[Cite as *State ex rel. Curtin v. Ohio Pub. Emps. Retirement Sys.*, 2011-Ohio-2536.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Robert E. Curtin,	:	
Relator,	:	
v.	:	No. 09AP-801
Ohio Public Employees Retirement System and The City of Grove City, Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 26, 2011

Hrabcak & Company, L.P.A., Michael Hrabcak, and *Heidi A. Smith*, for relator.

Michael DeWine, Attorney General, and *Hilary R. Damaser*, for respondent Ohio Public Employees Retirement System.

Schottenstein, Zox & Dunn, LPA, Stephen J. Smith, Jr., Paul L. Bittner, Aaron L. Granger, and *David T. Ball*, for respondent The City of Grove City, Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Robert E. Curtin, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Public Employees Retirement System ("OPERS"), to vacate its decision denying him the status of public employee

while he was employed part-time, from 1989 through 2005, as an assistant income tax administrator for respondent, city of Grove City, Ohio ("Grove City"), and to enter an order finding that he was a public employee.

{¶2} The matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate rendered a decision, including findings of fact and conclusions of law which is appended to this decision, recommending that this court issue a writ of mandamus "with respect to that portion of relator's Grove City service starting in 1989 until the August 31, 1992 effective date of former Ohio Adm.Code 145-5-15." Respondents OPERS and Grove City have both filed objections to the magistrate's decision.

{¶3} We briefly note the following background facts, which are more fully set forth in the magistrate's decision. From 1973 through 1975, relator accrued Public Employee Retirement System ("PERS") service credit working as a personal property tax consultant for the Ohio Department of Taxation. From 1975 through 1987, relator accrued PERS service credit working as an income tax administrator for the city of Columbus. In 1989, relator served as a marketing director for the Regional Income Tax Agency. Beginning on June 7, 1989, and continuing through December of 2005, relator provided services to Grove City as an assistant city income tax administrator on a part-time basis. Relator also had service contracts at various periods of time during 1989 through 2005 with 15 different public employers (i.e., six municipalities, two townships, and seven school districts).

{¶4} On April 25, 2005, relator sent a letter to Robert Behlen, the director of finance for Grove City, in which relator requested to be "paid as a part-time employee rather than an independent contractor." Relator stated that "[t]he reason for this should

be obvious as I want to establish a new FAS (final average salary) for PERS purposes." Behlen sent a memorandum, dated August 8, 2005, to the mayor of Grove City, outlining discussions "[o]ver the last two months * * * moving the strategic administration of our income tax collection from an independent contractor serving as Assistant Tax Administrator to a City employee serving as the Tax Administrator."

{¶5} In 2006, relator sought a determination from OPERS as to his membership status. On March 30, 2006, an OPERS compliance officer made a determination that relator was a public employee. On July 5, 2007, following several appeals by Grove City, general counsel for OPERS made a determination that relator was performing services as an independent contractor, rather than a public employee, during his service with Grove City. Relator appealed that determination, and the matter was assigned to an administrative hearing examiner. Following an evidentiary hearing, the hearing examiner issued a report and recommendation, dated August 25, 2008, recommending that OPERS find relator was a public employee while performing services for Grove City during the period from 1989 to 2005, and that he was therefore eligible for PERS coverage during that time.

{¶6} Grove City filed objections to the hearing examiner's report. At a meeting conducted on November 13, 2008, the Public Employees Retirement Board ("board") voted to remand the matter to the hearing examiner for additional evidence and analysis, including "more analysis on whether and how Mr. Curtin's scope and conditions of services performed for the other Ohio municipalities differed from that of Grove City." The hearing examiner issued a new report, dated February 17, 2009, recommending that OPERS find that relator was not a public employee while employed part-time for Grove City. At a meeting on March 18, 2009, the board voted to find that relator was not a

public employee while employed with Grove City from 1989 through 2005, and thus not eligible to participate in PERS benefits during that time period.

{¶7} Relator then filed an original action with this court, challenging the board's determination. As noted, a magistrate of this court rendered a decision recommending that the court issue a writ of mandamus with respect to relator's service with Grove City beginning in 1989, and continuing until the effective date (August 31, 1992) of the 1992 amendment to Ohio Adm.Code 145-5-15(C).

{¶8} In order to be entitled to a writ of mandamus, relator had to establish that OPERS abused its discretion in denying his request for PERS service credit. *State ex rel. Davis v. Pub. Employees Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, ¶25.

{¶9} In their objections, neither OPERS nor Grove City (collectively "respondents") challenge the magistrate's recommendation upholding the board's determination that relator was an independent contractor while employed part-time with Grove City between August 31, 1992 and 2005. Rather, respondents take issue with the magistrate's conclusion that the board abused its discretion in finding that relator was working under a personal service contract for the period from 1989 until the effective date of the 1992 amendment to Ohio Adm.Code 145-5-15 (August 31, 1992). In so holding, the magistrate found that the board's interpretation of that administrative code provision was inconsistent with its interpretation in an earlier decision, *State ex rel. Columbus v. Pub. Emp. Retirement Bd.,* 10th Dist. No. 08AP-807, 2009-Ohio-6321.

{¶10} In the magistrate's decision, it is noted that the former version of Ohio Adm.Code 145-5-15(C), effective December 12, 1976, defined "[e]mployed under a personal service contract" to mean that a person: (1) not appear on a public payroll; (2) not be eligible for sick leave, vacation, hospitalization, or other fringe benefits

extended to "regular employees"; and (3) be a party to a formal bilateral written contract delineating the rights, obligations, benefits and responsibilities of both parties.

{¶11} Effective August 31, 1992, Ohio Adm.Code 145-5-15 (currently Ohio Adm.Code 145-1-42) was amended to provide:

> (2) "Independent contractor" means an individual who:
>
> (a) Is a party to a bilateral agreement which may be a written document, ordinance, or resolution that defines the compensation, rights, obligations, benefits and responsibilities of both parties;
>
> (b) Is paid a fee, retainer or other payment by contractual arrangement for particular services;
>
> (c) Is not eligible for workers' compensation or unemployment compensation;
>
> (d) May not be eligible for employee fringe benefits such as vacation or sick leave;
>
> (e) Does not appear on a public employer's payroll;
>
> (f) Is required to provide his own supplies and equipment, and provide and pay his assistants or replacements if necessary;
>
> (g) Is not controlled or supervised by personnel of the public employer as to the manner of work; and
>
> (h) Should receive an Internal Revenue Service form 1099 for income tax reporting purposes.

{¶12} Respondents argue that the magistrate erred in applying this court's decision in *State ex rel*. *Columbus*. In that case, we held in part that it was not arbitrary for the board to determine that retirement provisions were among the "rights, obligations, benefits and responsibilities of both parties" to be included to constitute a personal services contract. Id. at ¶4.

