[Cite as *State ex rel. DeVengencie v. Biviano*, 2010-Ohio-706.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE ex rel. ALFRED DeVENGENCIE, JR., et al.,	:	**O P I N I O N**
	:	**CASE NO. 2008-T-0070**
Relators,	:	
- vs -	:	
ADRIAN BIVIANO, TRUMBULL COUNTY AUDITOR,	:	
Respondent.	:	

Original Action for Writ of Mandamus.

Judgment: Writ denied.

Michael D. Rossi, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Relators).

Dennis Watkins, Trumbull County Prosecutor, and *Jeffrey D. Adler*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondent).

TIMOTHY P. CANNON, J.

{¶1} This action in mandamus is presently before this court for consideration of the parties' competing motions for summary judgment. Upon reviewing the respective arguments and evidentiary materials, this court holds that respondent, Trumbull County Auditor Adrian Biviano, has satisfied the standard for summary judgment as to one of the elements of the sole claim of relators, Diane Shamrock and Alfred DeVengencie, Jr.

Specifically, we conclude that respondent has demonstrated that he does not have a legal duty to perform the official act which Ms. Shamrock and Mr. DeVengencie sought to compel. Therefore, since Ms. Shamrock and Mr. DeVengencie are not entitled to the issuance of the writ, final judgment will be entered in favor of respondent.

{¶2} The subject matter of this action involves the length of the service credits to which Ms. Shamrock and Mr. DeVengencie are entitled for purposes of determining the extent of their basic benefits under the State of Ohio Public Employees Retirement System ("PERS"). Although respondent has challenged the evidentiary quality of some of the materials attached to the opposing motion for summary judgment, he has also admitted many of the general facts pertaining to the nature of the employment and the periods of service for Ms. Shamrock and Mr. DeVengencie. The following statement of fact in this opinion is predicated upon the facts which are not in dispute.

{¶3} Ms. Shamrock was officially hired as an employee of Trumbull County in October 1978 and has remained in the county's employment over the ensuing thirty-one years. For approximately four months prior to her official hiring, covering the period from June through September 1978, she performed certain duties as a secretary for a county department. During that four-month period, Ms. Shamrock was a participant in an "on-the-job" training program that was conducted by the federal government. Thus, despite the fact that she was completing work for Trumbull County, she was considered a federal "CETA" employee because she had been hired under the Comprehensive Education and Training Act.

{¶4} Mr. DeVengencie was officially hired as an employee of Trumbull County in August 1975, and has remained in the county's employment over the ensuing thirty-

four years. For approximately thirty-two months prior to his official hiring, covering the period from December 1972 through July 1975, he performed certain duties as a maintenance person in the county's vehicle department. During this pre-employment phase, his status was identical to that of Ms. Shamrock in her four-month period; i.e., he was a participant in the federal CETA "on-the-job" training program.

{¶5} In 1998, after officially working as a Trumbull County employee for twenty-three years, Mr. DeVengencie contacted respondent's predecessor and asked that the auditor's office file the necessary paperwork with PERS to ensure that he receive credit for the thirty-two months he had been employed under the CETA program. In response, the auditor's office aided Mr. DeVengencie in the completion of a supplemental history record regarding his county employment. On the second page of this form, the auditor's office delineated the period of time in which Mr. DeVengencie had performed work for the county as part of the CETA program. However, in the section of the form that asked for a statement of the amount of pay Mr. DeVengencie had received, the auditor's office indicated that this information was not available because he had not been compensated by Trumbull County.

{¶6} Consistent with Mr. DeVengencie's request, the auditor's office submitted the supplemental history record with PERS. However, upon reviewing the information in the form, PERS denied the request for thirty-two months of additional service credit.

{¶7} Approximately ten years later, Mr. DeVengencie contacted respondent and again asked that sufficient information be given to PERS so that his "longevity date" could be adjusted to include the thirty-two months of his CETA employment. In regard to this second request, respondent chose to refer the matter to the county prosecutor's

office. In a correspondence dated June 2, 2008, an assistant prosecutor informed Mr. DeVengencie that it had been concluded that the county, including the auditor's office, would not be able to take any additional steps to assist him in this matter. In support of this conclusion, the assistant prosecutor noted the prior acts which the auditor's office had taken on his behalf, and that PERS had rejected his earlier request for an additional service credit covering the thirty-two months. The assistant prosecutor also stated that the county did not have any other records concerning his employment and, thus, could not provide any further information to PERS.

