

In the
Supreme Court of Ohio

THE STATE ex rel., BARBARA HALL, : Case No. 2009-0159
: :
Relator-Appellee, : On Appeal from the
: Cuyahoga County
v. : Court of Appeals,
: Eighth Appellate District
STATE EMPLOYMENT RELATIONS :
BOARD, : Court of Appeals Case
: No. CA-07-090808
Respondent-Appellant. :

**MERIT BRIEF OF APPELLANT
STATE EMPLOYMENT RELATIONS BOARD**

GERALD R. WALTON (0003914)

**Counsel of Record*

JOHN J. SCHNEIDER (0073671)

Gerald R. Walton & Associates

2800 Euclid Avenue

Suite 320

Cleveland, Ohio 44115

216-621-1230

216-621-3039 fax

grwalton49@aol.com

jsschneider_44107@yahoo.com

Counsel for Appellee,

Barbara Hall

RICHARD CORDRAY (0038034)

Ohio Attorney General

BENJAMIN C. MIZER* (0083089)

Solicitor General

**Counsel of Record*

KIMBERLY A. OLSON (0081204)

Deputy Solicitor

ANNE LIGHT HOKE (0039204)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for Appellant,

State Employment Relations Board

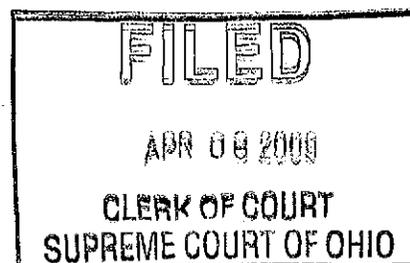


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	3
A. County Children Services terminated Hall for not referring an allegation of sexual and physical abuse.	3
B. The Union filed a grievance challenging Hall’s termination.....	4
C. After the Union decided not to arbitrate Hall’s grievance, Hall filed an unfair labor practice charge against the Union, which SERB dismissed.	6
D. Hall filed a mandamus action challenging SERB’s decision.....	8
ARGUMENT	10
SERB’S PROPOSITION OF LAW:.....	10
SERB did not abuse its discretion when it dismissed Hall’s unfair labor practice charge against the Union for lack of probable cause.	10
A. SERB did not abuse its discretion when it found that the Union was not obligated to arbitrate Hall’s grievance and, therefore, was not required to notify an arbitrator clearinghouse.	12
B. SERB did not abuse its discretion in concluding that a union does not violate its duty of fair representation under R.C. 4117.11(B)(6) when a the union makes an honest mistake that delays it from following up on the lack of an employer’s grievance response.....	14
C. The court below improperly considered evidence that was not in the SERB record and then used that evidence erroneously to criticize SERB’s investigation.....	17
CONCLUSION.....	23
CERTIFICATE OF SERVICE	1
APPENDIX OF EXHIBITS	
Notice of Appeal, January 23, 2009	Ex. 1

Journal Entry of Eighth District Court of Appeals granting writ, December 12, 2008... Ex. 2

Journal Entry of Eighth District Court of Appeals denying respondent’s motion for summary judgment, December 12, 2008 Ex. 3

Journal Entry and Opinion of Eighth District Court of Appeals, Case No. 90808, December 12, 2008 Ex. 4

SERB Dismissal of Unfair Labor Practice Charge, 07-ULP-07-0367, December 7, 2007 Ex. 5

SERB Investigator’s Memorandum, September 25, 2007..... Ex. 6

R.C. 4117.11 Ex. 7

R.C. 4117.12 Ex. 8

TABLE OF AUTHORITIES

Cases	Page(s)
<i>District 1199, Health Care & Social Services Union v. SERB</i> (10th Dist.), 2003 Ohio App. Lexis 3103, 2003-Ohio-3436	13, 14
<i>Hamilton County Board of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio</i> (1989), 46 Ohio St. 3d 147	10
<i>In re SERB v. OCSEA/AFSCME, Local 11, LRP 1998 OPER (LRP)</i> LEXIS 604, SERB 98-010 (7-22-98) (same).....	14, 16
<i>In re Wheeland v. SERB</i> (10th Dist.), 1995 Ohio App. Lexis 2369.....	13, 16
<i>Lorain City School District Board of Education v. SERB</i> (1988), 40 Ohio St. 3d 257	10
<i>OAPSE, Chapter 643 v. Dayton City Sch. Dist. Bd. of Educ.</i> (1991), 59 Ohio St. 3d 159	11
<i>SERB v. Adena Local Sch. Dist. Bd. of Educ.</i> (1993), 66 Ohio St. 3d 485	11
<i>State ex rel. G.F. Bus. Equip. v. Indus. Comm'n</i> (1981), 66 Ohio St. 2d 446	11
<i>State ex rel. Hall v. SERB</i> , 2008 Ohio App. Lexis 5558, 2008-Ohio-6661	passim
<i>State ex rel. MARCA Educ. Ass'n v. SERB</i> (10th Dist.), 2004 Ohio App. Lexis 2337, 2004-Ohio-2647	12
<i>State ex rel. Portage Lakes Education Association, OEA/NEA v. SERB</i> (2002), 95 Ohio St. 3d 533	11, 12, 17
<i>State ex rel. SEIU, Dist. 925 v. SERB</i> (1998), 81 Ohio St. 3d 173	12
<i>State ex rel. Smith v. Indus. Comm'n</i> (1986), 26 Ohio St. 3d 128.....	11
<i>State ex rel. Stewart v. SERB</i> , 108 Ohio St. 3d 203, 2006-Ohio-661	12

<i>State ex. rel. Hamilton County Bd. of Comm'rs v. SERB</i> , 102 Ohio St. 3d 344, 2004-Ohio-3122	12, 17
<i>State v. Bates</i> , 118 Ohio St. 3d 174, 2008-Ohio-1983	13
<i>Univ. of Cincinnati v. Conrad</i> (1980), 63 Ohio St. 2d 1	10
<i>Vaca v. Sipes</i> (1967), 386 U.S. 171	13
<i>Vencl v. Int'l Union of Operating Eng'rs</i> (6th Cir. 1988), 137 F.3d 420	14, 16, 17
Constitutional Provisions, Statutes, and Rules	
R.C. Chapter 4117.....	1, 11, 19
R.C. 4117.12(B).....	1, 10, 18
R.C. 4117.11(B)(6)	passim

INTRODUCTION

The General Assembly created the State Employment Relations Board (“SERB”) and made it responsible for administering R.C. Chapter 4117, the Public Employees’ Collective Bargaining law. As part of those duties, SERB is responsible for investigating unfair labor practice (“ULP”) charges filed by a charging party against a charged party. If SERB finds probable cause that a charged party has committed an unfair labor practice, SERB issues a complaint and sends the matter to a hearing pursuant to R.C. 4117.12(B). If SERB does not find probable cause, it dismisses the matter.

