[Cite as *Holloway v. Ohio Dept. of Edn.*, 2007-Ohio-1988.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

WAYNE HOLLOWAY	Case No. 2006-06442-AD
Plaintiff	Clerk Miles C. Durfey
v.	MEMORANDUM DECISION
OHIO DEPARTMENT OF EDUCATION	
Defendant	

{¶ 1} Plaintiff Wayne Holloway stated in his complaint that he had been employed by the Board of Education of the Youngstown City School District as a coach at Hayes Middle School in Youngstown since 2001. Plaintiff was required to maintain a valid Pupil Activity Permit (Permit) issued by defendant, Ohio Department of Education (ODE) to obtain and continue his coaching job. R.C. 3313.53(C) grants local school boards the authority to employ a person as a coach if the person has a properly issued Permit. ODE is the issuing body for licenses, certificates, and permits which allow individuals to perform services for local school districts. ODE last issued plaintiff a Permit that was valid from July 1, 2002 to June 30, 2005. At the same time plaintiff was employed as a coach at the Hayes Middle School, he worked at the Youngstown Youth Academy (Academy). Plaintiff observed that he worked 11:00 p.m. to 7:00 a.m. on weekends at the Academy, which he described to be a juvenile facility. Plaintiff also noted that school was not in session during the hours when he was working at the Academy.

{¶ 2} Before plaintiff's Permit expired on June 30, 2005, ODE received a complaint ". . . alleging [p]laintiff had engaged in professional misconduct while he held a valid pupil activity permit issued by the State Board of Education [an agency of ODE]." The professional misconduct noted in the complaint allegedly occurred at the Academy where plaintiff was employed on weekends and not in his capacity as a coach at Hayes Middle School. The complaint against plaintiff was investigated and a finding was made that an

action was to be initiated under the authority of R.C. 3319.31[1] against plaintiff's Permit before the Permit would expire and jurisdiction over the matter by the State Board of Education would be nullified. Defendant explained under the confidentially mandates expressed in R.C. 3319.311[2] and Ohio Administration Code Section 3301-73-04[3] that ODE

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[1] §3319.31. Grounds for refusing, suspending, revoking or limiting license.

"(A) As used in this section and sections 3123.41 to 3123.50 and 3319.311 [3319.31.1] of the Revised Code, 'license' means a certificate, license, or permit described in division (B) of section 3301.071 [3301.07.1], in section 3301.074 [3301.07.4], 3319.088 [3319.08.8], 3319.29, 3319.302 [3319.30.2], or 3319.304 [3319.30.4], or in division (A) of section 3319.303 [3319.30.3] of the Revised Code.

"(B) For any of the following reasons, the state board of education, in accordance with Chapter 119. and section 3319.311 [3319.31.1] of the Revised Code, may refuse to issue a license to an applicant, may limit a license it issues to an applicant, or may suspend, revoke, or limit a license that has been issued to any person:

"(1) Engaging in an immoral act, incompetence, negligence, or conduct that is unbecoming to the applicant's or person's position;

"(2) A plea of guilty to, a finding of guilt by a jury or court of, or a conviction of any of the following:

"(a) A felony;

"(b) A violation of section 2907.04 or 2907.06 or division (A) or (B) of section 2907.07 of the Revised Code;

"(c) An offense of violence;

"(d) A theft offense, as defined in section 2913.01 of the Revised Code;

"(e) A drug abuse offense, as defined in section 2925.01 of the Revised Code, that is not a minor misdemeanor;

"(f) A violation of an ordinance of a municipal corporation that is substantively comparable to an offense listed in divisions (B)(2)(a) to (e) of this section.

"(C) The state board may take action under division (B) of this section on the basis of substantially comparable conduct occurring in a jurisdiction outside this state or occurring before a person applies for or receives any license.

"(D) The state board may adopt rules in accordance with Chapter 119. of the Revised Code to carry out this section and section 3319.311 [3319.31.1] of the Revised Code."

[2] [§ 3319.31.1] §3319.311. Investigations; determinations by superintendent; hearings; consent agreements; grounds for automatic suspension; suspension orders.

