

[Cite as *State ex rel. Braxton v. Nichols*, 2010-Ohio-3193.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93653, 93654, and 93655

**STATE OF OHIO, EX REL.
RONAYE BRAXTON, ET AL.**

RELATORS

vs.

TRACEY NICHOLS, ET AL.

RESPONDENTS

**JUDGMENT:
WRIT GRANTED IN PART AND
DENIED IN PART**

Writ of Mandamus
Motion No. 434335
Order No. 435330

RELEASE DATE: July 7, 2010

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MARY EILEEN KILBANE, J.:

{¶ 1} On July 22, 2009, the relators, Ronaye Braxton (Case No. 93653), Pierre C. Betts (Case No. 93654), and Carla Edwards (Case No. 93655) commenced these mandamus actions against the respondents: Tracey Nichols, the Director of the City of Cleveland's Department of Economic Development; Larry Benders, the Executive Director of the City of Cleveland's Division of Workforce Development; Lucille Ambroz, the Secretary of the City of Cleveland's Civil Service Commission; and the City of Cleveland (hereinafter "the City"). The relators each alleged that the City improperly laid them off from their positions. They each made a claim to compel a hearing before the Civil Service

Commission, two claims for reinstatement to their jobs, and a public records claim under R.C. 149.43.¹

{¶ 2} As of early January 2009, all three relators were classified employees of the City in the Department of Economic Development, Division of Workforce Development.² On January 21, 2009, each of the relators were involuntarily terminated, ostensibly because their positions were being eliminated because of the merger between the workforce development departments of the City and Cuyahoga County. On January 26, 2009, the relators, through their attorney, filed an appeal with the City's Civil Service Commission. With their appeals, each relator also made an extensive public records request.³ In April

¹ In October 2009, this court consolidated the three cases.

² This entity provides services for unemployed and underemployed individuals to help them obtain jobs.

³ They requested the following records: (1) the complete civil service, personnel, departmental and divisional files maintained for every employee of the Division; (2) the Civil Service Job Description for every position in the Division as of 12-1-2008; (3) the Civil Service Job Description for every position in the Division as of 1-23-2009; (4) any Civil Service Eligible List for any position in the Division; (5) the complete civil service, personnel, departmental and divisional files maintained for every City of Cleveland employee who maintains the classification of Grant Administrator, or Manager of HR Programming and Planning, or Personnel Administrator, or Manager of HR Programming and Management, or HR Contract Administrator; (6) any intergovernmental agreements between the City and Cuyahoga County relating to the Division since 1-1-2008; (7) any Civil Service Eligible List for the positions of Grant Administrator, or Manager of HR Programming and Planning, or Personnel Administrator, or HR Contract Administrator, or Manager of HR Programming and Management; (8) any organizational chart for the Division; (9) any personnel request prepared for any position in the Division from 1-1-2008 through the date of response to the public records request; (10) the minutes from any meeting and copies of any board actions taken by the Cleveland/Cuyahoga Workforce Investment Board, including its

2009, the relators' attorney inquired about the status of the public records request, but he received no response. In May relators' attorney inquired about the status of the Civil Service Commission appeals, but no hearings were scheduled. Consequently, on July 22, 2009, the relators filed their mandamus actions.

{¶ 3} On September 1, 2009, the City responded to the public records request by sending the relators' lawyer a letter which stated that there were 5,376 pages responsive to the requests and that the copying fee at five cents a page totaled \$268.00. Upon payment of the copying fee, the City would provide the records to the relators and their attorney. The City further indicated in this letter that the Civil Service Commission was still "gathering records" and upon receipt of those records, the City would notify the attorney. However, there was no subsequent notification for the rest of the year. The relators' counsel in an effort to avoid incurring additional attorney's fees for his unemployed clients did not examine the 5300 pages of records until March 2010.

{¶ 4} In October 2009, this court ordered the parties to file cross-motions for summary judgment on the four claims. After briefing, this court, in February 2010, issued a writ of mandamus, and ordered the Civil Service Commission to

subcommittees from 2006 to the date of response; and (11) any letters, email or other written communication exchanged between the Civil Service Commission and the Division from 1-1-2008 through the date of the response. Relators' counsel hand-delivered these requests to the Civil Service Commission.

hold hearings for the relators concerning their terminations. This court ruled that the relators' appeals were timely filed and fulfilled the requirements of the City's Civil Service Rules. Thus, the relators had a clear legal right to appeal hearings, and the Civil Service Commission had a clear legal duty to hold such hearings. There was no adequate remedy at law.