The only way to challenge a SERB dismissal is through a writ of mandamus, and, for a relator to succeed, she must prove that SERB abused its discretion in dismissing the charge. Because this is a high burden, it is rare for a court to disrupt a SERB decision and overturn a dismissal of a ULP charge for lack of probable cause. Applying a lower burden would upset the legislative scheme by allowing courts to second-guess SERB’s probable cause findings—findings that SERB is uniquely qualified to make.

In this case, the court failed to properly defer to SERB’s decision. Barbara Hall filed a ULP charge alleging that her Union violated its duty to fairly represent her in processing her grievance pursuant to R.C. 4117.11(B)(6). SERB unanimously found no probable cause to support her claim. Hall filed a writ of mandamus in the Court of Appeals for the Eighth District challenging SERB’s dismissal of her ULP charge. The Eighth District agreed with Hall and found that SERB abused its discretion, but the court made three critical mistakes.

First, the Eighth District held that Hall’s Union did not take a basic and required step because it did not notify an arbitrator clearinghouse that it was taking her grievance to arbitration. But unions notify arbitrators only after they decide to arbitrate. And here, the Union had no obligation to arbitrate and, in fact, decided not to arbitrate. Requiring unions always to

notify an arbitrator clearinghouse expands the duty of fair representation and creates unnecessary work for both unions and the arbitrator clearinghouse.

Second, the court held that the Union's delay in following up on Hall's grievance violated the duty of fair representation. But SERB found that the Union had justifications for the delay: (1) The Employer was responsible for the next step in the process; and (2) the Union president made an honest mistake in thinking that the Union's legal department was reviewing the grievance. The court should have deferred to SERB's finding concerning these justifications. Instead, the court deviated from SERB precedent and broadened the duty of fair representation.

Third, the court of appeals considered evidence that was not before SERB and used that evidence to conduct a de novo review of SERB's investigation. Rather than submit all of her evidence to SERB, Hall submitted three affidavits—affidavits that SERB did not have—to the Eighth District in her summary judgment motion. The Eighth District admitted that it should not base its decision on evidence that had not been before SERB, but it nevertheless used the affidavits to criticize SERB's investigation. A mandamus court reviewing a SERB decision should not go outside the SERB record to make a determination. Moreover, SERB's investigation in this case was thorough and gave both parties equal opportunity to submit information. But the Eighth District concluded that because the SERB investigator asked the Union for witness statements, the SERB investigator should have asked Hall for witness statements. In other words, according to the Eighth District, SERB must ask all parties the exact same questions in its investigatory requests. This rule will frustrate future SERB investigations.

In sum, the Eighth District expanded a union's duty to represent its members under R.C. 4117.11(B)(6), applied incorrect standards, and improperly considered evidence outside the SERB record. Accordingly, SERB respectfully requests that this Court reverse the decision

below, find that SERB did not abuse its discretion, and affirm SERB's dismissal of Hall's ULP charge.

STATEMENT OF THE CASE AND FACTS

A. County Children Services terminated Hall for not referring an allegation of sexual and physical abuse.

On May 19, 2004, the Cuyahoga County Department of Children and Family Services ("County Children Services" or "Employer") terminated Barbara Hall, a social worker, because she mishandled a hotline telephone call from a referral source, Cleveland Metro Health Center. SERB Supplement ("Supp.") 45, 46. The hotline phone call, which was received on January 8, 2004, was recorded and transcribed. Supp. 28-30. According to the transcript, the Metro Health Center caller told Hall that a two-year-old boy's aunt called Metro Health and said that she thought her nephew had been sexually and physically abused. Supp. 28. The aunt reported that she had been with the boy the day before and he complained that his bottom hurt and that his mother's boyfriend touched him inappropriately. Supp. 28. She also said that she was worried because a couple weeks earlier he "was pretty well bruised." Supp. 29. Hall asked the Metro Health caller for the mother's identity, and the caller said, "Hold on a second I can look that up." Supp. 30. There was a seventeen-second pause before the caller returned and told Hall the mother's name. Hall responded that she would document the aunt's call as a non-referral because "she (aunt) can't go on speculation, she don't (sic) have any proof." Supp. 30. The call ended.

The Employer's database shows that Hall did not document the abuse allegation; she did not list the mother's name within the narrative of the Hotline Referral Form; she did not record the aunt's phone number; and she did not assign the abuse report for investigation. Supp. 45; see also Supp. 32.

A few weeks later, the boy was admitted to the hospital and diagnosed with a left subdural hematoma, a left arm fracture, and bilateral retinal hemorrhages—a condition often called Shaken Baby Syndrome. A week later, on January 30, 2004, County Children Services took custody of the boy. Supp. 32. The Employer placed Hall on paid administrative leave. Hall continued on paid leave pending the Employer's investigation of her non-referral of the sexual and physical abuse allegation. Supp. 24.

On March 11, 2004, the Employer held a pre-disciplinary hearing to investigate Hall's alleged neglect of duty. Supp. 31-33. Ohio Council 8, American Federation of State, County and Municipal Employees, Local 1746, AFL-CIO ("Union") represents the bargaining unit of the Employer, which included Hall. The local union president, Pamela Brown, attended the pre-disciplinary hearing. At the hearing, Hall claimed that her supervisor told her to designate the call as a non-referral during the seventeen-second pause when the hotline caller was looking up the name of the mother. Supp. 33. Hall also claimed that she would have otherwise referred the call. The supervisor denied that this seventeen-second conversation occurred. Supp. 33. Hall provided no evidence that she referred to the Employer's policy for help in deciding if the hotline call should be referred for an investigation. Supp. 33.

The Employer terminated Hall effective May 19, 2004, because she neglected her duty in failing to properly assess and process a hotline phone call alleging serious child abuse. Supp. 45. According to the Employer's department policies and procedures, which Hall admitted that she received, Hall should have assigned the case for investigation. Supp. 34-40, 41-42, 44.

B. The Union filed a grievance challenging Hall's termination.

At Hall's request, on May 21, 2004, the Union filed a grievance challenging her termination. Supp. 47. According to Brown's statement, she personally gave Hall a copy of her

grievance when Hall stopped by the union hall on or about June 10, 2004. Supp. 62. Hall denies that she received a copy of the grievance. Supp. 6.

In accordance with the collective bargaining agreement (“CBA”) between the Employer and the Union, see Supp. 10, the Union filed Hall’s termination grievance at Step 3 of the grievance procedure on May 21, 2004. Supp. 47. Also, on May 21, 2004, Brown sent a letter to the Employer’s labor relations administrator confirming that Hall’s grievance was filed. Supp. 48. Four days later, Brown sent the same labor relations administrator another letter asking for information about Hall’s grievance. Supp. 49. On June 10, 2004, a Step 3 grievance hearing was held, but Hall’s grievance was put on hold because Brown had not received the information requested from the Employer and because the County’s investigation of possible child abuse was incomplete. Supp. 62.