{¶13} OPERS argues that the decision in *State ex rel. Columbus* does not stand for the proposition that every personal service contract considered by the board must include a retirement term regardless of the underlying facts. Rather, OPERS contends, the court in *State ex rel. Columbus* was only asked to review the reasonableness of the board's discretionary decision to require a retirement term, and that the decision cannot be interpreted as holding that the retirement term is the only dispositive factor for OPERS to consider in deciding whether a bilateral agreement constitutes a personal service contract.

{¶14} Respondents both rely upon the Supreme Court of Ohio's decision in *State ex rel. Schaengold v. Ohio Pub. Employees Retirement Sys.,* 114 Ohio St.3d 147, 2007-Ohio-3760, rendered subsequent to this court's decision in *State ex rel. Columbus*. Under the facts of *Schaengold*, the relator, an attorney with his own private practice, served as a magistrate on an as-needed basis with the Dayton Municipal Court beginning in March 1986. The city considered the relator to be an independent contractor and, in 1999, the relator asked OPERS to determine whether his service as a magistrate for the court rendered him eligible for membership in PERS. OPERS subsequently informed the city that the relator and eight other similarly situated attorneys appearing on the court's as-needed list were public employees. The city appealed OPERS's finding, and the board subsequently determined that the relator was not a public employee while serving as a magistrate for the city.

{¶15} The relator in *Schaengold* filed an original action with this court, and we determined that some evidence supported the board's decision that the relator was not a public employee. On further appeal, the Supreme Court similarly found sufficient

evidence to support the board's determination that the relator was an independent contractor rather than a public employee.

{¶16} Respondents argue that the facts of the instant case are more similar to those in *Schaengold* than those in *State ex rel. Columbus.* Specifically, respondents note that the only version of the administrative rules under consideration in *State ex rel. Columbus* was the version in effect prior to the 1992 amendment of Ohio Adm.Code 145-5-15, whereas the decision in *Schaengold* covered periods, as in the instant case, both before and after the 1992 amendment to the rule. Respondents maintain that the Supreme Court in *Schaengold* did not differentiate between the pre-1992 rules and the post-1992 rules in upholding the board's determination that the relator was an independent contractor.

{¶17} As noted by respondents, in *Schaengold*, the relator requested service credit covering a time period beginning before and ending after (i.e., from 1986 to 2004) the 1992 change in the law, and the board determined the relator was not eligible for any OPERS service credit. As also noted by respondents, even though the relator in *Schaengold* performed services during periods that overlapped the effective date of the 1992 amendment to Ohio Adm.Code 145-5-15, the Supreme Court did not distinguish between the pre- and post-1992 versions of the rule for purposes of analysis; rather, the court applied the amended provisions of the Ohio Administrative Code defining "independent contractor" (i.e., Ohio Adm.Code 145-1-42(A)(2), formerly Ohio Adm.Code 145-5-15) to the entire period of time in determining whether the board abused its discretion in concluding that Schaengold was an independent contractor rather than a public employee.

{¶18} Under the facts of *Schaengold*, the factors deemed significant to the board and the Supreme Court included evidence that (1) relator's service as a temporary magistrate was pursuant to a bilateral contract that did not include fringe benefits like vacation or sick leave, (2) relator was not eligible for workers' compensation or unemployment compensation, (3) relator was never on the city or municipal court payroll, (4) neither the city nor the municipal court withheld PERS contributions on his behalf, (5) relator represented clients in court on days he was not on the bench, and (6) relator was paid pursuant to an IRS form 1099 for independent contractors instead of a W-2 form for employees.

{¶19} Upon review, we find persuasive respondents' reliance upon *Schaengold* and, pursuant to the analysis of the Supreme Court in that case, we find that there was some evidence to support the determination by the board in the instant case that relator was not a public employee during the entire period he worked part-time for Grove City. Accordingly, we find no abuse of discretion by OPERS in denying relator's request for service credit.

{¶20} Respondents' objections to the magistrate's decision are sustained. Based upon the foregoing, we adopt the findings of fact contained in the magistrate's decision, but not the conclusions of law, and we deny the request for a writ of mandamus.

Objections sustained; writ of mandamus denied.

FRENCH and CONNOR, JJ., concur.

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[Cite as *State ex rel. Curtin v. Ohio Pub. Emps. Retirement Sys.*, 2011-Ohio-2536.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Robert E. Curtin,	:	
Relator,	:	
v.	:	No. 09AP-801
Ohio Public Employees Retirement System and The City of Grove City, Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on September 17, 2010

Hrabcak & Company, L.P.A., Michael Hrabcak and *Heidi A. Smith*, for relator.

Richard Cordray, Attorney General, and *Hilary R. Damaser*, for respondent Ohio Public Employees Retirement System.

Schottenstein, Zox & Dunn, LPA, Stephen J. Smith, Jr., Paul L. Bittner, Aaron L. Granger and *David T. Ball*, for respondent The City of Grove City.

IN MANDAMUS

{¶21} In this original action, relator, Robert E. Curtin ("relator" or "Curtin"), requests a writ of mandamus ordering respondent Ohio Public Employees Retirement System ("OPERS") to vacate its decision denying him the status of public employee while

he was employed part time as the assistant income tax administrator for respondent The City of Grove City, Ohio ("Grove City"), and to enter an order finding that relator was a public employee.

Findings of Fact:

{¶22} 1. Curtin started his career as a public employee earning OPERS service credit with the Ohio Department of Taxation as a personal property tax consultant from 1973 to 1975. He continued to accrue service credit eligibility during his employment as an income tax administrator for the City of Columbus from 1975 through 1987. After leaving the City of Columbus, Curtin began his own tax consulting operation, landing several contracts, and ultimately building a business earning gross receipts of over $300,000 by 2003. Between 1989 and 2005, Curtin maintained service contracts with 15 different public employers at one time or another. Grove City was one of the 15 public employers to enter into a contract with Curtin to perform tax related services.

{¶23} During the initial engagement for services with Grove City, Curtin acknowledges that he understood his relationship to be that of an independent contractor. Curtin was issued a 1099 by Grove City for each year of his service contracts, and as a knowledgeable tax specialist, Curtin filed the appropriate documentation for his tax consulting business with the IRS. Overlapping the same years of his service contracts with Grove City, Curtin worked as a part-time employee for the Regional Income Tax Agency ("RITA") for which he received an annual W-2.

{¶24} Curtin continued to accrue service credit as a public employee with OPERS through his employment with RITA. In 2005, after running a profitable tax consulting business for several years, Curtin unsuccessfully approached Grove City about hiring him

as a full-time employee. Alternatively, he asked Grove City to pay RITA directly for services he performed for Grove City for the purpose of increasing his final average salary upon retirement.

