[Cite as *State ex rel. Bianchi v. Kent City School Dist. Bd. of Edn.*, 2011-Ohio-526.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO ex rel. MICHELE D. BIANCHI,	:	**O P I N I O N**
Relator,	:	**CASE NO. 2010-P-0038**
- vs -	:	
KENT CITY SCHOOL DISTRICT BOARD OF EDUCATION,	:	
Respondent.	:	

Original Action for Writ of Mandamus.

Judgment: Petition dismissed.

Matthew M. Banal, 6805 Oak Drive, Columbus, OH 43229 (For Relator).

David S. Hirt and *Sherrie C. Massey,* Britton, Smith, Peters & Kalail Co., L.P.A., 3 Summit Park Drive, #400, Cleveland, OH 44131-2582 (For Respondent).

CYNTHIA WESTCOTT RICE, J.

{¶1} This action in mandamus is presently before this court for consideration of the motion to dismiss of respondent, the Kent City School District Board of Education. As the primary grounds for its motion, respondent maintains that the petition of relator, Michele D. Bianchi, fails to state a viable claim for the writ because her own allegations establish that she does not have a legal right to be rehired as an employee of the school district. Upon reviewing the arguments of both sides, we conclude that the dismissal of the instant matter is warranted under Civ.R. 12(B)(6).

{¶2} A review of the mandamus petition readily shows that relator's sole claim

for relief is based upon the following basic facts. Pursuant to R.C. 3313.17, respondent is the corporate entity which has the statutory authority to operate the Kent City School District. Starting in September 1991, respondent employed relator as a school cafeteria worker. This employment continued uninterrupted until relator resigned her position in January 2009.

{¶3} After working for the school district for nearly seventeen months, relator was indicted by the Portage County Grand Jury on one count of child endangerment, a fourth-degree felony under R.C. 2919.22(A). The indictment expressly alleged that she had created a serious risk to the health and safety of a child below the age of eighteen, and that her conduct had caused physical harm to the victim. However, the wording of the indictment gave no indication that the charged offense had been committed during the course of relator's employment.

{¶4} Ultimately, relator chose to enter a plea of guilty to the single count of child endangerment. Upon accepting this plea in December 1992, the Portage County Court of Common Pleas suspended her original sentence and placed her on probation for a period of one year.

{¶5} At the time of the imposition of her criminal sentence, relator's conviction had no effect upon her continuing employment with respondent and the school district. In November 2007, though, the Ohio General Assembly enacted new legislation which both modified and extended the scope of the prior statutory scheme governing the duty of a board of education to conduct background checks on the criminal records of certain school employees. Under the new legislation, a board's pre-existing obligation to check the records of "licensed" employees was enlarged to cover any person hired by a school district who did not need to be licensed by the state in order to be employed. The new

law further mandated that if the records check revealed that a "non-licensed" employee had pled guilty to, or been convicted of, certain designated offenses, the school board was required to release the person from her employment.

{¶6} Pursuant to the new statutory scheme, as delineated in R.C. 3313.39 and 3313.391, child endangerment under R.C. 2919.22 was an offense which disqualified a non-licensed school employee from any subsequent employment. Nevertheless, when respondent received the results of the initial background check for relator in November 2008, it did not immediately terminate her employment in light of her 1992 conviction. Instead, respondent held a series of discussions with relator and the Ohio Association of Public Schools Employees, Local 176. These discussions led to an agreement that was set forth in a document labeled as a Memorandum of Understanding ("MOU"). This document was executed by the two parties and relator's union representative.

{¶7} In the first primary clause of the MOU, relator agreed to immediately sign and tender a written irrevocable resignation of her position as cafeteria worker, effective January 7, 2009. In the third primary clause, respondent agreed to re-employ relator in the future if a certain event occurred. The latter clause provided, in its totality:

{¶8} "In the event there is a future change in the criminal background check statutes that would eliminate the disqualification of [relator] from school employment, [relator] shall be offered employment with the Board in a cafeteria position at the same placement on the wage schedule and with the seniority she possessed on January 6, 2009."