Over the next few weeks, Brown wrote two letters to the Employer requesting more information about Hall’s grievance. Supp. 50, 51. In a June 30, 2004 letter, the Employer responded that it would not release certain information about its investigation of the child abuse report because it was not pertinent to Hall’s termination. Supp. 52. The Employer also referenced the hold on Hall’s grievance in a Step 3 response that it issued on multiple grievances on July 12, 2004. Supp. 54.

On August 11, 2004, Brown and the Employer’s labor relations administrator met with the County’s Special Investigation Unit (“SIU”) investigator, who provided only limited information, but did state that he had substantiated the physical abuse of the child. Supp. 62. At the conclusion of the meeting, Brown told the Employer’s labor relations administrator that she had her information and that the Employer could issue its Step 3 response to Hall’s grievance. Supp. 62; see also Supp. 56-57.

After this meeting with the Employer's investigator, Brown called and discussed the case with Hall. Supp. 62. Brown told Hall that her case was a losing battle because it involved substantiated physical child abuse that resulted in Shaken Baby Syndrome. Supp. 62. She also told Hall that her grievance would not be successful at arbitration because of the facts of the case. Supp. 62-63.

Brown talked again to Hall on October 12, 2004, and told her that the Union was still awaiting the Employer's response. Supp. 25. When Brown had not received the Step 3 response by January 2005, she called the Employer's human resources director who told her that the response would be coming and that the grievance would probably be denied. Supp. 63. Because of this conversation, Brown thought she had received the Employer's Step 3 response and that she had referred it to the Union's legal department for review. Supp. 63. A later investigation would show, however, that the Employer had not filed its Step 3 response. During 2005, Brown spoke again with Hall and told her that her grievance might not be approved for arbitration. Supp. 63.

In December 2006, Hall inquired about her grievance. The Union investigated and discovered that the Employer had never issued its Step 3 response. The Union notified the Employer's labor relations administrator who then issued a Step 3 response on December 20, 2006. Supp. 58.

C. After the Union decided not to arbitrate Hall's grievance, Hall filed an unfair labor practice charge against the Union, which SERB dismissed.

On January 8, 2007, the Union preserved its contractual right to arbitration when it sent its request to arbitrate Hall's grievance to the Employer's labor relations administrator within 30 days after the Union received the Step 3 response. Supp. 59. The Union Regional Director then

submitted Hall's file to Union headquarters to review the merits of the case. After review, the Union determined that the grievance lacked merit for the following reasons:

- (1) Hall did not follow proper procedures and assign the case for investigation;
- (2) the transcript of the hotline conversation showed that Hall was told of possible physical and sexual abuse, which according to the County Children Services' policies, of which Relator Hall was on notice, was enough information to refer the matter for an investigation;
- (3) it was Hall's responsibility to assess the hotline call and if a supervisor overrode her decision, that override must be in writing; and
- (4) there was no override in this case and no mention of her alleged discussion with her supervisor in the transcript of the hotline conversation.

Supp. 26.

On April 20, 2007, the Union Regional Director sent Hall a letter advising her that her grievance lacked merit and it would not be appealed to arbitration. Supp. 60. The post office returned the letter to the Union office because the address was no longer correct. The Union Regional Director sent a second letter on April 26, 2007, to a different address informing Hall that her grievance would not be taken to arbitration. Supp. 61.

On July 25, 2007, Hall filed a ULP charge with SERB alleging that the Union violated R.C. 4117.11(B)(6) by failing to fairly represent her; Hall's affidavit was attached to the ULP charge. Supp. 1, 5. A SERB labor relations specialist investigated Hall's charge. She sent a "charging party information request" to Hall, Supp. 22, and a "charged party information request" to the Union that included a request for witness statements supporting the Union's position, Supp. 18. The investigator asked each party to explain why the Union's action was or was not an unfair labor practice. In her narrative response, Hall repeated what she had said in her ULP charge. Supp. 19-21. The Union in its narrative response discussed why it believed that Hall's grievance lacked merit since she had not properly followed the Employer's procedures for referrals. The

Union also attached several documents to support its narrative, including Brown's statement. Supp. 23-63.

The SERB investigator issued her report on September 25, 2007, in which she recommended that SERB determine that there was no probable cause that the Union committed an unfair labor practice. Supp. 64-66. After due consideration of the SERB investigator's report and the entire record before it, SERB determined on October 25, 2007, that "the investigation revealed that based on the merits of [Ms. Hall's] grievance, the [Union] acted reasonably when it determined not to proceed any further on the grievance." The report concluded that "[the Union's] actions were not arbitrary, discriminatory, or in bad faith," and dismissed Hall's ULP charge with prejudice. Supp. 71-72.

D. Hall filed a mandamus action challenging SERB's decision.

Hall filed a mandamus action in the Court of Appeals for the Eighth District asking the court to order SERB to reinstate her unfair labor practice complaint, issue a complaint, and hold a hearing on the matter. Supp. 77. She asserted that "the balance of evidence establishes that the finding of SERB that Local 1746 and Ohio Council 8 did not commit an unfair labor practice against Ms. Barbara Hall is arbitrary, capricious, erroneous and contrary to the known facts." Supp. 77.¹ Hall and SERB filed respective motions for summary judgment. Hall attached to her motion for summary judgment three affidavits that were not submitted to SERB as part of her ULP charge or her response to the request for information. See Supp. 79-85.

The court below recognized that it was supposed to decide the issues based only on the evidence that was before SERB when SERB made its finding. *State ex rel. Hall v. SERB*, 2008 Ohio App. Lexis 5558, 2008-Ohio-6661, ("App. Op." attached at Appendix A-6) ¶ 29. But the court referred to Hall's improperly submitted affidavits and found that (1) the Union had failed

¹ The Court of Appeals denied as moot Hall's second claim for public records. App. Op. at ¶ 3.

to take a basic and required step by not notifying Federal Mediation Conciliation Service of its intent to arbitrate Hall's grievance because it had lost track of the grievance and did not promptly pursue it; (2) the SERB investigator excused the Union's behavior based on an alleged incorrect standard; and (3) the SERB investigator did not provide each party with an equal opportunity to present its case. App. Opp. at ¶ 30. Based on these conclusions, the court found that SERB abused its discretion in finding no probable cause that a ULP was committed, and it granted the writ of mandamus. App. Opp. at ¶ 30. The writ orders SERB to find probable cause and hold a hearing on the merits of Hall's ULP charge. App. Opp. at ¶ 30. SERB filed a motion for reconsideration, which was denied. This appeal followed.

ARGUMENT

SERB'S PROPOSITION OF LAW:

SERB did not abuse its discretion when it dismissed Hall's unfair labor practice charge against the Union for lack of probable cause.