{¶25} 2. On March 30, 2006, an OPERS compliance officer determined that relator was a public employee for his service with Grove City. Grove City administratively appealed that decision.

{¶26} 3. By letter dated December 29, 2006, an OPERS "issue resolution officer" upheld the decision:

> **Due to the information provided, I find Mr. Curtin to be an employee for his service with the City of Grove City from June 7, 1989 through his termination date in 2005 and contributions must be submitted for the hours worked. * * ***

(Emphasis sic.)

{¶27} 4. Grove City administratively appealed the December 29, 2006 decision.

{¶28} 5. By letter dated July 5, 2007, OPERS' general counsel determined:

> Based on our review of this matter, we find that Mr. Curtin was performing services as an independent contractor for the above referenced period. As such, no retirement contributions are due on this service.
>
> Ohio Administrative Code, Section 145-1-42(A)(2)(a)-(h) provides that an independent contractor means an individual who is party to a bilateral agreement that defines the compensation, rights, obligations, benefits and responsibilities of both parties; is paid a retainer, fee or other payment by contractual arrangement for particular services; is not eligible for workers' compensation or unemployment compensation; may not be eligible for employee fringe benefits such as vacation or sick leave; does not appear on the public employer's payroll; is required to provide his own supplies, equipment, and assistants/replacements if necessary; is minimally supervised by personnel of the

> public employer as to the manner of work; and should receive an IRS Form 1099 for income tax reporting purposes.
>
> Mr. Curtin provided services to the City on a contractual basis; was paid a fee for his services; is not covered by the City's Workers' Compensation plan; did not receive fringe benefits, did not appear on the City's payroll; provided many of his own supplies, and received Form 1099 for income tax reporting purposes. Further, the City did not control the manner of Mr. Curtin's work. City personnel only received periodic updates on Mr. Curtin's efforts to collect delinquent taxes.

{¶29} 6. Relator administratively appealed the senior staff level determination as provided by OPERS' general counsel.

{¶30} 7. On May 1, 2008, relator's administrative appeal was heard by a hearing examiner appointed by the Public Employees Retirement Board ("PERB"). The hearing was recorded and transcribed for the record.

{¶31} 8. On August 25, 2008, the hearing examiner issued a 38-page "Report and Recommendation" ("R&R"). Fifteen pages are devoted to a "Summary of the Evidence," followed by an "Analysis" that also fills 15 pages.

{¶32} The "Analysis" portion of the R&R states in part:

> It bears noting also that the rules in effect when the City entered into its first contract with Mr. Curtin are not the same as those that were adopted in 1992. Between 1976 and 1992, a set of rules was in place that had but three key requirements, and it wasn't until 1992 that the inventory of relevant factors relied by the City came into effect. * * *
>
> When Mr. Curtin entered into the contract with the City, the Board's rules for persons working under contracts were thus the same rules that had been in place since 1976. 1976 is an important year, because legislation enacted in that year permitted, for the first time, an employer to exclude workers who otherwise would presumptively be public employees,

from participating in OPERS, if the worker was hired under a "personal service contract." Employers who could hire employees under a "personal service contract" were not required to contribute towards the worker's retirement, saving the employer money, and shifting to the worker the responsibility to contribute to Social Security. When the General Assembly permitted employers to exclude these workers, the Board amended its rule (effective August 20, 1976), and set out the criteria it would use when determining whether a given worker was or was not working under a "personal service contract."

The 1976 rules defining what it meant to work under a personal service contract were in place when Mr. Curtin started working in 1989, and remained in effect, unchanged, until 1992. The Board's rules in 1976 provided that three conditions had to be present in order for the agreement between a public employee and a public employer to constitute "employ[ment] under a personal service contract": First, payment for the services of the person must "not appear on a public payroll." Here, the evidence establishes that the City kept these payments off of its public payroll, so this condition is met. Second, the person working for the City under the terms of the contract must "not be eligible for sick leave, vacation, hospitalization, or other fringe benefits extended to 'regular' employees." This point does not appear to be contested, because Mr. Curtin in his closing argument states that under the current version of the Codified Ordinances of Grove City, Mr. Curtin, as a part-time employee, was not eligible for benefits.

The third requirement in place in 1976 is, however, relevant in these proceedings. In his closing argument, Mr. Curtin correctly notes that in the 1976 version of these rules, the worker needed to "be a party to a formal bilateral written contract delineating the rights, obligations, benefits, and responsibilities of both parties." Thus, while it is a necessary condition for there to be a written agreement between the parties, that alone is not sufficient. The agreement:

- must be bilateral;
- must delineate the rights of both parties;
- must delineate the obligations of both parties;

- must delineate the benefits of both parties; and

- must delineate the responsibilities of both parties.

Curiously, the parties did not offer copies of the contracts they entered into in 1989, nor in the next twelve years – the first contract offered into evidence was from 2002. They did, however, agree that the preceding contracts were substantially the same as the ones shown as exhibits. The contracts offered into evidence are bilateral, but they do *not* delineate:

- which party has the responsibility for contributing to either Social Security or OPERS;

- whether Mr. Curtin will have the benefit of using City property, equipment, supplies, utilities, staff, and office space;

- whether Mr. Curtin will be entitled to sick leave, vacation time, workers' compensation coverage, unemployment compensation coverage, or any other fringe benefits;

- whether the City would have the obligation to pay Mr. Curtin using the City payroll.

The evidence established that at the very beginning of their working relationship, the City bore the responsibility for providing Mr. Curtin with an office, supplies, staff, and equipment; it denied him fringe benefits; it determined to pay him not on the payroll but as a professional expense; and it would not pay either its share or the employee's share of contributions due for either Social Security or OPERS. Thus, from the evidence, the parties in 1989 did *not* enter into a bilateral contract "delineating the rights, obligations, benefits, and responsibilities of both parties."

Mr. Curtin, as the claimant, had the burden of proving he was eligible for OPERS membership under the rules that were in effect in 1989 through 1992. He met that burden. The evidence is uncontroverted and establishes that Mr. Curtin was working for a public employer as a public officer: he maintained his office in the City's Finance Department,

saw members of the public on a daily basis, and provided services as an assistant to the City's Income Tax Administrator. For the contracts entered into in 1989, 1990, 1991, and 1992, Mr. Curtin proved he was a public employee working for a public employer, meeting his evidentiary burden and proving his eligibility for OPERS membership during those years.