{¶8} During her thirty-one years of employment with the county, Ms. Shamrock also made periodic demands that the auditor's office report her four months of federal CETA service to PERS so that her total length of service could be recalculated. Despite such demands, respondent's office never took any steps to submit such a report on her behalf.

{¶9} After Mr. DeVengencie's second primary request for a new submission to PERS had been rejected, he and Ms. Shamrock, relators, instituted the instant case for a writ of mandamus. As the grounds for their sole claim for relief, relators asserted that, pursuant to Section 676.27, Title 5, C.F.R., any person who participated in a CETA "on-the-job" training program was entitled to receive the same benefits and work under the same conditions as any other employees performing the identical duties. Based on this regulation, they further asserted that: (1) for purposes of calculating the length of their respective service in the state public employee retirement plan, each of them had a legal right for a credit covering the time in which they had worked for Trumbull County in the CETA program; and (2) under R.C. 145.15, respondent had a legal duty to provide

PERS with sufficient information to ensure an award of the service credits. For their final relief in the action, relators sought the issuance of an order that would compel respondent to provide such information immediately.

{¶10} Once respondent had answered the mandamus petition, the parties filed competing motions for summary judgment on the final merits of the sole claim for relief. In their amended motion, relators essentially restated the legal argument which formed the basis of the petition; i.e., since CETA employees were entitled to the same benefits, respondent was obligated to provide whatever information was needed for the credits to be granted. As the evidentiary foundation for their motion, relators submitted their own respective affidavits, in which they averred that they had been CETA employees during the cited time periods and that they had previously asked the county auditor's office to report the needed information. In addition, relators presented the affidavits of two other county employees who were able to recall that relators had "worked" for the county on the dates in question.

{¶11} In both responding to relators' motion and submitting his own Civ.R. 56(C) motion, respondent did attempt to point out certain flaws or errors in relators' statement of the facts and in the evidentiary quality of their affidavits. Despite this, respondent still admitted the general allegation that, prior to their official hiring, both relators had done certain work for the county under the federal CETA program. Furthermore, respondent maintained that, even if relators were entitled to additional service credits based on their CETA employment, he was not the proper public official to provide any information as to the amount of their compensation during the disputed time periods. As to this point, he contended that, since relators were actually employed by the federal government under

the CETA program, the county auditor's office would not have maintained any records for those periods of time. In light of this, respondent argued that he simply had no duty to provide information to PERS regarding relators' CETA employment.

{¶12} In support of his separate motion, respondent attached copies of certain records pertaining to relators which had been maintained by the county auditor's office. Included in these documents was a copy of the supplemental history record which had been submitted to PERS on behalf of Mr. DeVengencie ten years earlier. Respondent also attached to his motion his own affidavit, in which he averred the following: (1) prior to being elected county auditor in 2006, he had worked for that office for thirteen years; (2) during that period of time, the auditor's office has never retained any records as to any CETA employees; and (3) in 1998, PERS specifically refused to accept additional documentation concerning Mr. DeVengencie's CETA employment.

{¶13} At the outset of our analysis of the competing summary judgment motions, this court would again note that relators' entire claim for relief has been predicated upon the application of a section of the Code of Federal Regulations. Even though relators quoted a passage of the disputed regulation as part of their amended petition, they did not attach a copy of the regulation to that pleading. Moreover, neither side provided a copy of the regulation as an attachment to the motions for summary judgment.

{¶14} In order to verify the quote and citation in relators' petition, this court tried to obtain a complete copy of the disputed federal regulation. Initially, this task proved difficult because relators had accidentally cited the provision as "Federal Register, Sect. 676.27." However, once we had expanded our search to locate any federal provision containing the language quoted by relators, it became evident that they had intended to

rely upon a passage in the Code of Federal Regulations; i.e., Section 676.27, Title 5, C.F.R.

{¶15} As part of our research concerning the foregoing regulation, this court also attempted to locate the version of the regulation which supposedly had been in effect during the time periods that relators had worked for the county as CETA employees. The results of this research established that Section 676.27 of Title 5 did not exist until the 1979 Edition of the Code of Federal Regulations. In addition, certain provisions in Section 676.27 expressly state that some of the changes regarding the status of CETA employees would not take effect until April 1, 1979.