{¶9} As part of the new statutory scheme regarding this specific subject matter, the Ohio Department of Education was required under R.C. 3319.39(E) to adopt rules that would state the exact circumstances under which a board of education would have

the authority to rehire any disqualified employee who had satisfied certain requirements for rehabilitation. In August 2009, approximately eight months after relator's MOU had been executed, the Department of Education issued Ohio Adm.Code 3301-20-03, which was entitled: "Employment of non-licensed individuals with certain criminal convictions." In addition to stating a three-prong standard for a board of education to use in deciding if a disqualified employee has been rehabilitated, the section provided an extensive list of criminal offenses that have been deemed "non-rehabilitative" in nature; i.e., if a non-licensed school employee has pled guilty to such an offense, she cannot be considered for rehiring on the basis of rehabilitation. In regard to the offense of child endangerment under R.C. 2919.22(A), Ohio Adm.Code 3301-20-03(A)(6)(g) indicated that this crime only be deemed non-rehabilitative if the violation had occurred within five years of the date of an individual's current criminal records check.

{¶10} Since relator's conviction for child endangerment was nearly sixteen years old as of the date of her records check, she could be subject to rehabilitation under the new administrative procedure. As a result, upon reviewing her specific situation in light of the various provisions in Ohio Adm.Code 3301-20-03, relator made an official request to be reinstated to her prior position with the school district in accordance with the MOU. When respondent refused to grant this request, relator instituted the instant action for a writ of mandamus.

{¶11} As the general basis for her sole claim for relief, relator has first asserted that she is able to satisfy all four prongs of the standard for rehabilitation, including the requirement that her underlying criminal offense is not viewed as "non-rehabilitative" in nature. Based upon this, she has further asserted in her petition that she is now eligible to again work for an Ohio school district because she is no longer deemed "disqualified"

under R.C. 3319.391. In turn, relator has ultimately maintained that respondent has a contractual duty under the MOU to reinstate her as an employee of the district. For her final relief, she has requested the issuance of a writ to require respondent to follow the terms of the MOU and immediately place her in her prior position as a cafeteria worker, with the wages and seniority as of the date of her resignation.

{¶12} In now contending that relator's factual allegations are legally insufficient to state a viable claim, respondent primarily focuses upon her interpretation of the third clause of the parties' MOU. As was noted above, the disputed clause stated that relator would again be offered employment with the school district if "there is a future change in the criminal background check *statutes* that would eliminate the disqualification of [her] from school employment ***." (Emphasis added.) Citing the use of the word "statutes" in the clause, respondent contends that relator cannot invoke the MOU in this instance to require her rehiring because the substance of the two relevant statutes, R.C. 3319.39 and 3319.391, have not been modified. Specifically, respondent argues that the release of the new administrative provision by the Department of Education does not constitute a modification of the statutory scheme.

{¶13} In responding to the foregoing contention, relator essentially submits that respondent's interpretation of the third clause should be rejected because it ignores the fact that the issuance of Ohio Adm.Code 3301-20-03, as it pertains to the creation of a rehabilitation procedure, was expressly mandated in R.C. 3319.39(E) and cited in R.C. 3319.39(C). Building upon this, she further submits that, since the General Assembly clearly intended for there to be a means by which certain disqualified individuals could rehabilitate themselves and again qualify for employment, the basic scheme under the two statutes was not "fully functional" until the administrative procedure took effect. For

this reason, it is relator's position that the release of the new administrative code section actually altered the nature of the two existing statutes, and constituted a sufficient event to trigger the "re-employment" clause of the MOU.

{¶14} As the substance of the parties' respective arguments certainly indicates, the general issue before this court concerns the proper application of the MOU in light of the new "rehabilitation" procedure, as promulgated by the Department of Education. As was noted above, the Department's issuance of Ohio Adm.Code 3301-20-03 was based upon an express mandate in a provision of R.C. 3319.39. Since the date of its original enactment in June 2004, that statute has delineated the procedure for criminal records checks of school employees who must be licensed by the State of Ohio. At the time of the subsequent enactment of its companion statute, R.C. 3319.391, in November 2007, subsection (E) of R.C. 3119.39 was modified to require the Department to adopt specific rules governing various aspects of the entire "disqualification" procedures, including the creation of the standard for the rehabilitation of a disqualified employee.