* * *

In the changes to its rules effective in 1992, the Board retained the key provisions found in its prior rule, but significantly expanded the factors to be considered in cases such as these. All told, there have been four versions of these rules promulgated since 1992: two were under O.A.C. section 145-5-15 (effective 8/31/92, and amended effective 9/27/98, see copies attached as an appendix). In 2003 the section designation changed and these rules can now be found in O.A.C. section 145-1-42 (effective 1/1/03, and amended effective 1/1/06). These versions expressly refer to "independent contractors," and distinguish them from "contract employees": the former are expressly barred from participating in OPERS (unless they were parties to contracts predating August 20, 1976), and the latter were expressly determined to be eligible for OPERS membership. The post-1992 versions all recognize that *both* "contract employees" and "independent contractors" work pursuant to bilateral contracts. The post-1992 versions also all provide that these "contracts" may take the form of ordinances or resolutions – that there might not be a traditional contract, but instead the parties may act through city legislation. The question then becomes whether, under the post-1992 Board rules, Mr. Curtin was a "contract employee" – in which case he was eligible for OPERS participation, or an "independent contractor," in which case he was not eligible for OPERS participation.

* * *

Significant for our purposes here, all four of these post-1992 versions have a common requirement, one retained from the 1976 rule: in order for a worker to be barred from participating in OPERS as an "independent contractor," the agreement must "define the compensation, rights, obligations, benefits and responsibilities of both parties[.]"

> Thus, the requirements found in 1976 that the City spell out the respective responsibilities, rights, obligations, and benefits, all are retained in post-1992 Board rules; plus the contracts must define the compensation to be paid under the contracts. With respect to this requirement (and this is but one of many), the City failed to meet its evidentiary burden, for the reasons set forth above: these contracts (to the extent the Board accepts the parties' claim that the 1989 through 2002 contracts were the same as the ones presented as evidence), do not define Mr. Curtin's responsibility to contribute to either OPERS or Social Security, they don't reveal that the City was responsible for providing Mr. Curtin with an office and all that goes with it, they don't define Mr. Curtin's responsibility to maintain regular office hours in the City's Finance Department, and they don't disclose that Mr. Curtin's compensation would be reported apart from the City's payroll.
>
> The requirement that the contract define these rights and responsibilities now is but one factor the Board is required to consider. Since 1992, the Board and its staff have been required to consider all of the factors shown in sections (A)(1) and (A)(2) of the four versions of the cited rules.

(Footnotes omitted; emphases sic.)

{¶33} The R&R finishes with Findings of Fact, Conclusions of Law, and a Recommendation:

> **Findings of Fact** * * *
>
> [One] By at least a preponderance of the evidence the Petitioner, Robert E. Curtin, Jr., has proved that from 1989 to 2005, he was a public officer, working at the City of Grove City, Ohio, which is a public employer, in the capacity of Assistant Income Tax Administrator in the City's Finance Department.
>
> [Two] By at least a preponderance of the evidence, the Petitioner has proved that at all times relevant to this proceeding, he was employed at a non-elective city office, as that term is used in O.R.C. 145.01(A).
> [Three] At all times relevant to these proceedings, the Petitioner was not a party to a formal, bilateral, written

contract that delineated or defined the rights, obligations, benefits, and responsibilities of both the City and the Petitioner.

[Four] The City has failed to establish, by at least a preponderance of the evidence, that between 1989 and 1992 the City and the Petitioner were parties to a bilateral written contract delineating the rights, obligations, benefits and responsibilities of both parties.

[Five] The City has failed to establish, by at least a preponderance of the evidence, that between 1989 and 1992 the Petitioner was employed under a personal service contract, as that term is used in O.A.C. 145-5-15, eff. 8/20/76.

[Six] The City has failed to establish, by at least a preponderance of the evidence, that between 1992 and 2005 the Petitioner and the City were parties to a bilateral agreement that defines the compensation, rights, benefits, and responsibilities of both parties; that the Petitioner was paid a fee by contractual arrangement for particular services; that the Petitioner was required to provide his own supplies and equipment; that the Petitioner was required to pay his assistants at the City of Grove City; that the Petitioner was not controlled or supervised by personnel of the City; and that the Petitioner should receive an Internal Revenue Service Form 1099 for income tax purposes.

[Seven] From the evidence now in the record, the City has failed to establish, by at least a preponderance of the evidence, that the Petitioner was an independent contractor, as that term is used in O.A.C. 145-5-15(A)(2), eff. 8-31-92, and as amended, eff. 9-27-98; and as that term is used in O.A.C. 145-1-42(A)(2), eff. 1-1-03.

Conclusions of Law

[One] The authority for determining whether a person is eligible to participate in the Ohio Public Employees Retirement System is found in provisions of the Ohio Revised Code, the Ohio Administrative Code, and case law construing those authorities. In determining eligibility of persons whose service extended from 1989 to 2005, the applicable authority is the law as expressed in the statutes

and regulations that were in effect at the time of employment.

[Two] Throughout all applicable periods of time, Ohio law has provided that a municipal corporation is a "public employer." R.C. § 145.01(D). The Respondent in these proceedings, the City of Grove City, Ohio, is a public employer, as that term is used in R.C. §§ 145.01(D) and 703.01(A).

[Three] Throughout all applicable periods of time, Ohio law has provided that a person is a "public employee" for purposes of determining eligibility to participate in the Ohio Public Employees Retirement System if he or she is a "person holding an office, not elective," with any municipal corporation. R.C. § 145.01(A)(1).

[Four] Ohio law provides that "[i]n all cases of doubt, the Public Employees Retirement Board shall determine whether any person is a public employee, and its decision is final." R.C. § 145.01(A) (Page 2007). When the Board is called upon to make this determination, the person claiming to be eligible to participate in the OPERS has an affirmative obligation to establish, by at least a preponderance of the evidence, that he or she meets the definition of "public employee" in order to be eligible to participate in the Retirement System.

[Five] The Petitioner, Robert Curtin, established, by at least a preponderance of the evidence, that he was a public employee, working for the City of Grove City, Ohio, from 1989 to 2005. Accordingly, the Petitioner has established that he was performing services as a public employee for a public employer throughout this period, and was eligible for membership in [O]PERS.

[Six] Section 145.03 of the Ohio Revised Code, effective August 20, 1976, bars persons under personal service contracts from participating in [O]PERS. The burden of establishing the applicability of R.C. 145.03 to exclude a person's term of public employment from [O]PERS eligibility is on the employer. Pursuant to O.A.C. 145-5-15, eff. 8/20/76, that burden would be met only if by at least a preponderance of the evidence the employer establishes that the person was a party to a formal, bilateral, written

contract delineating the rights, obligations, benefits, and responsibilities of both the employer and the employee. There is in the record now before the Board insufficient evidence to establish that the Petitioner was a party to a contract that established the rights, obligations, benefits, and responsibilities of the parties. Accordingly, the City has failed to meet its burden of establishing the Petitioner was employed under personal service contracts from 1989 to 1992, as that term is used in O.A.C. 145-5-15, eff. 8/20/76, and R.C. 145.03.