{¶ 5} The relators also sought mandamus to be immediately reinstated to their positions. The first claim alleged that the failure to conduct a pre-deprivation hearing required immediate reinstatement, and the second claim alleged illegal terminations. However, this court denied these mandamus claims, because the civil service appeal hearing provided an adequate remedy at law which precluded mandamus. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E.2d 914 and *State ex rel. Harris v. Rhodes* (1978), 54 Ohio S.2d 41, 374 N.E.2d 641.

{¶ 6} The court also noted that the public records claim seemed to be at an impasse. To move the claim to resolution, this court ordered the relators to inspect the records that the City had assembled and then to certify to this court whether those records fully satisfied the request or whether there were still records outstanding.

{¶ 7} After the relators and their attorney inspected the records on March 12, 2010, they certified to the court on March 17, 2010, that most of the requests had, in fact, not been fulfilled. Specifically, the City had not provided the

requested eligibility lists, the civil service job descriptions, the personnel files for the City employees holding the same classifications as the relators, the intergovernmental agreement between the City and Cuyahoga County relating to the Division of Workforce Development, the organizational chart, the minutes from the board meetings, and any communications between the Civil Service Commission and the Department of Economic Development, Division of Workforce Development. In their March 29, 2010, response certification, the respondents admitted that they had not provided records for most of the relators' requests. However, they certified to this court that 14 months after the requests had been hand-delivered, they were producing the remaining records by sending them to relators' attorney by FedEx that very day. These totaled over 500 pages and included the eligibility lists, the job descriptions, a list of City employees in the same classification as relators with hire and appointment dates, the organizational chart, the board minutes, the intergovernmental agreement, and e-mails between the Division of Workforce Development and the Civil Service Commission.

{¶ 8} This court then directed the parties to recertify the status of the public records claim. The relators' April 8, 2010 certification complained that the respondents had not provided the records under requests two, three and five.

Requests two and three were the job descriptions for every position in the Department of Economic Development, Division of Workforce Development as of

December 1, 2008, and as of January 23, 2009, respectively. Request five was for the complete personnel files for every City employee who maintained the same classifications as the relators. The relators admitted that they received a list of such employees, but not the complete personnel files. These are probably the most critical records requested, because they could show the proper seniority for the relators, and whether there were any irregularities in the hiring or retaining of the individuals in the relators' classifications.

{¶ 9} On April 15, 2010, the respondents filed their certification. They admitted again that not all the requests had been fulfilled and that on April 13, 2010, they sent an additional 32 pages of records to the relators; these were the job descriptions. Beyond that, the respondents insisted for the third time that they had provided all of the requested records. In response, the relators stated the respondents have almost completed fulfilling the requests. They maintained that the personnel files for the persons holding the same civil service classifications as each of the relators still have not been produced. In addition, the relators sought statutory damages, attorney's fees, and expenses. The respondents sought damages for frivolous conduct under R.C. 2323.51 because the relator's delay and arguments revealed that their public records claims was a sham. This court ruled that the relators' public records request was an authentic request and that any delay in taking possession of the records or insistence that the requests have not been fulfilled was not frivolous conduct. Furthermore, the

respondents' 15-month delay in producing the records precluded them from receiving damages under R.C. 2323.51.

{¶ 10} Next, the court considered whether the City had fulfilled all the public records requests. The respondents have conceded that not all the records had been disclosed; thus, this court issued the writ of mandamus and ordered the respondents to fulfill completely all the public records requests submitted by the relators, including specifically the subject personnel files. *State ex rel. Nat. Broadcasting Co. v. Cleveland* (1988), 38 Ohio St.3d 79, 526 N.E.2d 786, and *State ex rel. Wadd v. City of Cleveland* (1998), 81 Ohio St.3d 50, 689 N.E.2d 25. This court further ordered the parties to resolve the remaining disputes. In subsequent filings the relators certified that they and the City had reached an agreement for the fulfillment of the outstanding public records requests which resolved any outstanding issues. Accordingly, this court rules that the public records claim has been fulfilled and resolved.

{¶ 11} The court also awarded each of the relators \$1000 in statutory damages pursuant to R.C. 149.43(C)(1), because the relators had hand-delivered their requests and because the respondents had not fulfilled their duty under R.C. 149.43(B)(1) to prepare promptly the requested records for inspection until more than 10 days after the filing of the mandamus action. After the relators' counsel had hand-delivered the public records requests on January 26, 2009, there is no evidence that the respondents did anything to produce the requested records

until after the mandamus action was filed six months later. Even after that, approximately 40 days lapsed before the respondents made even a partial disclosure and ultimately this court issued a writ of mandamus to compel full production.