{¶15} Through its passage of the 2007 legislation for R.C. 3319.391, the Ohio General Assembly merely extended the "records check" procedure for licensed school employees to unlicensed school employees. Consequently, many of the provisions in R.C. 3319.391 either refer to a counterpart subsection in R.C. 3319.39, or are worded in the same manner as the corresponding subsection. For example, R.C. 3319.391(B)(1) provides that a request for a criminal records check of an unlicensed school employee must be made in accordance with the procedure prescribed under R.C. 3319.39(A). In regard to the effect of the prior commission of a disqualifying offense, R.C. 3319.391(C) states:

{¶16} "Any person who is the subject of a criminal records check under this

section and has been convicted of or pleaded guilty to any offense described in division (B)(1) of section 3319.39 of the Revised Code shall not be hired or shall be released from employment, as applicable, unless the person meets the rehabilitation standards adopted by the department under division (E) of that section."

{¶17} In the final segment of the foregoing quote, a specific reference is made to the procedure by which a disqualified person can be rehabilitated for purposes of future employment. Moreover, the segment also refers to the provision in R.C. 3319.39 which required the Department of Education to adopt rules governing that specific procedure. Accordingly, as of the November 14, 2007 effective date for the new statutory scheme under R.C. 3319.39 and 3319.391, both statutes clearly cited to the imminent creation of the rehabilitation procedure.[1]

{¶18} In the instant matter, the factual allegations in relator's mandamus petition readily state that both parties and the union representative executed the disputed MOU on December 16, 2008. Thus, as of that particular date, the "rehabilitation" provisions in the two governing statutes had been in effect for over one year. To this extent, there is no dispute that both relator and respondent were aware when the MOU was duly signed that she could be subject to a rehabilitation procedure, depending upon the exact nature of the provisions adopted by the Department of Education.

{¶19} Nevertheless, it is equally true that, since Ohio Adm.Code 3301-20-03 was not enacted until eight months after the execution of the MOU, neither side had any knowledge concerning the specific procedures or standards which would subsequently

1. As part their various submissions before this court, both parties note that R.C. 3319.39 and 3319.391 have been modified twice since the original enactment of the latter statute in November 2007. However, both parties also acknowledge that none of the amendments to the statutes pertain to the rehabilitation procedure or the status of child endangerment under 2919.22(A) as a disqualifying offense.

govern the "rehabilitation" process. In this regard, none of the three parties to the MOU had any knowledge as to whether relator would be able to even qualify for this particular process. Therefore, in interpreting the third primary clause of the MOU, this court must assume that, in negotiating the matter, both sides were fully aware that the passage of the administrative section could have a significant effect upon relator's status under the controlling statutory scheme.

{¶20} As was previously noted, the third primary clause essentially provided that respondent would be obligated to rehire relator at her prior position if, at some point in the future, the "criminal background check" statutes were altered in such a manner as to eliminate her disqualification from employment with the school district. A review of the other five primary clauses in the MOU demonstrates that they did not contain any type of reference to the possibility that relator could be rehabilitated once the Department of Education had performed its duty under R.C. 3319.39(E). Given that the three parties to the MOU had been forewarned as to the upcoming enactment of the "rehabilitation" process, logic dictates that their "understanding" would cover the effect of the creation of that process upon relator's legal status. Thus, the absence of any separate reference to rehabilitation supports the conclusion that the third primary clause was intended to be applicable to that specific contingency.

{¶21} When Ohio Adm.Code 3301-20-03 finally took effective in August 2010, it had a provision which expressly stated that the crime of child endangerment under R.C. 2919.22(A) would *not* be viewed as a "non-rehabilitative" offense if its commission had took place more than five years prior to the date of the criminal records check. The new administrative section further provided that if the former employee's prior crime did not fall within the definition for a "non-rehabilitative" offense, the board of education could

then employ a three-prong standard for determining whether the employee should now be deemed rehabilitated.