{¶16} Our review of this version of Section 676.27 readily confirmed that it was intended to delineate the benefits and working conditions of persons who participated in certain federal work programs. Our review further confirmed that relators intended to base their present action upon subsection (b)(1) of the regulation:

{¶17} "Each participant in an on-the-job training or public service employment program shall also be provided health insurance, collective bargaining agreement coverage, and other benefits and working conditions at the same level and to the same extent as other employees similarly employed. ***"

{¶18} At first blush, the foregoing language in Section 676.27 appeared to have some relevance to the subject matter of the instant action. Nevertheless, given that the undisputed facts in the parties' submissions indicated that both relators completed their CETA employment prior to January 1, 1979, this court concluded that an issue existed concerning whether the 1979 version of Section 676.27 could be applied retroactively to the specific time periods in which each relator had worked for the county as a CETA

employee.

{¶19} Since neither motion for summary judgment addressed the issues of the effective date of Section 676.27 and whether that regulation could be applied in a retroactive manner, a magistrate of this court conducted a conference with the counsel for both sides. During this proceeding, the attorneys were informed of the court's concern as to whether Section 676.27 should or could be applied retroactively. Both parties were given the opportunity to submit additional briefs on the "retroactivity" question.

{¶20} In their "retroactivity" brief, relators have not challenged the finding that Section 676.27 of Title 5 first existed in 1979. They do not contend that before 1979, the provisions in subsection (b)(1) were set forth in another section of the Code of Federal Regulations. Despite this, they maintain the general assertion that Section 676.27(b)(1) is controlling, even though both of their terms as CETA employees ended prior to that year. In support of the assertion, relators have attached to their brief copies of two documents that contain discussions of certain aspects of CETA employment.

{¶21} Relators' first document is a copy of the March/April 1980 edition of the Midwest Monitor. Our review of the fourth page of this periodical shows that it contains a two-paragraph discussion of two arbitration decisions which had been rendered in the states of Ohio and New York. In both decisions, the arbitrators held that the seniority of a public employee began to accrue on the first day of his CETA employment, not the day upon which he is made a "permanent" employee.

{¶22} In reviewing the summaries in the periodical, this court would note that neither decision contained any reference to Section 676.27(b)(1) or retirement benefits.

As to the New York arbitration, the summary only indicates that, although the decision pertained to matters which occurred prior to 1979, the arbitrator based his ruling upon specific language contained in a contract. As to the Ohio arbitration, the summary does not state the exact dates of the CETA employment, and the decision appears to be predicated solely upon prior "treatment" of such employees. Therefore, to this extent, the cited arbitration decisions do not provide any true guidance concerning the proper application of Section 676.27(b)(1).

{¶23} The second document submitted by relators is a copy of a report generated by the Trumbull County Employment and Training Agency. The subject matter of the report concerned certain grievances which had been filed by CETA employees who had been laid-off from county departments when the federal CETA funding was terminated on September 30, 1979. As part of the grievances, the employees maintained that, in setting the order of recall for new positions, they had not been afforded the proper seniority in accordance with the relevant collective bargaining agreement. In discussing the application of various federal regulations to the situation, the report specifically quotes Section 676.27(b)(1), and then concludes that the "Agency" had acted in compliance with the provisions of that section by affording the terminated CETA employees the same rights as other county employees.

{¶24} If this report is intended to support relators' contention that Section 676.27(b)(1) is meant to be applied retroactively, it would have to establish that the terminated CETA employees were originally hired under the federal program prior to 1979. However, our review of the entire report shows that it does not contain any specific information on the employees' starting dates. In addition, this court would

emphasize that, like the summaries in the periodical, the agency's report simply does not attempt to delineate any legitimate legal analysis of the "retroactivity" issue. Instead, the report simply concludes that the provisions of the federal regulation had been satisfied in regard to the terminated CETA employees. Thus, even if we assume that the agency's report could have precedential value for purposes of a judicial opinion, it does not address the issue before this court.

{¶25} Neither party presented authority that would allow this court to apply a standard for determining when a federal law can be enforced retroactively. As a basic proposition, federal courts have recognized that Congress has been given the power to enact legislation which will have a retroactive effect. *Peralta v. Gonzales* (2006), 441 F.3d 23, 29, quoting *INS v. St. Cyr* (2001), 533 U.S. 289, 316. Nevertheless, since the enforcement of a retroactive law is usually not encouraged under the law, such a law will only be allowed to stand when Congress has given a clear indication that such an effect was intended. Id. For purposes of assessing when a statutory enactment may properly be applied retroactively, federal courts have followed a two-prong standard that was first promulgated by the United States Supreme Court in *Landgraf v. USI Film Prods.* (1994), 511 U.S. 244. This well-established standard has also been employed in determining when a federal regulation can be applied in that particular manner. See, e.g., *Pimental v. Mukasey* (2008), 530 F.3d 321.