[Seven] Section 145.012 of the Ohio Revised Code, eff. 8/3/92, provides that any person employed on a contractual basis as an independent contractor under a personal service contract with a public employer is not a "public employee" and is excluded from participating in OPERS. In making any determination as to whether an individual employed between 1992 and 2005 is a contract employee or independent contractor the Board shall review, including but not limited to, the elements described in paragraphs (A)(1) and (A)(2) of Ohio Administrative Code section 145-1-42, eff. 1/1/03.

[Eight] The burden of establishing the applicability of R.C. 145.012 to exclude a person's term of public employment from [O]PERS eligibility is on the employer. Pursuant to O.A.C. 145-5-15, eff. 8-31-92, as amended eff. 9-27-98, and O.A.C. 145-1-42, eff. 1-1-03, that burden would be met only if by at least a preponderance of the evidence the employer establishes that the person was an independent contractor, as that term is used in the Board's rules. There is in the record now before the Board insufficient evidence to establish that the Petitioner was an independent contractor between 1992 and 2005. Where the City by at least a preponderance of the evidence has not proved that between 1992 and 2005 the Petitioner and the City were parties to a bilateral agreement that defines the compensation, rights, benefits, and responsibilities of both parties; that the Petitioner was paid a fee by contractual arrangement for particular services; that the Petitioner was required to provide his own supplies and equipment; that the Petitioner was required to pay his assistants at the City of Grove City; that the Petitioner was not controlled or supervised by personnel of the City; and that the Petitioner should receive an Internal Revenue Service Form 1099 for income tax purposes, the City has failed to establish that the Petitioner

> was an independent contractor between 1992 and 2005, as that term is used in the relevant Board regulations.
>
> [Nine] Throughout his service as Assistant Income Tax Administrator for the City of Grove City, Ohio, the Petitioner was a part-time employee, and the formula for reporting part-time service is set forth in R.C. § 145.01(T)(1). The Respondent City of Grove City failed to deduct contributions required pursuant to R.C. § 145.47 throughout the Respondent's entire term of service, and is liable for the Respondent's unreported service pursuant to R.C. § 145.483, with penalties and interest as may be provided pursuant to § 145.51 of the Revised Code.
>
> **Recommendation**
>
> Upon this review of the evidence, and upon examination of the applicable authorities controlling these proceedings, I recommend the Board SUSTAIN the Petitioner's appeal challenging the decision of the Board's senior staff as reported in the Board's letter of July 5, 2007, find the Petitioner WAS A PUBLIC EMPLOYEE while employed part-time as the Assistant Income Tax Administrator for the City of Grove City, and find the City liable for the Petitioner's unreported service pursuant to R.C. § 145.483.

(Emphases sic.)

{¶34} 9. In September 2008, Grove City filed objections to the hearing examiner's R&R.

{¶35} 10. On November 13, 2008, at one of its monthly meetings, PERB heard arguments of counsel regarding the R&R. Thereafter, PERB voted to remand the matter to the hearing examiner.

{¶36} 11. By letter dated November 24, 2008, OPERS' general counsel informed the hearing examiner:

> The Ohio Public Employees Retirement Board instructed me to inform you of the November 13, 2008 board action to

> remand the above-referenced membership case to your attention for further analysis on the following issues:
>
> [One] The board requested more analysis on whether and how Mr. Curtin's scope and conditions of services performed for the other Ohio municipalities differed from that of Grove City.
>
> [Two] The board questioned whether in weighing the factors relative to independent contractor/employee status, whether some factors should be given more importance than others. For example, the board states that the fact that Grove City required Mr. Curtin maintain certain office hours did not seem determinative to the board and requested what other factors would lean towards employment v. independent contractor status.
>
> [Three] The board questioned the technical analysis relative to the specificity of contracts issue, and requested any relevant case law or precedent to establish that the absence of certain terms in a contract equates to the contract failing to "delineate the rights, obligations, benefits and responsibilities" under OPERS rules.
>
> I have also enclosed a copy of Written Objections of Respondent City of Grove City to Hearing Examiner's Report and Recommendation filed on September 9, 2008. * * *

{¶37} 12. By journal entry dated January 6, 2009, the hearing examiner ordered that there would not be an additional hearing regarding the remand.

{¶38} 13. On February 17, 2009, the hearing examiner issued his "Report and Recommendation upon Remand" ("Remand Report") consisting of 22 pages with exhibits.

> The Remand Report states in part:
>
> In a letter dated November 24, 2008, the Board directed further analysis on three issues, as a supplement to the Report and Recommendation filed in this case. It also provided a copy of written objections to the Report, filed by

the Respondent. Accordingly, this supplement to the Report will provide further analysis on three issues:

[One] There will be additional analysis on whether and how Mr. Curtin's scope and conditions of services performed for the Respondent City differed from the scope and conditions of work Mr. Curtin performed for other Ohio municipalities.

[Two] There will be additional analysis on whether some factors should be given more importance than others, when the Board weighs factors relative to a person's status as either an independent contractor or an employee under the statutes and regulations applicable to Board determinations.

[Three] There will be additional analysis on that part of the Report that analyzed the phrase "delineates the rights, obligations, benefits and responsibilities" under OPERS rules. This analysis will include a report on whether any case law or precedent establishes that the absence of certain terms in a contract equates to the failure of the contract to make such a delineation.

* * *

[Three] **The Impact of the Absence of Terms that Delineate the Rights, Obligations, Benefits and Responsibilities in the Parties' Contracts[.]**

The Board directed a review of case law or other precedent that would supplement that part of the Report's analysis that concerned terms found in the parties' contracts. The Board questioned the technical analysis that was based on language appearing in the controlling statutes and regulations, starting in 1976, that required independent contractor status to be based on a written contract that "delineates the rights, obligations, benefits, and responsibilities". * * *

* * *

Thus, the Report noted the 1976 statutory language and applied that language to the contracts between Mr. Curtin and the City from 1989 until 1992, when the law changed and the contract-term language became but one of several

factors to be considered by the Board when determining independent-contractor status.

In its written objections, the City argues that in each year, the parties' contracts met this statutory threshold, because they all included:

- the Petitioner's job responsibilities;
- the City's right to expect that Petitioner would perform those responsibilities in a professional manner;
- the Petitioner's compensation at a specified hourly rate;
- the term of the contract (i.e., the length of time covered by the contract);
- the Petitioner's right to reimbursement for expenses; and
- the parties' right to terminate the contract upon 30 days' written notice.