"(A) The state board of education, or the superintendent of public instruction on behalf of the board, may investigate any information received about a person that reasonably appears to be a basis for action under section 3319.31 of the Revised Code. The board shall contract with the office of the Ohio attorney general to conduct any investigation of that nature. The board shall pay for the costs of the contract only from moneys in the state board of education licensure fund established under division (B) of section 3319.51 of the Revised Code. All information obtained during an investigation is confidential and is not a public record under section 149.43 of the Revised Code. If an investigation is conducted under this division regarding information received about a person and no action is taken against the person under this section or section 3319.31 of the Revised Code within two years of the completion of the investigation, all records of the investigation shall be expunged.

is constrained from releasing particular information concerning any allegations against plaintiff which prompted the investigation and the subsequent determination to institute

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"(B) The superintendent of public instruction shall review the results of each investigation of a person conducted under division (A) of this section and shall determine, on behalf of the state board, whether the results warrant initiating action under section 3319.31 of the Revised Code. The superintendent shall advise the board of such determination at a meeting of the board. Within fourteen days of the next meeting of the board, any member of the board may ask that the question of initiating action under section 3319.31 of the Revised Code be placed on the board's agenda for that next meeting. Prior to initiating that action against any person, the person's name and any other personally identifiable information shall remain confidential.

"(C) The board shall take no action against a person under section 3319.31 of the Revised Code without providing the person with written notice of the charges and with an opportunity for a hearing in accordance with Chapter 119. of the Revised Code.

"(D) For purposes of an investigation under division (A) of this section or a hearing under division (C) of this section, the board, or the superintendent on behalf of the board, may administer oaths, order the taking of depositions, issue subpoenas, and compel the attendance of witnesses and the production of books, accounts, papers, records, documents, and testimony. The issuance of subpoenas under this division may be by certified mail or personal delivery to the person.

"(E) The superintendent, on behalf of the board, may enter into a consent agreement with a person against whom action is being taken under section 3319.31 of the Revised Code. The board may adopt rules governing the superintendent's action under this division.

"(F) The board automatically may suspend any license without a prior hearing if the license holder is convicted of or pleads guilty to one or more of the following offenses or a violation of an ordinance of a municipal corporation or a law of another state that is substantially comparable to one of the following offenses: aggravated murder; murder; aggravated arson; aggravated robbery; aggravated burglary; voluntary manslaughter; felonious assault; kidnapping; rape; sexual battery; gross sexual imposition; or unlawful sexual conduct with a minor. A suspension under this division is effective on the date of the conviction or guilty plea.

"For a suspension under this division, the board, in accordance with section 119.07 of the Revised Code, shall issue a written order of suspension to the license holder by certified mail or in person and shall afford the person a hearing upon request. If the person does not request a hearing within the time limits established by that section, the board shall enter a final order revoking the person's license. An order of suspension under this division is not subject to suspension by a court during the pendency of an appeal filed under section 119.12 of the Revised Code.

"An order of suspension under this division shall remain in effect, unless reversed on appeal, until the final order of the board, issued pursuant to this section and Chapter 119. of the Revised Code, becomes effective. The board shall issue a final order within sixty days of the date of an order of suspension under this division or a hearing on an order of suspension, whichever is later. If the board fails to issue a final order by that deadline, the order of suspension is dissolved. No dissolution of an order of suspension under this division shall invalidate a subsequent final order of the board.

"(G) No surrender of a license shall be effective until the board takes action to accept the surrender unless the surrender is pursuant to a consent agreement entered into under division (E) of this section."

[3] 3301-73-04 Confidentiality of Investigative records.

"(A) All information obtained during an investigation is confidential and is not a public record under section 149.43 of the Revised Code except as provided in paragraphs (B) to (G) of rule 3301-73-04 of the Administrative Code.

disciplinary action. This disciplinary action was initiated on June 29, 2005, when written notice was sent to plaintiff's address in order to inform him of charges against his Permit and to notify him of his right to have a hearing in accordance with R.C. 119.

{¶ 3} Defendant maintained that the June 29, 2005, written notice to plaintiff was returned to ODE as "unclaimed." Consequently, a second notice was sent by certified mail on or about August 17, 2005. Plaintiff received this second notice and related that he responded by sending back a written request for a hearing. Defendant has not conducted a hearing and to date has not taken any further action regarding any disciplinary proceeding involving plaintiff.