R.C. 4117.12(B) states that “when anyone files a charge with the board alleging that an unfair labor practice has been committed, [SERB] or its designated agent shall investigate the charge. If [SERB] has probable cause for believing that a violation has occurred, [SERB] shall issue a complaint and shall conduct a hearing concerning the charge.” Therefore, the converse is also true: When SERB does not find probable cause, a complaint is not issued and a hearing is not held. Here, SERB found no probable cause to believe that the Union committed an unfair labor practice. But in reviewing SERB's determination, the Eighth District failed to apply the proper standard of review and instead substituted its own judgment for SERB's.

Courts may not substitute their judgment for that of administrative agencies; instead, courts must defer to administrative decisions. See *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 1. Courts must apply this deference when reviewing SERB decisions. In *Lorain City School District Board of Education v. SERB* (1988), 40 Ohio St. 3d 257, 260, for example, this Court held that courts must defer to SERB's interpretation of R.C. Chapter 4117 because “[o]therwise, there would be no purpose in creating a specialized administrative agency, such as SERB, to make determinations.” *Id.* Moreover, “[t]o allow courts such latitude would invite many conflicting interpretations of R.C. 4117.” *Id.* Similarly, in *Hamilton County Board of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St. 3d 147, this Court explained why it is appropriate for courts to defer to SERB: “[SERB's] decision is a product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies and responsible treatment of the facts. It is a type of

judgment which administrative agencies are best equipped to make and for which the administrative process is the most appropriate.” *Id.* at 151. Thus, so long as “SERB construes [R.C. Chapter 4117] in a permissible fashion, the courts should not interfere. It is only when the agency makes a decision that is without support under the law that we may impose our construction on the statute.” *SERB v. Adena Local Sch. Dist. Bd. of Educ.* (1993), 66 Ohio St. 3d 485, 501.

Additionally, SERB’s probable-cause determinations are reviewable only through a mandamus action, not by direct appeal. *OAPSE, Chapter 643 v. Dayton City Sch. Dist. Bd. of Educ.* (1991), 59 Ohio St. 3d 159. In *State ex rel. Portage Lakes Education Association, OEA/NEA v. SERB*, 95 Ohio St. 3d 533, 2002-Ohio-2839, this Court articulated the standard for reviewing mandamus actions challenging a SERB probable-cause determination: The relator must “establish[] an abuse of discretion by SERB in its probable-cause determination,” and “if there is conflicting evidence on an issue . . . courts should not substitute their judgment for those of the administrative agency.” *Id.* at ¶ 41; see also *Id.* at ¶ 35. (“An abuse of discretion means an unreasonable, arbitrary, or unconscionable decision.”).

Accordingly, it is only those “rare instances where an administrative body’s ruling cannot be reconciled with the facts or reason which must be remedied by the issuance of the extraordinary writ of mandamus.” *State ex rel. Smith v. Indus. Comm’n* (1986), 26 Ohio St. 3d 128, 131-32. Where there is a “rational connection between the facts found and the choice made” by the administrative agency, mandamus will not issue. *Id.* at 132. Thus, when reviewing alleged arbitrary actions by an administrative agency in mandamus, an abuse of discretion will not be found if there is any evidence in the record supporting the agency’s finding. See *State ex rel. G.F. Bus. Equip. v. Indus. Comm’n* (1981), 66 Ohio St. 2d 446.

Time and again, courts have applied the deferential *Portage Lakes* standard and upheld SERB no-probable-cause findings. See, e.g., *State ex rel. Hamilton County Bd. of Comm'rs v. SERB*, 102 Ohio St. 3d 344, 2004-Ohio-3122; *State ex rel. MARCA Educ. Ass'n v. SERB* (10th Dist.), 2004 Ohio App. Lexis 2337, 2004-Ohio-2647; *State ex rel. Stewart v. SERB*, 108 Ohio St. 3d 203, 2006-Ohio-661. In fact, only once has this Court found that SERB abused its discretion when it dismissed a ULP charge for no probable cause. See *State ex rel. SEIU, Dist. 925 v. SERB* (1998), 81 Ohio St. 3d 173. Here, however, the Eighth District failed to defer to SERB'S judgment and made three critical mistakes.

A. SERB did not abuse its discretion when it found that the Union was not obligated to arbitrate Hall's grievance and, therefore, was not required to notify an arbitrator clearinghouse.

The Eighth District concluded that the Union violated its duty of fair representation under R.C. 4117.11(B)(6) in part because "the Union failed to take [the] basic and *required* step" of processing Hall's grievance to arbitration and failed to "fulfill the *required* process" of notifying the Federal Mediation and Conciliation Service ("FMCS"), the arbitrator clearinghouse, about Hall's case. App. Opp. at ¶ 25 (emphasis added); see also App. Opp. at ¶ 30 ("[B]ecause the Union failed to take the basic and required step of notifying the [FMCS] . . . SERB abused its discretion."). But neither the applicable agreement nor case law require the Union to process all grievances to arbitration, and if a grievance is not processed to arbitration, the Union has no reason to notify the FMCS.

The collective bargaining agreement in effect between the Employer and the Union when Hall was terminated provides in pertinent part that "[i]f the grievance is not satisfactorily settled at Step 3, the Union *may*, within thirty (30) days after the receipt of the Step 3 answer, submit the issue to arbitration." Supp. 14 (emphasis added). Thus, the CBA does not require the Union to process all grievances to arbitration. Instead, the permissive language allows the Union to decide

whether to arbitrate. See *State v. Bates*, 118 Ohio St. 3d 174, 2008-Ohio-1983, ¶ 14 (interpreting “may” as permissive).

Moreover, Ohio case law does not require a union to arbitrate all cases. To the contrary, other courts and SERB have held that a union is not required to process every grievance to arbitration. In *In re Wheeland v. SERB* (10th Dist.), 1995 Ohio App. Lexis 2369, for example, the Tenth District held that it is not a per se violation of the duty of fair representation for a union to withdraw a grievance and not to proceed to arbitration. *Id.* at *17. The court relied on *Vaca v. Sipes* (1967), 386 U.S. 171, and explained that “to be effective, the collective bargaining system must subordinate the interest of individual employees to the collective interest of all employees”; therefore, “an individual employee d[oes] not have an absolute right to compel arbitration of his or her grievance.” *Wheeland*, 1995 Ohio App. Lexis 2369, at *10. “[A]llowing an individual employee to compel arbitration of a grievance regardless of its merits,” the court continued, “would undermine the collective bargaining system and result in unsystematic negotiations.” *Id.* Instead, a breach of duty of fair representation in processing a grievance occurs only when a Union’s conduct is “arbitrary, discriminatory, or in bad faith.” *Id.* (citing *Vaca*, 386 U.S. at 190). Also, in *District 1199, Health Care & Social Services Union v. SERB* (10th Dist.), 2003 Ohio App. Lexis 3103, 2003-Ohio-3436, the Tenth District described the basic and required actions a union must take: filing a grievance, processing a grievance, and “arbitrat[ing] the grievance *when appropriate*.” *Id.* at ¶ 38 (emphasis added). In other words, arbitration will not be appropriate in all cases, and therefore arbitration is not per se required in every case.