{¶22} In the instant matter, since relator's prior conviction under R.C. 2919.22(A) had occurred almost sixteen years earlier, her crime did not fall within the definition of a "non-rehabilitative" offense. Stated differently, relator's prior crime was of such a nature that, pursuant to Ohio Adm.Code 3301-20-03(A)(6)(g), she could be subject to review under the rehabilitation procedure. As a result, the enactment of the new administrative section clearly altered relator's general status under R.C. 3319.19 and 3319.191.

{¶23} Under the governing language of the MOU's third primary clause, the duty of respondent to rehire relator could be invoked only when the two criminal background check statutes had been modified in such a fashion that relator's disqualification for her prior conviction had been eliminated. Given that the release of Ohio Adm.Code 3301-20-03 immediately altered relator's status under the statutory scheme, this court holds that the application of the new administrative section to relator was a sufficient event to satisfy the requirements of the MOU. That is, in light of the fact that the disputed clause was clearly intended to cover any contingency regarding relator's status under the two governing statutes, it must be interpreted to encompass any event under which relator would again become eligible for employment, thereby eliminating the legal effect of her prior disqualification.

{¶24} In conjunction with the foregoing, this court would again indicate that the applicable versions of R.C. 3319.19 and 3319.191 contained specific references to both the creation and use of the rehabilitation procedure. Given that the new administrative section was meant to act as a supplement to the statutory scheme, its actual enactment had the effect of changing the two statutes in the manner contemplated under the third

primary clause of the MOU.

{¶25} As a general proposition, a memorandum of understanding is viewed as a contract. *Futey v. Director*, 5th Dist. No. 04 CA 14, 2004-Ohio-5400, at ¶23. Under the first rule of contract construction, a court must determine whether the provisions of the agreement are unambiguous and, accordingly, can be applied as written. *Gates v. Ohio Savings Assn.*, 11th Dist. No. 2009-G-2881, 2009-Ohio-6230, at ¶24. In making such a determination, a court is required to examine the contract objectively and thoroughly for any indication of actual uncertainty. Id. at ¶23, citing *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095. If it is concluded that the terms of the contract are unambiguous, the plain, ordinary and common meaning of the contractual language must be followed. *Kistler v. Kistler*, 11th Dist. No. 2003-T-0060, 2004-Ohio-2309, at ¶14.

{¶26} In the present case, a review of the terms of the parties' MOU shows that there is no ambiguity in its third primary clause. In light of the specific subject matter of the MOU, the language of the clause was sufficient to indicate that the parties intended for it to apply whenever relator's eligibility for employment with the school district had been modified to such an extent as to "eliminate" the effect of her prior disqualification. Consistent with the foregoing discussion, this court concludes that the final enactment of Ohio Adm.Code 3301-20-03 constituted an event which invoked the application of the MOU.

{¶27} Given the foregoing conclusion as to the proper interpretation of the third primary clause, the next issue before this court is whether relator's re-employment was mandated by the governing provisions in Ohio Adm.Code 3301-20-03. At the outset of this aspect of our analysis, we would emphasize that the administrative section contains a general statement concerning the manner in which a board of education is intended to

apply the three-prong standard for determining if a former employee can be rehired on the basis of rehabilitation. Specifically, subsection (D) states, in pertinent part:

{¶28} "A district maintains the *discretion* whether to employ or retain in employment an individual who has been deemed rehabilitated pursuant to this rule. A district *may* employ an applicant or continue to employ an individual that has previously pled guilty to, been found guilty by a jury or court of, or convicted of an offense listed in division (B)(1) of section 3319.39 of the Revised Code, if all of the following conditions for rehabilitation are met: ***." (Emphasis added.)

{¶29} Like the disputed clause in the MOU, the foregoing language from the new administrative code section is not ambiguous. That is, Ohio Adm.Code 3301-20-03(D) clearly does not grant a disqualified employee a "right" to be rehired if each prong of the standard for rehabilitation is satisfied. Rather, the quoted language indicates that the decision to rehire a rehabilitated individual lies solely within the sound discretion of a board of education. In this respect, it is evident that the Department of Education chose to give the board the ability to review each situation and decide whether re-employment is still justified despite the fact that the basic standard for rehabilitation has been met.