{¶ 4} Defendant explained that no administrative hearing was held to challenge the State Board of Education's intended disciplinary action, because it received no written request for a hearing from plaintiff. Defendant denied having received a written hearing request from plaintiff within the thirty days period required by statute R.C. 119.07. Therefore, no hearing was conducted, although plaintiff asserted that he did provide and send a written request for a hearing. Plaintiff produced a letter dated August 24, 2005, directed to Susan T. Zelman (Superintendent of Public Instruction) at defendant's office in Columbus. In this letter, plaintiff requested an administrative hearing concerning defendant's intended disciplinary action. Plaintiff apparently sent this letter by certified mail and submitted a receipt with a Columbus postmark dated August 29, 2005. The certified mail receipt bears a signature showing that the document was received. However, the signature is illegible and there is no date of delivery designated. Defendant denied receiving any written request for a hearing from plaintiff. Defendant stated: "several times [d]efendant requested [p]laintiff to provide a copy of the written request and proof of delivery to [d]efendant's Office of Professional Conduct." Defendant recalled that on June 19, 2006, it first received a copy of plaintiff's written request for a hearing and proof of delivery.

{¶ 5} Defendant related that settlement proposals were discussed with plaintiff in

an attempt to resolve the still pending disciplinary case before the State Board of Education. Defendant observed that a written settlement proposal was sent to plaintiff on June 21, 2006, but that no response was forwarded. Consequently, the 2005 disciplinary case against plaintiff's Permit remains open and unresolved. Defendant noted that plaintiff filed two applications for Pupil Activity Permits (dated September 20, 2005 and April 27, 2006). However, defendant pointed out that plaintiff cannot receive any new Permit until the disciplinary action, pending since June, 2005, has been concluded.

{¶ 6} Defendant submitted a copy of a letter addressed to plaintiff and dated June 29, 2005, from Susan T. Zelman, the Superintendent of Public Instruction at ODE. Such letter, returned to defendant as undelivered, constituted the first attempt by ODE to inform plaintiff of the State Board of Education's intent to institute disciplinary action involving plaintiff's Permit. Plaintiff submitted a copy of a second letter from ODE dated August 16, 2005, regarding intended disciplinary action against plaintiff. This second letter was received by plaintiff and was followed by a written response from plaintiff requesting a hearing. The June 29, 2005, letter and the August 16, 2005, letter were not mailed to the same address. Defendant has not proceeded with any disciplinary action involving plaintiff's access to a Permit other than to refuse to issue him a new Permit when he applied.

{¶ 7} Plaintiff has asserted that he has been damaged by the acts and omissions of ODE and its agents in regard to the initiation of disciplinary matters involving a Permit which expired on June 30, 2005. Plaintiff contended that he has suffered damages based on claims of wrongful termination of a contract and failure to pay on a contract, as well as malicious prosecution, abuse of process, and discrimination. Plaintiff alleged that defendant should bear liability for monetary damages that he sustained based on all proposed causes of action. Plaintiff filed this complaint seeking to recover $2,500.00 for loss of pay and travel expense that he incurred as a result of defendant's instituting disciplinary action on his old Permit (valid from July 1, 2002 to June 30, 2005) and failing to

issue a new Permit. The filing fee has been paid.

{¶ 8} Defendant countered, insisting that plaintiff has failed to introduce sufficient evidence to establish the elements of a malicious prosecution or abuse of process action. Defendant supported its claim citing the case of *Robb v. Chagrin Lagoons Yacht Club, Inc.* (1996), 75 Ohio St. 3d 264, 662 N.E. 2d 9, in which the Supreme Court of Ohio quoted a prior case holding:

{¶ 9} "In order to state a cause of action for malicious prosecution in Ohio, four essential elements must be alleged by the plaintiff: (1) malicious institution of prior proceedings against the plaintiff by defendant, *** (2) lack of probable cause for filing of the prior lawsuit, *** (3) termination of the prior proceedings in plaintiff's favor, *** and (4) seizure of plaintiff's person or property during the course of the prior proceedings***." *Crawford v. Euclid Natl. Bank*, 19 Ohio St. 3d 135, 139, 19 Ohio B. Rep. 341, 344, 483 N.E. 2d 1168-1171, at page 269.

{¶ 10} Defendant contended that plaintiff failed to prove any elements to sustain a claim for malicious prosecution. Under the facts presented, this court agrees with defendant's position and, consequently, any claim by plaintiff based on malicious prosecution is denied.