The Eighth District was also wrong in claiming that notifying the FMCS was required here. Based on common labor-management practice, a union contacts the FMCS only after a union decides to process a grievance to arbitration. The CBA is consistent with this practice: “The

Union shall notify the Federal Mediation and Conciliation Service . . . and the other party of its intent to arbitrate” Supp. 14. Thus, it is only after the Union decides to arbitrate that the Union notifies FMCS of its intent to arbitrate—a completely logical approach. A contrary rule would unnecessarily involve the FMCS in matters when it is not needed. The Union’s decision not to notify the FMCS therefore comports with both the CBA and common sense.

Finally, the fact that the Union sent a letter to the Employer preserving its right to arbitrate does not change the analysis. The Union sent a letter to notify the Employer of its intent to arbitrate Hall’s grievance, Supp. 59; this letter was sent to comply with contractual timelines in case the Union decided to arbitrate the matter. But preserving the right to arbitrate does not tie the Union’s hands; the Union still had the option of not arbitrating Hall’s grievance.

In short, the Union did not breach its duty of fair representation under R.C. 4117.11(B)(6) by not filing a grievance and therefore not notifying the FMCS.

B. SERB did not abuse its discretion in concluding that a union does not violate its duty of fair representation under R.C. 4117.11(B)(6) when a the union makes an honest mistake that delays it from following up on the lack of an employer’s grievance response.

The standard for finding a union acted “arbitrarily” under R.C. 4117.11(B)(6) is failure to take a necessary and required step without justification or excuse:

Absent justification or excuse, a union’s negligent failure to take a basic and required step, unrelated to the merits of the grievance, is a clear example of arbitrary and perfunctory conduct which amounts to unfair representation.

District 1199, 2003-Ohio-3436, at ¶ 38 (citing *Vencl v. Int’l Union of Operating Eng’rs* (6th Cir. 1988), 137 F.3d 420, 426); see also *In re SERB v. OCSEA/AFSCME, Local 11, LRP 1998 OPER (LRP) LEXIS 604, SERB 98-010 (7-22-98)* (same). SERB applied this standard, but the Eighth District improperly discounted the Union’s justifications for not following up on the Employer’s Step 3 response to Hall’s grievance.

First, the hold-up in processing the grievance was the Employer's doing, not the Union's. Here, the Union could not act because the Employer had not issued its Step 3 response. The local union president, Brown, had requested, and the Employer had agreed, to put the grievance on hold pending the outcome of the Employer's investigation of the alleged child abuse. Supp. 24-25. On August 11, 2004, however, Brown met with the Employer's labor relations specialist and the Employer's investigator, who substantiated the child abuse. Supp. 25. Because the investigation was complete and the abuse confirmed, Brown told the Employer's labor relations administrator to issue the Step 3 response. Supp. 25. But the Employer did not issue its response.

Before the union could decide whether to process the grievance to arbitration, the Union had to receive the Employer's Step 3 response granting or denying the grievance. The CBA does not provide the Union an alternative course if the Employer fails to file its Step 3 response. See Supp. 12. This process of waiting for an Employer's response is similar to a court case in which a losing party must wait for an opinion before it can appeal. The Eighth District claimed that the Union should have "act[ed] as a catalyst" to force the Employer to provide its response, App. Opp. at ¶ 26, but neither the CBA nor any other legal standard required or even authorized the Union to force the Employer to comply with its Step 3 duty. Thus, the Union had a justification or excuse for the delay: The Employer failed to take a basic and required step. Neither SERB nor the Courts have held that a union acts arbitrarily, and therefore commits a violation of the duty of fair representation, if another person or entity neglects to act in a matter over which a union has no control. A contrary result would unduly burden unions because it would make them responsible for not only their own actions but also the actions of third parties. Thus, SERB's determination was not an abuse of discretion.

Second, the Union's delay in following up on the receipt of the Employer's Step 3 response was an "honest mistake." Supp. 65 ("[The Union] asserts that . . . the delay in following up on receipt of the grievance response was due to an honest mistake."). SERB has found that if a union's justification or excuse constitutes simple negligence, the union's conduct is not "arbitrary" and does not breach the duty of fair representation. *Local 11*, LRP 1998 OPER (LRP) LEXIS 604, at *3 ("[I]f the [union's] justification or excuse constitutes simple negligence, we will find that the conduct is not arbitrary."). For example, in *Wheeland*, the union failed to notify the discharged employee that the union had withdrawn her grievance. While the court recognized that the union should have kept her apprised of the status of her grievance, "the failure to do so was more the result of simple negligence . . . than an act that was arbitrary, discriminatory or in bad faith." *Id.* at *19. The same is true here. As local union president, Brown had a conversation with the Employer that led her to believe that the Employer had filed its Step 3 response. Because of this conversation, Brown also thought that the Union's legal department was reviewing Hall's grievance. Supp. 63. While the Union could have been more diligent, its lack of diligence was an "honest mistake" that was not arbitrary, discriminatory, or in bad faith.

To come to the opposite and incorrect conclusion, the Eighth District relied on *Vencl*. App. Opp. at ¶ 27 (citing *Vencl*, 137 F.3d at 426). But *Vencl* cannot be pressed into service to describe the Union's actions here as arbitrary. The union in *Vencl* told the employee it would arbitrate his claim, but the union missed the filing deadline. The arbitrator denied the employee's claim solely because the union filed its request too late. *Id.* at 423. The employee then sued the union and argued that the union breached its duty to fairly represent him. *Id.* The court agreed and held that missing the filing deadline was a breach of the union's duty of fair representation. *Id.*

at 426. In contrast, the Union here did not miss a deadline or fail to take a required step. Also, unlike the employee in *Vencl*, Hall did not lose an opportunity to vindicate her rights; instead, she experienced only delay.

The arbitrariness standard that the SERB investigator applied is consistent with precedent. SERB did not abuse its discretion in relying upon this analysis when it found the Union's actions were not arbitrary but, instead, an honest mistake made in not following up on the Employer's failure to provide its Step 3 grievance response.

C. The court below improperly considered evidence that was not in the SERB record and then used that evidence erroneously to criticize SERB's investigation.

As discussed above, in order to succeed in this mandamus action, Hall must show that SERB abused its discretion when it found that no probable cause existed to support her claim. To determine whether SERB abused its discretion, a court may consider only the evidence that was before SERB when SERB made its decision: “[Because] SERB could not abuse its discretion based on evidence that was not properly before that board when it made its decision. . . , the review of a SERB decision is generally limited to the facts as they existed at the time SERB made its decision.” *Portage Lakes*, 2002-Ohio-2839 at ¶ 54; see also *Hamilton County Bd. of Comm'rs*, 2004-Ohio-3122, at ¶ 21 (holding that the court could not consider relator's evidence that was filed with the court but not with SERB).