{¶ 12} Now after full briefing this court examines the issue of statutory attorney's fees. R.C. 149.43(C)(2)(b) provides in pertinent part: "If the court renders a judgment that orders the public office or the person responsible for the public records to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction * * * . The court shall award reasonable attorney's fees, subject to reduction * * * when * * * (1) the public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section." Under Subsection (B) "all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours," and copies shall be made available within a reasonable period of time.

{¶ 13} In the present case the court has issued a writ of mandamus ordering the respondents to comply fully with the Ohio Public Records Act. Moreover, the court finds that the respondents did not respond to the relators' public records request and did not provide the records for inspection within the

time envisioned by R.C. 149.43. Therefore, the award of attorney's fees is mandatory. Furthermore, the respondents have not persuaded this court that their conduct served some underlying public purpose or that they reasonably believed that they were complying with the statute.

{¶ 14} The respondents counter that a relator must show a public benefit in the request in order to be entitled to attorney's fees and that the relators in their filings have essentially conceded that their public records request was a discovery tool. However, the General Assembly amended R.C. 149.43 by adding the above-quoted provisions, effective September 29, 2007. By enacting language mandating attorney's fees under certain circumstances, the General Assembly obviated the common law principle that a relator must establish a public benefit in order to obtain attorney's fees. *State ex rel. Doe v. Smith* 123 Ohio St.3d 44, 2009-Ohio-4149, 914 N.E.2d 159.

{¶ 15} In their motion for attorney's fees, the relators request \$12,937.50 which is the product of 57.50 hours multiplied by \$225.00 per hour. The court has examined the submitted fee bill and finds it reasonable. Pursuant to this court's admonition, the relator's attorney has billed only for the time spent on the public records claim. The respondents do not question the amount of time billed.

{¶ 16} However, they do argue that the rate of \$225.00 per hour is unreasonable. They rely on the fact that the relator's attorney, pursuant to a

retainer agreement, charges the Civil Service Employees' Association \$120.00 per hour for litigation services at the administrative level plus \$3,500.00 per month for other services. A fee arrangement an attorney makes with one client for the provision of one type of service is not necessarily determinative of what constitutes a reasonable fee in a public records case. This court notes that relators' attorney is an experienced attorney, having practiced for over twenty years. Moreover, this court has previously ruled that \$260.00 per hour for an experienced attorney is a reasonable fee for a public records case. *State ex rel. Mun. Constr. Equip. Operators' Council v. The City of Cleveland*, Cuyahoga App. No. 94226, 2010-Ohio-2108. Accordingly, this court rules that \$225.00 per hour is a reasonable rate and awards the relators \$12,937.50 in attorney's fees pursuant to R.C. 149.43(C)(2)(b), plus copying costs of \$146.00 for a total of \$13,083.50.

{¶ 17} The relators have also asked for an additional \$14,681.25 in attorney's fees under R.C. 2323.51. Relying on *Thomas v. City of Cincinnati*, Hamilton App. No. C-050643, 2006-Ohio-3598, they argue that the failure to provide the relators with the required civil service hearing for over a year is so egregious as to constitute frivolous conduct. However, *Thomas* is distinguishable because the case concerned an undisclosed agreement between Cincinnati and the union which contradicted Cincinnati's position; an element which is not present in the case sub judice. Additionally, *Thomas* was not a writ

action, and this court hesitates to extend R.C. 2323.51 to writ actions without compelling authority. Accordingly, this court declines to award attorney's fees to the relators pursuant to R.C. 2323.51.

{¶ 18} In summary, the court has issued the writ of mandamus to compel the respondents to hold a civil service appeal hearing. It declined to issued the writ of mandamus to compel immediate reinstatement; the appeal hearing is an adequate remedy at law precluding such relief. The court granted judgment to the relators on their public records claim and issued the writ of mandamus and orders the respondents to fulfill completely the public requests of the relators. The parties are to resolve any final issues on the disclosure of public records. The court awards each of the relators \$1,000.00 in statutory damages against the City pursuant to R.C. 149.43. The court further awards the relators \$13,083.50 in attorney's fees against the City pursuant to R.C. 149.43. The court declines to award attorney's fees pursuant to R.C. 2323.51. Respondents to pay costs. The court directs the Clerk of the Eighth District Court of Appeals to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B). Final.

MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, J., and
ANN DYKE, J., CONCUR