The record establishes that each of these terms are in the contracts; on this point the record is clear. Ultimately, whether this inventory of terms is sufficient for the Board is a matter of policy, left to its sound discretion. There is no reported case where this interpretation of the requirements of the 1976 version of O.R.C. 145.03 is reviewed by the courts. * * *

* * *

Ultimately, it remains within the sound discretion of the Board, in its evaluation of this Report, to accept or reject the analysis objected to by the City. As long as the Board fairly interprets the language found in the 1976 version of O.R.C. 145.01 and O.A.C. 145-5-15, it may conclude that these contracts need not specify which party (as between the employer and the claimant) should be responsible for paying retirement contributions.

* * *

Should the Board, in the exercise of its judgment, find the contract as written meets the statutory and regulatory requirements, and should the Board, in the exercise of its judgment, find that eligibility factors on balance establish that Mr. Curtin was engaged as an independent contractor, it should amend the Findings of Fact and Conclusions of Law in the Report of August 25, 2008, as follows:

Findings of Fact

Finding of Fact 1: no changes.

Finding of Fact 2: no changes.

Finding of Fact 3: At all times relevant to these proceedings, the Petitioner was a party to a formal, bilateral, written contract that delineated or defined the rights, obligations, benefits, and responsibilities of both the City and the Petitioner.

Finding of Fact 4: The City has established, by at least a preponderance of the evidence, that between 1989 and 1992 the Petitioner was employed as an independent contractor, working under a "personal service contract," as those terms are used in O.A.C. 145-5-15, eff. 8/20/76.

Finding of Fact 5: The City has established, by at least a preponderance of the evidence, that between 1992 and 2005 the Petitioner and the City were parties to a bilateral agreement that defines the compensation, rights, benefits, and responsibilities of both parties to a degree sufficient to meet the requirements of O.A.C. 145-5-15 (from 1992 to 2003), and O.A.C. 145-1-42 (from 2003 to 2005); that the Petitioner was not eligible for fringe benefits, sick leave, vacation leave, workers' compensation, or unemployment compensation; and that while the Petitioner was not always paid a fee by contractual arrangement for particular services, was not required to provide his own supplies and equipment, and was not required to pay his assistants at the City of Grove City, the Petitioner was not controlled or supervised by personnel of the City to such a degree as to render him an employee.

Finding of Fact 6: From the evidence now in the record, the City has established, by at least a preponderance of the

evidence, that between 1992 to 2005 the Petitioner was an independent contractor, as that term is used in O.A.C. 145-5-15(A)(2), eff. 8-31-92, and as amended, eff. 9-27-98; and as that term is used in O.A.C. 145-1-42(A)(2), eff. 1-1-03.

Finding of Fact 7: delete in full.

Conclusions of Law

Conclusion of Law 1: no change.

Conclusion of Law 2: no change.

Conclusion of Law 3: no change.

Conclusion of Law 4: no change.

Conclusion of Law 5: no change.

Conclusion of Law 6: Section 145.03 of the Ohio Revised Code, effective August 20, 1976, defines the term "personal service contract" and bars persons working under such contracts from participating in OPERS. The burden of establishing the applicability of R.C. 145.03 to exclude a person's term of public employment from OPERS eligibility is on the employer. There is in the record now before the Board evidence sufficient to establish that between 1989 and 1992 the Petitioner was a party to a personal service contract, as that term is used in O.A.C. 145-5-15, eff. 8/20/76. Accordingly, the City has met its burden of establishing the Petitioner was not eligible to participate in OPERS from 1989 to 1992, as that term was used in O.A.C. 145-5-15, eff. 8/20/76, and R.C. 145.03.

Conclusion of Law 7: no change.

Conclusion of Law 8: The burden of establishing the applicability of R.C. 145.012 to exclude a person's term of public employment from [O]PERS eligibility is on the employer. Pursuant to O.A.C.145-5-15, eff. 8-31-92, as amended eff. 9-27-98, and O.A.C. 145-1-42, eff. 1-1-03, that burden would be met only if by at least a preponderance of the evidence the employer establishes that the person was an independent contractor, as that term is used in the Board's rules. There is in the record now before the Board

sufficient evidence to establish, by a preponderance, that the Petitioner was an independent contractor between 1992 and 2005. Where the City by at least a preponderance of the evidence has proved that between 1992 and 2005, the Petitioner and the City were parties to a bilateral agreement that defines the compensation, rights, benefits, and responsibilities of both parties; that the Petitioner was not eligible for fringe benefits, vacation leave, sick leave, workers' compensation, or unemployment compensation; and notwithstanding the fact that the Petitioner was not required to provide his own supplies and equipment nor pay his assistants at the City of Grove City, and was not always paid a fee by contractual arrangement for particular services, the City has established that the Petitioner was an independent contractor between 1992 and 2005, as that term is used in the relevant Board regulations.

Conclusion of Law 9: Upon sufficient proof that the Claimant was not eligible to participate in OPERS during the period described by his Claim, the Claim should be denied, and the Board should affirm and implement the terms appearing in the final determination by the Board's General Counsel, dated July 5, 2007.

Conclusion

In sum, to address the three queries presented by the Board's remand order: (1) There are significant differences between the employment relationship that existed between Mr. Curtin and Grove City, and those that existed between Mr. Curtin and the other municipalities he served. Those differences do not, however, constitute a basis for concluding Mr. Curtin was an independent contractor when he worked for Grove City. (2) No one factor should control the outcome of this claim. It is for the Board to evaluate the relative weight to give to the various factors appearing in the then-controlling regulations and statutes, and based on that evaluation make its determination of this claim. (3) There are no reported cases that definitively establish how to interpret or apply the requirement that a contract "delineate the rights, obligations, benefits, and responsibilities" of the parties, and no reported cases that guide the Board when those terms are absent from such a contract. The Board may choose to follow its past decisions concerning the interpretation of this language or, for cause shown, it may conclude that such

> specificity is not required in order for the City to establish the existence of a contract that meets the requirements of O.A.C. 145-5-15 and O.A.C. 145-1-42.
>
> The Report and Recommendation submitted on August 25, 2008, is incorporated by this reference, supplemented as set forth above. In the event the Board adopts the findings of fact and conclusions of law appearing above, then my recommendation would be as follows (replacing in its entirety the Recommendation appearing in the August 25, 2008, Report):
>
> **Recommendation**
>
> Upon this review of the evidence, and upon examination of the applicable authorities controlling these proceedings, I recommend the Board DENY the Petitioner's appeal challenging the decision of the Board's senior staff as reported in the Board's letter of July 5, 2007, find the Petitioner WAS NOT A PUBLIC EMPLOYEE while employed part-time as the Assistant Income Tax Administrator for the City of Grove City and IS NOT ELIGIBLE to participate in OPERS during the time reflected in his claim, and find the City IS NOT liable for the Petitioner's unreported service pursuant to R.C. § 145.483.