In this case, the court below should have considered only the record that SERB had before it when SERB made its decision to dismiss Hall's ULP charge. The Eighth District recognized this limitation, App. Opp. at ¶¶ 22, 29, but went on to describe evidence that was not in the SERB record. In its decision, the Eighth District considered three affidavits that Hall attached to her summary judgment motion—affidavits that Hall did not submit to SERB. The court then

used these affidavits to criticize SERB's investigatory process. App. Opp. at ¶ 29 (asserting that the SERB investigator should have asked Hall for witness statements).

As an initial matter, by reviewing SERB's investigatory process, the Eighth District reached a claim that was not properly before the court. In her mandamus complaint, see Supp. 73-78, Hall did not allege that SERB improperly investigated her claim. Thus, SERB was not on notice that the court would be scrutinizing its investigation. Therefore, the Eighth District improperly considered evidence outside the SERB record and passed judgment on a claim that was not properly raised.

The court compounded its error by coming to the wrong conclusion about SERB's investigation. Revised Code 4117.12(B) establishes the statutory standard for SERB's investigations: "When anyone files a charge with the (SERB) board alleging that an unfair labor practice charge has been committed, the board or its designated agent shall investigate the charge." Here, the SERB investigator complied with the statute.

Hall filed a ULP charge alleging that the Union violated its duty of fair representation. Supp. 1-2. In her charge, Hall included her statement of facts and attached five exhibits: (1) a two-page additional statement of "facts"; (2) her affidavit describing her termination and the Union's response to filing her grievance and not processing it to arbitration; (3) a Union letter asking the Employer to produce the approvals of her supervisor during the period when she allegedly did not properly refer a child abuse message and all of her supervisor's computer transactions during the same time period; (4) a Union letter informing her that the Union had reviewed her termination grievance and determined that it did not have sufficient merit to warrant arbitration; and (5) the discipline and grievance procedure of the collective bargaining agreement between the Union and the Employer. Supp. 3-14.

The SERB investigator, a labor relations specialist, investigated Hall's charge. The SERB investigator sent a "charging party information request" to Hall that asked her to supplement to the information already provided: "(P)lease state specifically why you believe the Charged Party's [Union] conduct as alleged in the charge violates Ohio Revised Code 4117.11. . . . *Please provide all documentation supporting your position.*" Supp. 16 (italics added). In her narrative response, Hall did not include any further discussion of the merits of her grievance or discussion of others' opinion of the merits of her grievance, did not include the Employer's policy regarding supervisory consultation about referrals, did not include the Employer's policy for making referrals, and did not include a document stating that she disagreed with the Employer's policies or that she withdrew her receipt of the Employer's policies and procedure manual. Supp. 19-21. Thus, Hall had opportunities to submit the affidavits that she attached to her summary judgment motion to SERB but failed to do so.

The SERB investigator sent the Union a "charged party information request" that asked whether the acts alleged in the charge occurred and whether, in the Union's opinion, those acts constituted an unfair labor practice. The SERB investigator also asked the Union to provide documentation and witness statements to support the Union's position. Supp. 17-18.

The Union filed a narrative response, Supp. 23-27, in which it discussed why Hall's grievance lacked merit. Specifically, the response explained that Hall did not follow properly the Employer's procedures for referrals. For reference, the Union attached the procedures that hotline employees must use when deciding whether to refer a call, Supp. 43, and the form that Hall signed verifying that she received the policies and procedures, Supp. 44. The Union also attached the Employer's Order of Removal. In the Order, the Employer stated that Hall "failed

to use the Structure Decision Making (SDM) process, which determines whether a Hotline call should be referred for investigation.” Supp. 45-46.

Attached to its response, the Union also included the telephone call transcript that showed that Hall was told of possible physical and sexual abuse, Supp. 28-30; the pre-disciplinary conference report, Supp. 31-33; a copy of Hall’s grievance, Supp. 47; a letter from the Union to the Employer to advance the grievance to Step 3, Supp. 48; numerous letters from the Union to the Employer requesting documents, Supp. 49-51; the Employer’s response to the Union’s request for information, Supp. 52; notes from a Union interview about the abuse of the child who had been the object of the hotline call, Supp. 56-57; the Employer’s Step 3 response denying Hall’s grievance, Supp. 58; the timely Union notice to the Employer of its intent to take Hall’s grievance to arbitration, Supp. 59; the two Union letters informing Hall that her “grievance does not have sufficient merit to warrant an appeal to arbitration,” Supp. 60, 61; and last, Brown’s statement discussing how she processed Hall’s grievance, Supp. 62-63. Thus, the Union provided SERB with comprehensive information related to Hall’s ULP charge.

Hall now tries to avoid the consequence of not properly submitting the affidavits to SERB by claiming that it is SERB’s fault for not explicitly requesting the affidavits. The Eighth District agreed and concluded that “it is disturbing that the [investigator] explicitly asked the Union for witness statements, but did not extend that invitation to Hall.” App. 25. But this is wrong. Hall had multiple opportunities to submit information—including the affidavits—to SERB. See, e.g., Supp. 16.

Moreover, SERB does not abuse its discretion if an investigator does not ask all parties the exact same questions in its investigatory requests. SERB investigates ULP charges on a case-by-case basis, and investigators ask questions of each party based on the information the SERB

investigator needs to understand the charge. This practice ensures that the SERB investigator and the board will be fully apprised of the controversy, and not simply follow a checklist of questions regardless of whether those questions are relevant to the charge. Put simply, SERB's investigation here was not "disturbing," and the court below overstepped its bounds by concluding that SERB's investigation was insufficient. Requiring SERB investigators to ask rote questions—and determining that SERB abuses its discretion in not requiring those questions—will frustrate and delay future SERB investigations.

Finally, regardless of their admissibility, the affidavits attached to Halls' summary judgment motion contain legal conclusions, hearsay, and co-worker opinions that are irrelevant. Two of the affiants are Hall's former co-workers who did not work in the hotline unit when the incident that led to Hall's termination occurred, and thus these affiants have no personal knowledge of what happened. See Supp. 79-82. Moreover, in their affidavits, they focused on whether the Employer's Structure Decision Making ("SDM") process is utilized for non-referrals, Supp. 79, 83. But the Employer's policy mandates referral for all calls alleging abuse. Supp. 41-43; Supp. 45. So the affiants' opinions about whether the SDM process is used for non-referrals are irrelevant.

Additionally, the third co-worker's general description of the supervisor's role in non-referrals is contrary to the actual transcript of the call. The affiant claimed that the hotline supervisor was responsible for deciding if a case should be referred for investigation, and hotline staff, on the other hand, were responsible only for collecting rudimentary identifying information. Supp. 83. But this contradicts the call transcript. The transcript shows that Hall told the hotline caller after only a seventeen-second pause that she would not refer the matter. Supp. 30. It is highly

improbable that in seventeen seconds Hall provided satisfactory information to her supervisor such that the supervisor determined that the case was a non-referral.