{¶30} However, under the specific facts of this case, respondent no longer has the ability to exercise the cited discretion. By agreeing under the MOU to rehire relator if she became eligible for employment with the school district in the future, respondent essentially gave up its discretion over the matter. Instead, respondent became legally obligated to rehire her if she was otherwise qualified to resume her prior position. Thus, the MOU gave relator the "right" to be re-employed with the school district if she could satisfy the standard for rehabilitation.

{¶31} Initially, Ohio Adm.Code 3301-20-03(D)(1) states that a former employee

can only be considered for rehabilitation if her prior crime was not a "non-rehabilitative" offense. As has already been discussed in this opinion, relator was able to comply with this preliminary requirement. Again, Ohio Adm.Code 3301-20-03(A)(6)(g) provides that child endangerment under R.C. 2919.22(A) will not be deemed "non-rehabilitative" if the conviction occurred more than five years prior to the date of the background check.

{¶32} Once the foregoing initial hurdle is negotiated, the administrative section sets forth three remaining prongs for deciding whether rehabilitation has been achieved in a given situation. The first of these prongs, as delineated in Ohio Adm.Code 3301-20-03(D)(2), states that a disqualified person can only be subject to rehabilitation if, "[a]t the time of the offense, the victim of the offense was not a person under eighteen years of age or enrolled as a student in a district."

{¶33} Noting that respondent referred to this requirement as a basis for denying her request to be rehired, relator has contended that this specific prong of the standard should not be applied to her because, as defined under R.C. 2919.22(A), the offense of child endangerment always involves a victim who is under the age of eighteen. As to this point, respondent submits that relator's interpretation of R.C. 2919.22(A) is flawed because there can be instances in which a victim of child endangerment is a mentally handicapped individual between the ages of eighteen and twenty-one.

{¶34} Upon reviewing the pertinent provisions in Ohio Adm.Code 3301-20-03, this court holds that the Department of Education has created a conflict which cannot be resolved through the normal means of statutory construction. On the one hand, Ohio Adm.Code 3301-20-03(A)(6)(g) expressly indicates that child endangerment under R.C. 2919.22(A) is an offense from which rehabilitation is possible when the "five-year" rule has been satisfied. On the other hand, subsection (D)(2) states that a former employee

can never be subject to rehabilitation if the victim of the disqualifying offense was under the age of eighteen. Moreover, given that the administrative section does not attempt to distinguish between different forms of child endangerment or provide any indication as to the manner in which the two subsections are intended to be applied, the wording of the section does not provide any means for resolving the conflict.

{¶35} In light of the present status of Ohio Adm.Code 3301-20-03, an action in mandamus is not the proper type of proceeding for relator to pursue in order to resolve the underlying dispute between the parties. Specifically, since relator cannot establish at the present time that she has a clear legal right to be deemed rehabilitated and, thus, qualified for rehiring as a cafeteria worker under the terms of the MOU, the appropriate remedy would be a declaratory judgment proceeding in regard to the two governing statutes and Ohio Adm.Code 3301-20-03. Under such circumstances, the dismissal of this matter is warranted under Civ.R. 12(B)(6).

{¶36} Consistent with the foregoing discussion, respondent's motion to dismiss is granted. It is the order of this court that relator's entire mandamus petition is hereby dismissed.

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

MARY JANE TRAPP, J., dissents with Dissenting Opinion.

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

{¶37} I concur in judgment only on the basis that the relator has an adequate legal remedy before a trial court in this matter.

{¶38} To be entitled to a writ of mandamus, the relator must be able to prove that: (1) he has a clear legal right to have a specific act performed by a public official; (2) the public official has a corresponding duty to perform that act; and (3) there is no other legal remedy that could be pursued to adequately resolve the matter. *State ex rel*. *Appenzeller v. Mitrovich*, 11th Dist. No. 2007-L-125, 2007-Ohio-6157, at ¶5.