{¶26} Under the first prong of the *Landgraf* standard, the wording of the statute or regulation is reviewed to see whether the provisions contain a specific statement that a retroactive effect was actually intended. *Mejia v. Gonzales* (2007), 489 F.3d 991, 997. For a finding of express intent to be warranted, the reviewing court must conclude that

the language is so clear that such an interpretation is the only reasonable one. *Peralta*, 441 F.3d at 29. Moreover, if the disputed provisions do exhibit the requisite intent, the legal analysis is considered complete, and a retroactive application must be followed for all purposes. Id.

{¶27} In regard to Section 676.27, Title 5, C.F.R., our review of the language of subsection (b)(1), as quoted previously, fails to disclose any indication that a retroactive effect was intended. Similarly, none of the language in the remaining subsections of the regulation would support a finding of such an express intent. In fact, our review shows that Section 676.27 only has one express reference to the timing of the application of a provision, and that reference readily states that the provision is only meant to be applied prospectively. See Section 676.27(b)(4). Thus, the first prong of the *Landgraf* standard is not dispositive of the analysis because a retroactive application of Section 676 cannot be predicated solely upon the precise wording of the regulation.

{¶28} The second prong of the *Landgraf* standard has been summarized in this manner:

{¶29} "In the absence of clear direction, we must consider whether the application of the regulation would have a retroactive effect. *Landgraf*, 511 U.S. at 280. 'The inquiry into whether a statute (or regulation) operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.' [*St. Cyr*, 533 U.S. at 321]. A regulation has retroactive effect 'when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.' *See id*. ***. A

judgment bearing on retroactivity should be guided by 'fair notice, reasonable reliance, and settled expectations.' *Id*." *Mejia*, 499 F.3d at 997.

{¶30} In turn, if the nature of the statute or regulation is such that its retroactive application would result in a new legal consequence regarding a completed transaction, the "'traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.'" *Peralta*, 441 F.3d at 29, quoting *Landgraf*, 511 U.S. at 280. In other words, federal law does not permit the creation of a new consequence for a past act unless it has been expressly mandated by the legislature.

{¶31} As was noted above, Section 676.27(b)(1) provided that a participant in an "on-the-job" training program had to be afforded "benefits" at the same level and to the same extent as was given to any other individual who was "similarly employed." Even though subsection (b)(1) did not refer specifically to "retirement" benefits, for purposes of summary judgment, this court would agree that the language of the provision may be sufficiently broad to encompass a right to participation in PERS based upon contributions made during the employment.

{¶32} Under Ohio law, the retirement program for public employees, including an employee for a local county government, is governed by R.C. Chapter 145. A review of the various statutes under that chapter readily confirms that the creation of retirement benefits constitutes a part of the compensation package to which such an employee is entitled for the performance of his or her duties. Pursuant to R.C. 145.12 and 145.48, the public employer has a legal obligation to make contributions to the retirement program on behalf of participating employees based upon a percentage of the annual earnable salary of the employee. Therefore, if it was established that the employee

elected to participate in PERS, the payment of such contributions would have the effect of technically increasing the total amount of compensation which the public entity owed under the employment contract.

{¶33} In bringing the instant action for a writ of mandamus, relators framed their prayer for relief as a request for additional service credits to cover the respective lengths of time in which they worked for the county as CETA employees. This would have the effect of increasing the amount of retirement benefits they would be entitled to collect by adding to their total years of service. However, if the interpretation proposed by relator is correct, when Section 676.27(b)(1) became effective in 1979, it did not merely increase the amount of retirement benefits to which a CETA employee would be entitled. Under relators' interpretation, the regulation created an entirely new right for the employee and an entirely new obligation for the employer.

{¶34} To the extent that a retroactive application of Section 676.27(b)(1) to both relators would have imposed a new duty on their employer in regard to the work which they had already performed before 1979, such an application would be permissible only if it was expressly intended when the regulation was enacted. There is no such language. As a result, the "benefits" provision of Section 676.27 cannot be applied to the service they completed as CETA employees prior to that year. Hence, Trumbull County had no legal duty to make contributions to PERS on relators' behalf. Likewise, respondent had no duty to report to PERS any new information regarding relators' CETA employment prior to enactment of the regulation.

{¶35} Even if Section 676.27(b)(1) could be applied retroactively to relators, respondent would still not be the proper public official to report relators' service

information to PERS. As part of their amended petition, relators attached a copy of the supplemental history record which the auditor's office submitted on behalf of Mr. DeVengencie to PERS in 1998. As previously noted, our review of the second page of that document shows that the auditor's office did not provide information regarding the amount of pay he had received while working for the county as a CETA employee. The second page further states that such information was not available because Mr. DeVengencie had not been paid by Trumbull County during that time period.