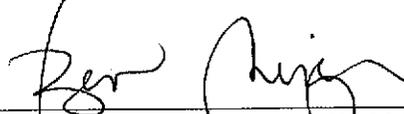
In sum, the Eighth District improperly considered evidence that was not in the SERB record and then used that evidence to come to erroneous conclusions.

CONCLUSION

For all the reasons set forth above, this Court should reverse the judgment of the Court of Appeals and enter judgment in favor of SERB.

Respectfully submitted,

RICHARD CORDRAY (0038034)
Ohio Attorney General



BENJAMIN C. MIZER* (0083089)
Solicitor General

*Counsel of Record

KIMBERLY A. OLSON (0081204)
Deputy Solicitor

ANNE LIGHT HOKE (0039204)
Assistant Attorney General

Labor Relations Section

30 East Broad Street, 26th Floor

Columbus, Ohio 43215-3400

614-644-8462

614-466-4424 (fax)

benjamin.mizer@ohioattorneygeneral.gov

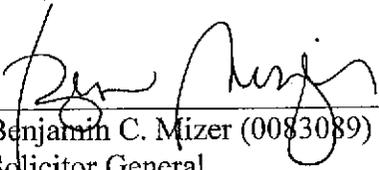
Counsel for Appellant
State Relations Board

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the Merit Brief of Appellant State Employment Relations Board was served this 6th day of April, 2009 by regular U.S. Mail on the following:

Gerald R. Walton
John J. Schneider
Gerald R. Walton & Associates
2800 Euclid Avenue
Suite 320
Cleveland, Ohio 44115

Counsel for Appellee,
Barbara Hall



Benjamin C. Mizer (0083089)
Solicitor General

In the
Supreme Court of Ohio

THE STATE EX REL., BARBARA HALL,	:	Case No. <u>09-0159</u>
	:	
Relator-Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
STATE EMPLOYMENT RELATIONS BOARD,	:	
	:	Court of Appeals Case
Respondent-Appellant.	:	No. CA-07-090808

**NOTICE OF APPEAL OF
APPELLANT STATE EMPLOYMENT RELATIONS BOARD**

GERALD R. WALTON* (0003914)
**Counsel of Record*
 JOHN J. SCHNEIDER (0073671)
 Gerald R. Walton & Associates
 2800 Euclid Avenue, Suite 320
 Cleveland, Ohio 44115
 216-621-1230
 216-621-3039 fax
 grwalton49@aol.com
 jsschneider_44107@yahoo.com

Counsel for Appellee
 State ex rel., Barbara Hall

RICHARD CORDRAY (0038034)
 Attorney General of Ohio

BENJAMIN C. MIZER* (0083089)
 Solicitor General
**Counsel of Record*
 ELISABETH A. LONG (0084128)
 Deputy Solicitor
 ANNE LIGHT HOKE (0039204)
 Assistant Attorney General
 30 East Broad Street, 17th Floor
 Columbus, Ohio 43215
 614-466-8980
 614-466-5087 fax
 bmizer@ag.state.oh.us

Counsel for Appellant
 State Employment Relations Board

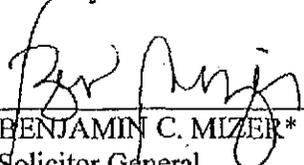
FILED
 JAN 23 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

**NOTICE OF APPEAL OF APPELLANT
STATE EMPLOYMENT RELATIONS BOARD**

Appellant State Employment Relations Board gives notice of its appeal of right to this Court, pursuant to Ohio Supreme Court Rule II(A)(1), from a Judgment Entry of the Eighth District Court of Appeals, journalized in Case No. CA-07-090808, *State ex rel., Barbara Hall v. State Employment Relations Board*. That Judgment Entry was stamped "Filed" on December 12, 2008. The Judgment Entry and Opinion are attached to this notice of appeal. This case originated in the Eighth District Court of Appeals.

Respectfully submitted,

RICHARD CORDRAY (0038034)
Attorney General of Ohio


BENJAMIN C. MIZER* (0083089)
Solicitor General

**Counsel of Record*

ELISABETH A. LONG (0084128)
Deputy Solicitor

ANNE LIGHT HOKE (0039204)
Assistant Attorney General

30 East Broad Street, 17th Floor
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

bmizer@ag.state.oh.us

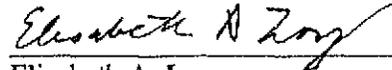
Counsel for Appellant
State Employment Relations Board

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Appellant State Employment Relations Board was served by U.S. mail this 23rd day of January, 2009, upon the following counsel:

Gerald R. Walton
John J. Schneider
Gerald R. Walton & Associates
2800 Euclid Avenue, Suite 320
Cleveland, Ohio 44115

Counsel for Appellee
State ex rel., Barbara Hall



Elisabeth A. Long
Deputy Solicitor

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

THE STATE EX REL, BARBARA HALL

Relator

COA NO.
90808

ORIGINAL ACTION

-vs-

STATE EMPLOYMENT RELATIONS BOARD

Respondent

MOTION NO. 415287

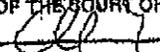
Date 12/12/2008

Journal Entry

WRIT GRANTED. SEE JOURNAL ENTRY AND OPINION OF SAME DATE SIGNED BY MARY J.
BOYLE, J.; COLLEEN CONWAY COONEY, P.J., AND ANN DYKE, J., CONCUR.

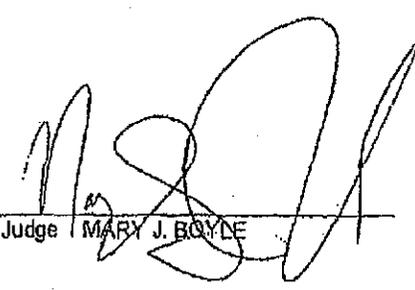
FILED AND JOURNALIZED
PER APP. R. 22(E).

DEC 12 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY:  DER.

Presiding Judge COLLEEN CONWAY COONEY,
Concurs

Judge ANN DYKE, Concurs

Judge  MARY J. BOYLE

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90808

THE STATE EX REL., BARBARA HALL

RELATOR

VS.