{¶39} The relator must be able to establish, inter alia, that there does not exist an alternative adequate legal remedy he could pursue. *Hamilton v. Collins*, 11th Dist. No. 2003-L-106, 2003-Ohio-5703, at ¶4. "Under this requirement, a writ will not lie if the relator could obtain the same basic relief he seeks in the mandamus case through a distinct legal proceeding." *State ex rel. Maxwell v. Kainrad*, 11th Dist. No. 2004-P-0042, 2004-Ohio-5458, at ¶10, citing *State ex rel. Norris v. Watson*, 11th Dist. No. 2001-P-0089, 2001-Ohio-3932, 2001 Ohio App. LEXIS 4807, at *2-3.

{¶40} In this case, the relator had several alternative legal remedies available. The relator may seek declaratory judgment as to her rights under the MOU or injunctive relief from the lower court. A petition for a writ of mandamus should not be granted when the relator is actually seeking a declaratory judgment which "the court of appeals lack[s] jurisdiction to grant on a purported mandamus claim**."** *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006-Ohio-4334, at ¶19 (citations omitted). However, the lower court's ruling must afford the relator an adequate and complete remedy. While the Supreme Court held in *State ex rel. Fenske v. McGovern* (1984), 11 Ohio St.3d 129, 130, that the availability of declaratory judgment does not preclude mandamus, the

appellate court may still determine that declaratory judgment would provide a complete remedy. *State ex rel. Viox Builders, Inc. v. Lancaster* (1989), 46 Ohio St. 3d 144, 145.

{¶41} Furthermore, both *Fenske* and *State ex rel. Fattlar v. Boyle*, 83 Ohio St.3d 123, cited by the dissent for the proposition that the trial court is unable to provide an adequate remedy, are distinguishable from the facts in this case. *Fenske* and *Fattlar* involved parties who had a "clear legal duty" to act under either an ordinance or a charter. Here, no such duty is present. The only obligation for the School Board to act arises from the Memorandum of Understanding (MOU) between the parties. This obligation concerns a disputed potential contractual duty, not the type of "clear legal duty" as in the cases cited by the dissent.

{¶42} Here, the relator could file a breach of contract action at the trial court level, alleging that the Kent School Board is not acting according to the terms of the MOU.

{¶43} A memorandum of understanding is typically viewed as a contract. *Futey v. Director*, 5th Dist. No. 04 CA 14, 2004-Ohio-5400, at ¶23. As such, a failure of one party to comply with the terms would allow the other party to properly bring an action for breach of contract at the trial court level and afford the relator an adequate remedy. A mandamus action may be dismissed when there is an adequate remedy at law through an action for breach of contract. *State ex rel. Russell v. Duncan* (1992), 64 Ohio St.3d 538, 538-539. "A breach of contract action is not a plain and adequate remedy in the ordinary course of law that precludes issuance of a writ of mandamus if relator is being damaged not solely by a breach of contract, but also by a failure of public officers to perform official acts that they are under a clear legal duty to perform." *State ex rel. V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 472, 1998-Ohio-329. The School Board

was not required to reinstate the relator by law, but instead arguably by contractual obligation. Therefore, a breach of contract action would have been an appropriate remedy.

{¶44} The relator failed to establish to this court that the foregoing remedies were unavailable, warranting a Petition for Writ of Mandamus.

{¶45} This case should be dismissed solely due to the availability of an adequate legal remedy. It is not necessary for this court to address the merits of the relator's Petition.

{¶46} On this basis, I concur in the ultimate decision to dismiss the Petition for Writ of Mandamus.

MARY JANE TRAPP, J., dissents with Dissenting Opinion.

{¶47} While I concur with the analysis and well-reasoned lead opinion, I do not arrive at the same outcome for two reasons: the first is simply that this case, as pled, cannot be dismissed upon a Civ.R. 12(B)(6) motion, and the second is that I do not agree with the conclusion of either of my colleagues that a declaratory judgment action (or, for that matter, a breach of contract action) provides Ms. Bianchi with a plain and adequate remedy at law to resolve the conflict between the two subsections and thus resolve the dispute.