(Emphases sic.)

{¶39} 14. On March 18, 2009, at another of its monthly meetings, PERB heard arguments of counsel. At the meeting, PERB voted to amend the findings of fact and conclusions of law of the August 25, 2008 R&R to find that relator is not eligible to participate in OPERS during the time of his service with Grove City.

{¶40} 15. By letter dated March 19, 2009, OPERS' executive director informed the parties specifically of the amendments to the findings of fact and conclusions of law of the R&R. The March 19, 2009 letter repeats the hearing examiner's amendments to his findings of fact and conclusions of law as presented in his Remand Report. The March 19, 2009 letter concludes:

> Therefore the Board voted that Mr. Curtin was not a public employee while employed part-time as the Assistant Income Tax Administrator for the City of Grove City; is not eligible to participate in OPERS during the time reflected in his claim; and the City is not liable for Mr. Curtin's unreported service pursuant to R.C. 145.483.

{¶41} 16. On August 21, 2009, relator, Robert E. Curtin, filed this mandamus action.

Conclusions of Law:

{¶42} It is the magistrate's decision that this court issue a writ of mandamus with respect to that portion of relator's Grove City service starting in 1989 until the August 31, 1992 effective date of former Ohio Adm.Code 145-5-15.

{¶43} Pursuant to Amended Substitute House Bill No. 268 ("Am.Sub.H.B. 268"), effective August 20, 1976, the Ohio General Assembly added language to R.C. 145.03 to limit the definition of a public employee so that one "who is employed under a personal service contract, does not become a member of the public employees retirement system."

{¶44} Effective December 12, 1976, PERB promulgated Ohio Adm.Code 145-5-15(C) which stated:

> "Employed under a personal service contract" means that an individual so employed would:
>
> (1) Not appear on a public payroll.
>
> (2) Not be eligible for sick leave, vacation, hospitalization, or other fringe benefits extended to "regular" employees.
>
> (3) Be a party to a formal bilateral written contract delineating the rights, obligations, benefits and responsibilities of both parties.

{¶45} Effective August 31, 1992, PERB promulgated former Ohio Adm.Code 145-5-15 which is now Ohio Adm.Code 145-1-42. Therein, "independent contractor" means an individual who:

> (a) Is a party to a bilateral agreement which may be a written document, ordinance, or resolution that defines the compensation, rights, obligations, benefits and responsibilities of both parties;
>
> (b) Is paid a fee or other payment by contractual arrangement for particular services;
>
> (c) Is not eligible for workers' compensation or unemployment compensation;
>
> (d) May not be eligible for employee fringe benefits such as vacation or sick leave;
>
> (e) Does not appear on a public payroll;
>
> (f) Is required to provide his own supplies and equipment, and provide and pay his assistants if necessary;
>
> (g) Is not controlled or supervised by personnel of the public employer as to the manner of work; and
>
> (h) Should receive an Internal Revenue Service Form 1099 for income tax reporting purposes.

Curtin's Grove City Service: 1989 to 1992

{¶46} Recently, in *State ex rel. City of Columbus v. Public Emp. Retirement Bd.*, 10th Dist. No. 08AP-807, 2009-Ohio-6321, this court had occasion to apply former Ohio Adm.Code 145-5-15(C) effective August 20, 1976.

{¶47} In *City of Columbus*, the hearing examiner's R&R rendered the following analysis:

> The Board's rules in 1976 provided that three conditions had to be present in order for the agreement between a public employee and a public employer to constitute "employ[ment] under a personal service contract": First, payment for the services of the person must "not appear on a public payroll." Here, the evidence establishes that the City kept these payments off of its public payroll, so this condition is met. Second, the person working for the City under the terms of the contract must "not be eligible for sick leave, vacation, hospitalization, or other fringe benefits extended to 'regular' employees." * * * The testimony * * * established that the claimants received none of the benefits described in the rule. Accordingly, the City met this condition.
>
> In order to meet the third requirement found in the Board's rule, the Claimant needed to "be a party to a formal bilateral written contract delineating the rights, obligations, benefits, and responsibilities of both parties." Thus, while it is a necessary condition for there to be a written agreement between the parties, that alone is not sufficient. * * *
>
> * * *
>
> A review of the evidence now in the record demonstrates that the agreements entered into between the City and these Claimants did not satisfy these requirements. The contracts do not address whether the City will provide fringe benefits, they do not state whether the Real Estate Negotiator will be a member of PERS or will be responsible for contributing to Social Security instead of PERS; and they do not address whether the City will bear any responsibility for paying either the employer or employee's share of PERS withholdings.

Id. at ¶39.

{¶48} In *City of Columbus*, this court accorded PERB due deference in its interpretation of former Ohio Adm.Code 145-5-15(C) effective August 20, 1976.

{¶49} It is clear that PERB's interpretation of Ohio Adm.Code 145-5-15(C) as it was applied to respondents Richard Pieplow, Donna Hunter, Linda Helms, and Minnie Dixon in the *City of Columbus* case is inconsistent with the interpretation given that rule

by the hearing examiner in his Remand Report and as adopted by PERB in the instant case.

{¶50} Finding of fact four and conclusion of law six of the Remand Report are at odds with PERB's interpretation of former Ohio Adm.Code 145-5-15(C) and as PERB applied the former rule in the four cases involved in the *City of Columbus* case.

{¶51} Again, finding of fact four and conclusion of law six of the Remand Report state:

> Finding of Fact 4: The City has established, by at least a preponderance of the evidence, that between 1989 and 1992 the Petitioner was employed as an independent contractor, working under a "personal service contract," as those terms are used in O.A.C. 145-5-15, eff. 8/20/76.
>
> * * *
>
> Conclusion of Law 6: Section 145.03 of the Ohio Revised Code, effective August 20, 1976, defines the term "personal service contract" and bars persons working under such contracts from participating in OPERS. The burden of establishing the applicability of R.C. 145.03 to exclude a person's term of public employment from OPERS eligibility is on the employer. There is in the record now before the Board evidence sufficient to establish that between 1989 and 1992 the Petitioner was a party to a personal service contract, as that term is used in O.A.C. 145-5-15, eff. 8/20/76. Accordingly, the City has met its burden of establishing the Petitioner was not eligible to participate in OPERS from 1989 to 1992, as that term was used in O.A.C. 145-5-15, eff. 8/20/76, and R.C. 145.03.

{¶52} PERB cannot have it both ways. The doctrine of due deference does not permit PERB to arbitrarily interpret its rule in one fashion for one case and then give it another interpretation in another case.

