$15,132, that was received by Calloway as unemployment compensation, must be considered interim wages. *State ex rel. Guerrero v. Ferguson* (1981), 68 Ohio St.2d 6, 427 N.E.2d 515; *State ex rel. Crockett v. Robinson* (1981), 67 Ohio St.2d 363, 423 N.E.2d 1099.

	2007	2008	Total
Rent	\$0	\$0	\$0
Business	\$0	\$8,950	\$8,950
Unemployment Compensation	\$3,104	\$12,028	\$15,132
Total Interim Wages	\$3,104	\$20,978	\$24,082

{¶ 19} Therefore, Calloway has established, with certainty, his entitlement to a back-pay award of \$41,375.68 less interim wages of \$24,082, which results in net back-pay of \$17,293.68.

D. Other Benefits

{¶ 20} In addition to back-pay, Calloway seeks a 4% wage increase in his hourly wage, which allegedly was granted to all city of Cleveland employees in 2007 and 2008.⁶ Unlike the issue of Calloway's hourly wage, which was substantiated by the parties, Calloway simply states by way of an affidavit that he is entitled to a 2% pay increase for the years of 2007 and 2008. Calloway's self-serving affidavit, absent other testimony, evidence or stipulations, does not establish with certainty that he would have received any increase in his rate of pay. "Such an argument is purely speculative and

⁶ Calloway argues that all city of Cleveland employees received a wage increase in the amount of 2% for 2007 and 2% for 2008.

falls far short of establishing ‘with certainty’ what [relator] would have earned. [Relator] has failed to demonstrate that he would have received any raise at all, let alone what its amount would have been. * * * This case differs from *State, ex rel. Crockett v. Robinson*, supra. There, the employee ‘proved by testimony, by an exhibit, and by stipulation that he would have received a salary award which included the salary increases.’ * * *” *State ex rel. Hamlin v. Collins*, supra, at 122.

{¶ 21} Calloway has also failed to establish, with the required certainty, that he is entitled to credit for any sick, holiday, vacation time or medical coverage that would have been earned during the period of his wrongful termination. *State ex rel. Couch v. Trimble Local School Dist. Bd. of Edn.*, 120 Ohio St.3d 75, 2008-Ohio-4910, 896 N.E.2d 690; *State ex rel. Mun. Constr. Equip. Operators’ Labor Council v. Cleveland*, 114 Ohio St.3d 183, 2007-Ohio-3831, 870 N.E.2d 1174; *State ex rel. Crockett v. Robinson*, supra.

{¶ 22} Calloway, however, is entitled to have the respondents contribute to his Public Employees Retirement System (“PERS”) account, based upon the gross amount of back-pay of \$41,375.68. “The board maintains that its duty to make PERS contributions should only be based upon the net amount of back pay found owing rather than the gross figure of * * *. Additionally, to allow the board to pay a reduced sum into [relator’s] PERS account on the basis of a setoff for other funds received during the period of his dismissal

would confer upon the board a benefit directly attributable to its own wrongdoing. * * * The board will not be allowed to benefit from its wrongdoing and pay a percentage of a reduced dollar amount into [relator's] account.” *State ex rel. Hamlin v. Collins* (1984), 9 Ohio St.3d 117, 121, 459 N.E.2d 520.

E. Prejudgment Interest

{¶ 23} An award of prejudgment interest is available in contract and tort cases pursuant to R.C. 1343.03(A). An award of prejudgment interest, under R.C. 1343.03(C), requires proof that the complaining party made a good faith effort to settle the case and that the other party did not attempt to settle the case in good faith. *State ex rel. Carver v. Hull*, 70 Ohio St.3d 570, 1994-Ohio-449, 639 N.E.2d 1175. In the case at bar, Calloway was entitled to back-pay and benefits as a matter of law, not based on a contract. Thus, R.C. 1343.03(A) does not support Calloway’s claim for prejudgment interest. Calloway has also failed to establish that the respondents did not attempt to settle this action in good faith. To the contrary, numerous attempts, through this court’s Pre-hearing Conference Program, were made in an effort to amicably settle the matter. Consequently, Calloway is not entitled to any prejudgment interest under R.C. 1343.03(C).

{¶ 24} Calloway, however, is entitled to post-judgment interest on this court's award pursuant to R.C. 1343.03(A). See, also, *State ex rel. Shimola v. Cleveland*, 70 Ohio St.3d 110, 1994-Ohio-243, 637 N.E.2d 325.

F. Attorney Fees

{¶ 25} Attorney fees are not recoverable as damages in a mandamus action that has been brought pursuant to R.C. 2731.11. *State ex rel. Chapnick v. E. Cleveland City School Dist. Bd. of Edn.*, 93 Ohio St.3d 449, 2001-Ohio-1585, 755 N.E.2d 883. It must also be noted that the “American Rule,” which this court follows, requires statutory authorization for the recovery of attorney fees. *State ex rel. Caspar v. Dayton* (1990), 53 Ohio St.3d 16, 558 N.E.2d 49. Absent statutory authorization, attorney fees can be awarded if it is demonstrated that a party acted in bad faith. *State ex rel. Durkin v. Ungaro* (1988), 39 Ohio St.3d 191, 529 N.E.2d 1268. Again, we find no evidence of bad faith on the part of the respondents. Thus, Calloway is not entitled to attorney fees. *State ex rel. Kabatek v. Stackhouse* (1983), 6 Ohio St.3d 55, 451 N.E.2d 248.

V. Conclusion

{¶ 26} For the foregoing reasons, we grant Calloway's request for a writ of mandamus in part, and order the following: (1) the respondents shall pay to Calloway back-pay in the amount of \$17,293.68 plus post-judgment interest per R.C. 1343.03(A); (2) the respondents are to pay to PERS the employer

contribution due Calloway based upon the gross back-pay wages of \$41,375.68; and (3) the respondents shall pay any interest and penalties that have accrued from the deficient PERS employer and employee contributions.⁷

{¶ 27} Accordingly, we grant Calloway’s complaint for a writ of mandamus in part. Costs to the respondents. It is further ordered that the Clerk of the Eighth District Court of Appeals shall serve notice of this judgment upon all parties as required by Civ.R. 58(B).

Writ granted in part.

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

KENNETH A. ROCCO, J., and
PATRICIA A. BLACKMON, J., CONCUR

⁷Calloway is responsible for any federal, state or local taxes, that must be withheld from the net amount of back-pay of \$17,293.68.