{¶36} In presenting additional evidentiary materials in support of their motion for summary judgment and in answering respondent's competing motion, relators did not in any way refute the statement in the supplemental history record regarding whether the county had been responsible for paying for their services as CETA employees. Thus, the evidentiary materials before this court, construed in a light most favorable to relators, establishes that although both relators performed work for Trumbull County as part of their CETA employment, the compensation for their services was paid by the federal government.

{¶37} A review of the general statutory scheme governing the public employee retirement system, as set forth in R.C. Chapter 145, readily indicates that the payment of an employee's salary constitutes a critical point in determining the total amount of an employer's periodic contribution to the retirement plan. For example, in regard to the appropriation of funds for the payment of a public employer's contribution, R.C. 145.12 states, in pertinent part:

{¶38} "The public employees retirement board shall prepare and submit to the board of county commissioners and county auditor of each county *** a certification of

the rate necessary to pay the obligation of each county ***. The rate so certified to each county *** shall be a percentage of the earnable salary of all contributors *in the employ of such employer*, and an amount determined by multiplying the total annual earnable salary of all such contributors *employed by the employer* by such rate and the amount so determined shall be included in its budget and allowed by the budget commission." (Emphasis added.)

{¶39} Given that a public employer is only required to make contributions to the retirement plan for those individuals who are in their employment, and given that the amount of the contribution is tied directly to the amount of annual earnable salary that is paid, logic dictates that the public employer only has an obligation to those workers who receive their pay from that employer. In other words, for purposes of R.C. Chapter 145 and the public employee retirement plan, a person is not considered an employee of a county unless the county pays his salary.

{¶40} The fact that Trumbull County did not pay relators' compensation while they were performing work as CETA employees is significant. Under such circumstance, not only would the county auditor have no obligation to make contributions on their behalf, he would not have legal authority to do so, and he also would have no duty to maintain any records regarding their compensation. Consequently, even if both relators were entitled to the submission of information to PERS concerning the lengths of their respective service as CETA employees, respondent has no legal duty to provide such information because his office has no responsibility to make any contributions on their behalf or maintain the underlying records.

{¶41} Under Civ.R. 56(C), the moving party in a summary judgment exercise is entitled to prevail when: (1) there are no genuine factual disputes remaining to be tried; (2) the moving party is entitled to final judgment as a matter of law; and (3) the nature of the evidentiary materials is such that, even when the materials are construed in a way most favorable to the opposing party, a reasonable person still could only reach a final conclusion against that party. *Edwards v. Southeast Local School Dist. Bd. of Educ*., 11th Dist. No. 2005-P-0057, 2007-Ohio-585, at ¶22. In applying this standard in the context of a mandamus action, this court has held that the respondent-defendant must be granted summary judgment when he has satisfied all three prongs of the standard in regard to at least one element of a mandamus claim. Id.

{¶42} Consistent with the foregoing discussion, this court ultimately concludes that summary judgment should be granted in favor of respondent because he has satisfied the Civ.R. 56(C) standard as to the second element for a writ of mandamus. That is, he has demonstrated that, under the undisputed facts of the instant case, he is not legally obligated to provide any additional information to PERS relating to the respective CETA employments of either relator. This lack of duty is predicated upon the following two points: (1) the "benefit" provisions of Section 676.27, Title 5, C.F.R., cannot be applied retroactively to CETA employment which occurred prior to 1979; and (2) for purposes of the public employee retirement plan, relators were not "employees" of the county while they were participating in the CETA program. Therefore, since relators will never be able to satisfy all three elements of a mandamus claim, they cannot prevail in this matter.

{¶43} Respondent's motion for summary judgment is granted. It is the order of

this court that final judgment is hereby entered in favor of respondent as to relators' entire claim for a writ of mandamus.

{¶44} Relators' amended motion for summary judgment is overruled.

MARY JANE TRAPP, P.J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶45} While I do not agree with the majority's retroactivity analysis, I concur in the judgment on the basis that the relators were paid by the federal government during their CETA employment. Relators were not paid by Trumbull County; therefore, their salary and service for that period does not count. See R.C. 145.12. I concur in the majority's analysis on this issue, which renders the retroactivity analysis unnecessary. Therefore, on the basis of the federal funding of appellants' CETA employment, the decision of the court below should be affirmed.