{¶53} Accordingly, the magistrate finds that relator is entitled to a writ of mandamus ordering respondent OPERS to enter an amended decision that deletes its adoption of finding of fact four and conclusion of law six from the Remand Report and that accepts finding of fact four and conclusion of law six from the R&R issued by the hearing examiner on August 25, 2008.

Curtin's Grove City Service: 1992 to 2005

{¶54} Regarding relator's Grove City service beginning with the effective date of former Ohio Adm.Code 145-5-15, i.e., August 31, 1992, the record clearly provides sufficient evidence to support PERB's finding that relator was an independent contractor beginning August 31, 1992.

{¶55} In *State ex rel. Schaengold v. Ohio Public Emps. Retirement Sys*., 114 Ohio St.3d 147, 2007-Ohio-3760, the Supreme Court of Ohio had occasion to review a PERB decision holding that Gary C. Schaengold was not a public employee between 1986 and 2004 when he served as a temporary magistrate for the Dayton Municipal Court.

{¶56} In *Schaengold*, the court applied the definition of "independent contractor" as that term is defined at Ohio Adm.Code 145-1-42(A)(2) (formerly 145-5-15).

{¶57} It should be noted that this court, in the *City of Columbus* case, did not apply the definition of "independent contractor" as did the *Schaengold* court ostensibly because the time period at issue in *City of Columbus* predates the August 31, 1992 effective date of former Ohio Adm.Code 145-5-15 wherein the definition of "independent contractor" first appears. Thus, the specific PERB rules at issue in *City of Columbus* and *Schaengold* are dramatically different. Accordingly, we would expect the analysis to differ between the two cases.

{¶58} In *Schaengold*, the court quotes the board's analysis which:

> * * * "[D]etermined that the factors weighed more heavily in concluding that the service is more of that of an independent contractor rather than a public employee, including the facts that Mr. Schaengold is not required to report to the court on a daily basis, he has the option of passing on assignments if he has scheduling conflicts, and represents individual clients in the Dayton Municipal Court on days when he is not on the bench."

Id. at ¶6.

{¶59} Thus, in *City of Columbus*, the contract's failure to delineate the retirement terms was held to be dispositive, whereas, in *Schaengold*, no one factor was dispositive and the board was given the discretion to weigh the factors listed in the definition of "independent contractor."

{¶60} In *Schaengold*, the court explains:

> There is sufficient evidence here to support the board's determination that Schaengold was an independent contractor rather than a public employee when he served as a temporary magistrate for the Dayton Municipal Court. Schaengold was paid a flat fee by bilateral contract for services performed, was not eligible for workers' compensation, unemployment compensation, or employee fringe benefits, did not appear on either the city's or municipal court's payroll, was not controlled or supervised in conducting hearings or in issuing decisions, and received IRS form 1099 for tax purposes. See Ohio Adm.Code 145-1-42. Although he was not required to provide a replacement when he could not serve, the board found that under his contract, he could decline assignments if he had scheduling conflicts.

Id. at ¶20.

{¶61} The *Schaengold* decision clearly supports PERB's decision in the instant case for the period of Curtin's service starting with the effective date of former Ohio Adm.Code 145-5-15, i.e., August 31, 1992.

{¶62} There is no abuse of discretion in finding of fact five and conclusion of law eight contained in the Remand Report:

> Finding of Fact 5: The City has established, by at least a preponderance of the evidence, that between 1992 and 2005 the Petitioner and the City were parties to a bilateral agreement that defines the compensation, rights, benefits, and responsibilities of both parties to a degree sufficient to meet the requirements of O.A.C. 145-5-15 (from 1992 to 2003), and O.A.C. 145-1-42 (from 2003 to 2005); that the Petitioner was not eligible for fringe benefits, sick leave, vacation leave, workers' compensation, or unemployment compensation; and that while the Petitioner was not always paid a fee by contractual arrangement for particular services, was not required to provide his own supplies and equipment, and was not required to pay his assistants at the City of Grove City, the Petitioner was not controlled or supervised by personnel of the City to such a degree as to render him an employee.
>
> * * *
>
> Conclusion of Law 8: The burden of establishing the applicability of R.C. 145.012 to exclude a person's term of public employment from [O]PERS eligibility is on the employer. Pursuant to O.A.C.145-5-15, eff. 8-31-92, as amended eff. 9-27-98, and O.A.C. 145-1-42, eff. 1-1-03, that burden would be met only if by at least a preponderance of the evidence the employer establishes that the person was an independent contractor, as that term is used in the Board's rules. There is in the record now before the Board sufficient evidence to establish, by a preponderance, that the Petitioner was an independent contractor between 1992 and 2005. Where the City by at least a preponderance of the evidence has proved that between 1992 and 2005, the Petitioner and the City were parties to a bilateral agreement that defines the compensation, rights, benefits, and responsibilities of both parties; that the Petitioner was not

> eligible for fringe benefits, vacation leave, sick leave, workers' compensation, or unemployment compensation; and notwithstanding the fact that the Petitioner was not required to provide his own supplies and equipment nor pay his assistants at the City of Grove City, and was not always paid a fee by contractual arrangement for particular services, the City has established that the Petitioner was an independent contractor between 1992 and 2005, as that term is used in the relevant Board regulations.

Grove City's Written Objections to the R&R

{¶63} Relator argues that PERB abused its discretion when its general counsel enclosed a copy of Grove City's written objections with her November 24, 2008 letter to the hearing examiner. According to relator, it was an abuse of discretion for the hearing examiner to then address Grove City's written objections in his Remand Report. The magistrate disagrees with relator's argument.

{¶64} Ohio Adm.Code 145-1-11(C) provides:

> (3) The record of any appeal shall consist of the information submitted by the parties and staff to the hearing examiner, the report and recommendation, the transcript of the hearing, any objections to the report and recommendation and the minutes of any personal appearance.
>
> (4) The retirement board shall review the report and recommendation and any objections to the report and recommendation in determining whether to accept, reject, or modify the report and recommendation and may remand to the hearing examiner for further findings before making its final decision.

{¶65} Grove City cites to Ohio Adm.Code 145-1-11(C)(3) while relator, in his reply brief, cites to Ohio Adm.Code 145-1-11(C)(4). Relator points out that the rule provides that the retirement board (PERB) shall review any objections and does not provide for a review by the hearing examiner.

{¶66} But clearly, the administrative rules do not prohibit the procedure that evolved here. The rules do not prohibit the retirement board (PERB) from seeking the hearing examiner's analysis on any objections filed.

{¶67} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering respondent OPERS to amend its March 18, 2009 decision so that finding of fact four and conclusion of law six of the Remand Report are not adopted, but, instead, finding of fact four and conclusion of law six from the R&R issued August 25, 2008 are adopted.

s/s Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).