{¶48} "'A court can dismiss a mandamus action under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted if, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in relator's favor,

it appears beyond doubt that he can prove no set of facts entitling him to the requested writ of mandamus.'" *State ex rel. Carnail v. McCormick,* 126 Ohio St.3d 124, 2010-Ohio-2671, at ¶6, quoting *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, at ¶9.

{¶49} As the lead opinion observes, pursuant to the terms of the MOU, the enactment of Ohio Adm.Code 3301-20-03 was a sufficient event to invoke respondent's contractual duty to rehire relator as an employee of the school district inasmuch as the passage of the new administrative section meant that, if relator could satisfy the four requirements for rehabilitation, she would no longer be deemed to be disqualified under the two governing statutes. Furthermore, since respondent had expressly agreed to rehire relator if her status under the statutory scheme had been modified, it had essentially relinquished its right to exercise any discretion relating to the matter.

{¶50} Thus, the primary issue in the action concerns the proper interpretation of Ohio Adm.Code 3301-20-03(D)(2), which sets forth the second prong of the "rehabilitation" standard. Under this provision, a disqualified employee cannot be considered for rehabilitation if the victim of her prior crime was under the age of 18 at the time of the offense. This provision appears to directly conflict with subsection (A)(6)(g), which expressly states that child endangerment under R.C. 2919.22(A) is *not* a "non-rehabilitative" offense. Relator submits that, since the two provisions directly contradict each other, she should not be required to satisfy the second prong in order to qualify for rehabilitation.

{¶51} The language of the administrative section does not provide any indication as to how the Department of Education intended for the two provisions to be applied. As a result, it will be necessary to consult secondary sources, such as any relevant

legislative histories, to resolve the conflict. However, in considering such sources, this court will not be limiting the scope of our review to the specific allegations in the petition. Accordingly, the merits of the instant case cannot be resolved in a Civ.R. 12(B)(6) exercise.

{¶52} Secondly, my colleagues opine that the mandamus action will not lie because this relator has available to her adequate legal remedies such as a declaratory judgment action or a breach of contract action. I disagree.

{¶53} In an action dismissed by the appellate court on the grounds that mandamus would not lie where charter provisions at issue were not readily subject to a clear interpretation and thus a declaratory judgment action constituted an adequate remedy at law, the Supreme Court of Ohio reversed the court of appeals. In doing so it reiterated long-standing precedent that "*** courts in mandamus actions have a duty to construe constitutions, charters and statutes, if necessary, and thereafter evaluate whether the relator has established the required clear legal right and clear legal duty. *** It is the court's duty to resolve all doubts concerning the legal interpretation of these provisions." *State ex rel. Fattlar v. Boyle* (1998), 83 Ohio St.3d 123, 125 (Internal citations omitted).

{¶54} The Supreme Court continued its analysis and found that a declaratory judgment action "would not have been a complete remedy *** unless coupled with ancillary extraordinary relief in the nature of a mandatory injunction to compel [reinstatement] to his former position." Id. at 125.

{¶55} This is also the case for Ms. Bianchi. The *Fattlar* court relied upon this long-standing precedent regarding the question of whether injunctive relief is an adequate remedy at law -- "[a]s to injunctive relief, necessarily it would be mandatory in

nature since relator seeks to compel respondents to perform an alleged clear legal duty. The extraordinary remedy of mandatory injunction available in the court of common pleas is not a plain and adequate remedy in the ordinary course of law precluding exercise of the original jurisdiction in mandamus conferred upon the courts of appeals by Section 3, Article IV of the Ohio Constitution." *State ex rel. Fenske v. McGovern* (1984), 11 Ohio St.3d 129, 130 (Whiteside, J., sitting by assignment). The *Fenske* court noted that while the "availability of declaratory judgment may be considered by the court as an element in exercising its discretion whether a writ should issue[,]" it does not preclude mandamus. Id. at 131.

{¶56} Therefore, I must respectfully dissent.