{¶ 11} Concordantly, defendant argued plaintiff failed to prove the necessary elements constituting a prevailing claim for abuse of process. Defendant again cited *Robb*, supra, quoting another holding setting forth elements of abuse of process:

{¶ 12} "In order to establish a claim of abuse of process, a plaintiff must satisfy three elements: '(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process.' *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A* (1994), 68 Ohio St. 3d 294, 298, 626 N.E. 2d 115, 118" at page 270.

{¶ 13} Although some disciplinary action or proceeding regarding plaintiff's expired

Permit has been initiated, this action has remained pending, but there is no evidence that the initiation of disciplinary action was, "perverted to attempt to accomplish an ulterior purpose." Furthermore, plaintiff has not proven: (1) defendant's start of disciplinary action was a wrongful use of process and (2) direct damage resulted from any wrongful act by defendant. The court is aware that plaintiff has been unable to obtain a new Permit and, therefore, has been prevented from receiving coaching compensation until the disciplinary matter is settled. However, plaintiff has failed to prove that defendant's failure to proceed with and culminate the disciplinary action against his expired Permit constituted an abuse of process.

{¶ 14} Defendant argued that plaintiff has failed to provide any evidence to prove his claim of discrimination. Defendant assumed that plaintiff based this particular claim on the actions of ODE to, "initiate and pursue disciplinary proceedings against [p]laintiff's pupil activity permit." Defendant maintained that plaintiff did not submit any facts or details to establish any recognizable discrimination claim based on race, gender, nationality, religion, age, or other basis. The court concludes that defendant's argument is well-founded and plaintiff has not produced any evidence sufficient to move forward with a discrimination claim. Plaintiff's claim alleging discrimination is dismissed.

{¶ 15} In his response, plaintiff explained that since defendant refuses to issue him a new Permit he is unable to be paid for the coaching services he provides. Plaintiff related, "I am suing for the work I've done and wanting to be paid." Plaintiff further related that he is still waiting to receive a hearing date on the disciplinary action pending since 2005 and essentially just wants a reissued Permit in order to receive monetary compensation for coaching duties performed. It appears that plaintiff is claiming his that constitutional right to due process has been violated by defendant's failure to hold a hearing on the instituted disciplinary action stemming from conduct that allegedly occurred in 2005. This court generally lacks jurisdiction over any constitutional claims. See *Bleicher v. Univ. of Cincinnati College of Med.* (1992), 78 Ohio App. 3d 302, 604 N.E. 2d 783. Any

constitutional claim based on lack of due process advanced by plaintiff is dismissed due to lack of jurisdiction.

{¶ 16} Furthermore, this court does not have jurisdiction at the Administrative Determination level to rule on any claim that plaintiff may perceive based on defendant's act or refusal to act in regard to the status of a Permit. This court does not have jurisdiction over matters involving defendant's statutory authority to issue or not issue Permits. Additionally, disciplinary matters in regard to a Permit rest entirely within the office of defendant and are not subject to any review by this court. The Court of Claims does not function as a court of review with the power to overrule a decision issued by an administrative agency in a separate action. *George v. Ohio Dept. of Human Services*, No. 04AP-351, 2005-Ohio-2292. Where there is no appeal from a decision by an administrative agency, such as the instant claim, the only remedy available is in mandamus or another extraordinary writ. See *Miller v. Ohio Department of Administrative Services,* No. 83AP-484, 1984 Ohio App. LEXIS 10486. The Court of Claims has no authority to issue writs of mandamus. See *Brockman v. Ohio Dept. of Public Welfare* (1982), 7 Ohio App. 3d 239, *Rosso v. Dept. of Adm. Serv.* (1982), 4 Ohio App. 3d 312, 448 N.E. 2d 524. Plaintiff, in the instant action, requests a new Permit in order to enter into a valid coaching contract. Under the circumstances described, the proper remedy that plaintiff seeks lies in mandamus, since he wants to compel a state official to perform a clear duty under statute. This court has no jurisdiction over the type of relief sought.

{¶ 17} Without any resolution of the disciplinary matter on his 2002-2005 Permit, plaintiff, on September 20, 2005, and again on April 27, 2006, applied with defendant for a new Permit. Neither application was granted. On October 25, 2005, plaintiff attempted to finalize a coaching contract with the Board of Education of the Youngstown City School District. Plaintiff submitted a copy of this purported contract covering the 2005-2006 school year. Plaintiff explained that he did not receive any payment for performing coaching duties due to the fact he did not hold a valid Permit. Plaintiff observed that he has been

prevented from being paid by defendant's refusal to issue him a valid Permit. Defendant related R.C. 3313.53(C)[4], "grants local school boards the authority to employ a person as a coach if the person has a permit properly issued," by ODE. The evidence available establishes that plaintiff knew he could not enter into an enforceable coaching contract without possessing a valid Permit. The contract document submitted was void due to plaintiff's failure to hold proper credentials that would allow him to be a party to an employment contract. Plaintiff, in this purported contract, misrepresented that he possessed a valid Permit and such misrepresentation rendered the contract voidable. *Link v. Leadworks Corp.* (1992), 79 Ohio App. 3d 735, 607 N.E. 2d 1140. Also, the contract directly violated R.C. 3313.53(C), thereby rendering the document invalid and unenforceable. *Countrymark Cooperative Inc. v. Smith* (1997), 124 Ohio App. 3d 159, 705 N.E. 2d 738. *Professional Property Services, Inc. v. Agler Green Townhouses, Inc.*, 998 F. Supp. 831 (1998). Concomitantly, defendant's refusal to issue plaintiff a valid Permit cannot rise to actionable interference with a contract since plaintiff has failed to produce evidence establishing the requisite elements.[5] Any claim plaintiff raised arising out of contract or interference with a contract is denied.

{¶ 18} In addressing plaintiff's allegation of defamation, the court finds the claim stems from the August 16, 2005, notice letter ODE drafted concerning the institution of disciplinary action against plaintiff. Defendant recorded in the body of this letter that ODE

[4] "(C) The board of education of any city, exempted village, or local school district may employ a nonlicensed individual to direct, supervise, or coach a pupil-activity program as long as that individual holds a valid pupil-activity permit issued by the state board of education under division (A) of section 3319.303 [3319.30.3] of the Revised Code."

[5] A claim of tortious interference with a contract involves the following five elements: (1) the actual existence of a contract or negotiations with regard to a contract; (2) defendant's knowledge of the contract or negotiations; (3) the defendant's interference in the contract or negotiation; (4) the defendant's conduct was malicious and without legal justification; and (5) damages. *Juhasz v. Quik Shops, Inc.* (1977), 55 Ohio App. 2d 51, 379 N.E. 2d 235; *Davison Fuel & Dock Co. v. Pickands Mather & Co.* (1977), 54 Ohio App. 2d 177, 376 N.E. 2d 965; *Universal Coach, Inc. v. New York City Transit Auth., Inc.* (1993), 90 Ohio App. 3d 284, 629 N.E. 2d 28.

had received information plaintiff engaged in inappropriate conduct while employed at the Academy. Based on the information received, defendant intended to conduct proceedings to act against plaintiff's Permit validation. Apparently, the accusatory language in the August 16, 2005, notice letter received on August 23, 2005, spawned plaintiff's defamation claim.

{¶ 19} Plaintiff's complaint regarding defamation is governed by the statute of limitations for commencement of actions prescribed in R.C. 2743.16. R.C. 2743.16(A) states:

{¶ 20} "(A) Subject to division (B) of this section, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties."

{¶ 21} Accordingly R.C. 2305.11(A) states in pertinent part:

{¶ 22} "(A) An action for libel, slander *** shall be commenced within one year after the cause of action accrued." (Emphasis added.)

{¶ 23} Plaintiff's cause of action for any defamation claim accrued on August 23, 2005. He filed his complaint on October 10, 2006, more than one year after his cause of action accrued. Plaintiff's action grounded in defamation is barred by R.C. 2743.16(A). The claim is consequently dismissed based on the statute of limitations and the court shall not address any contention of defamation on the merits.

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WAYNE HOLLOWAY

Plaintiff

v.

OHIO DEPARTMENT OF EDUCATION

Defendant

Case No. 2006-06442-AD

Clerk Miles C. Durfey

ENTRY OF ADMINISTRATIVE DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
MILES C. DURFEY
Clerk

Entry cc:

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