STATE EMPLOYMENT RELATIONS BOARD

RESPONDENT

**JUDGMENT:
WRIT GRANTED**

WRIT OF MANDAMUS
MOTION NOS. 408865 AND 408793
ORDER NO. 415287

RELEASE DATE: December 12, 2008

ATTORNEYS FOR RELATOR:

Gerald R. Walton
John J. Schneider
Gerald R. Walton & Associates
2800 Euclid Avenue
Suite 320
Cleveland, Ohio 44115

ATTORNEY FOR RESPONDENT:

Wayne S. Kriynovich
Senior Asst. Attorney General
Executive Agencies Section
615 W. Superior Ave., 11th Fl.
Cleveland, Ohio 44113-1899

MARY J. BOYLE, J.:

The relator, Barbara Hall, commenced this mandamus action against the State Employment Relations Board (hereinafter "SERB") for two claims. In the first claim, she seeks to compel SERB to vacate the dismissal of her unfair labor practice charge and find that there was probable cause that her union, Ohio Council 8, American Federation of State, County and Municipal Employees, Local 1746, AFL-CIO (hereinafter, unless otherwise specified, the "Union"), engaged in an unfair labor practice. Hall asserts that her Union mishandled her discharge grievance against the Cuyahoga County Department of Children and Family Services (hereinafter the "County"). To grant that relief, this court must find that SERB abused its discretion in ruling that there was no probable cause for an unfair labor practice charge. Hall's second claim is a public records action to compel SERB to produce its investigatory file.

On April 9, 2008, this court ordered SERB to submit to this court, a copy of its investigatory file in the subject case, 07-ULP-07-0367, which it had released to Hall. The order further provided that if SERB had made any redactions in releasing the records to Hall, then it should submit redacted and unredacted copies to this court under seal. This court also ordered the parties to submit cross-motions for summary judgment and reply briefs on both claims.

On April 21, 2008, SERB submitted a copy of its investigatory file which it had released to Hall; SERB asserted no redactions.¹ On May 12, 2008, Hall filed her motion for summary judgment but argued only her first claim. On May 19, 2008, SERB filed its motion for summary judgment on both claims. It noted that it had not released its investigatory file to Hall, because she had not requested it. When she sought it through this mandamus action, SERB released it in toto. By June 2, 2008, both parties had filed their summary judgment reply briefs. Hall admitted in her reply brief that her public records claim had been rendered moot. Accordingly, this matter is ripe for adjudication on Hall's first claim, and her second claim for public records is denied as moot.

FACTUAL AND PROCEDURAL BACKGROUND

The Collective Bargaining Agreement

It is undisputed that at all relevant times Hall was a Union member, the Union was the official bargaining representative, and a collective bargaining agreement existed between the Union and the County. Article 10 of the agreement governed discipline. Section 5 provided: "It is important that the employee complaints regarding unjust or discriminatory *** discharge be handled promptly. Therefore, all such disciplinary action may be reviewed

¹ The transcript has some redactions of identifying information of a child abuse victim; those may have been made before the transcript reached SERB.

through the Grievance Procedure, beginning at Step 3." (Pg. 19.)² Article 11 provided the Grievance Procedure.³ In Step 3, the grievance "must be received in writing by the Administrator of the County Division of Labor Relations of the Department of Human Resources and/or his designee from the Union President *** within seven (7) working days after the receipt of the Step 2 answer. The Administrator *** shall consider the grievance at the monthly Step 3 Grievance meeting to be held on the second Thursday of each month. *** Within twenty (20) working days after the Step 3 meeting, the Administrator *** shall give a written answer to the Union President." (Pg. 21.)

Step 4, Mediation, allowed the parties to seek mediation once the grievance had been appealed to arbitration. Either party could decide not to mediate. Step 5, Arbitration, provided in pertinent part as follows: "If the grievance is not satisfactorily settled at Step 3, the Union may, within thirty (30) days after the receipt of the Step 3 answer, submit the issue to arbitration. The Union shall notify the Federal Mediation and Conciliation Service *** and the

² Hall attached as Exhibit A to her motion for summary judgment, SERB's investigatory file and numbered each page. Unless otherwise specified, page number references will be to this exhibit.

³ Steps 1 and 2 provided for the grievance to be submitted in writing first to the Human Resource Manager and then to the Director of the appropriate department with meetings between the necessary parties, and the County replying in writing within specified time frames.

other party of its intent to arbitrate. *** The parties agree grievances that involve removal, suspension of five (5) days or more *** shall be arbitrated on an expedited basis at the discretion of the Union." (Pg. 23.)

Hall's Discharge and Grievance

On January 8, 2004, Hall, then a Social Service Worker 3, was working the 696-KIDS Hotline, when she received a call from a Metro Health employee.⁴ The caller related that the aunt of a two-year-old boy had called Metro Health and stated that she thought her nephew had been sexually and physically abused. The nephew had told the aunt that his "bottom" was hurting and said that his mother's boyfriend had touched him there. The aunt further related that when she saw the boy a couple of weeks earlier he was bruised all over his body. Hall obtained some identifying information including the child's address, and when she asked for the mother's name, the caller said, "Hold on a second I can look that up." At this point, there was a seventeen-second pause in the conversation, and then the caller provided the mother's name. Hall said that she would document this call as a non-referral, meaning that it did not warrant investigation by the County. The call then ended.

⁴A transcript of this call is in the SERB investigatory file. (Pg. 42-44.)

On January 26, 2004, Metro Health admitted the child who was suffering from shaken baby syndrome.⁵ On January 30, 2004, the County took custody of him.

In early March, the County suspended Hall. She maintains that she asked the Union to grieve her suspension.⁶ There is no evidence in the file that the Union filed a grievance for this suspension. However, on April 13, 2004, the County clarified the suspension by stating that it had placed Hall on administrative leave with pay retroactively.⁷ Thus, there was no harm to Hall at that time.

Also, the County held a pre-disciplinary hearing on March 11, 2004. The County found that Hall did not enter the allegation of sexual abuse and the mother's name within the narrative section of the hotline referral form, although she entered that information on other computer screens. Hall acknowledged that she had received the County policy on hotline procedures and that she had

⁵ His specific injuries were a left arm fracture, retinal hemorrhages, and left subdural hematoma.

⁶ In her written statement to SERB, the Local Union President stated that Hall discussed with her the County's investigation, but Hall did not ask her to grieve "being placed on administrative leave." (Pg. 76.)

⁷ The Local Union President in her statement to SERB said that it was the County policy to place the employee on administrative leave while it investigated charges like these.

been instructed on the use of the Structure Decision Making Tree, which helps determine whether a referral should be accepted for investigation and what priority it should have. The County further found that she did not use the tool when evaluating this call.

In response, at the pre-disciplinary hearing, Hall asserted that during the seventeen-second pause in the conversation, she communicated the essential information to her supervisor who instructed her to document the call as a non-referral, meaning no investigation was necessary. Hall further stated that this went against her common sense, but that her supervisor had threatened her with insubordination if Hall questioned the supervisor's judgment. Hall further stated that it was standard practice for social workers to seek advice from their supervisor during hotline calls.⁸ When confronted with the supervisor's denial of this version, Hall replied that she was disappointed with the supervisor's dishonesty.⁹

⁸ The County noted that it is "not unusual for staff to seek the assistance of management when the situation lacks clarity. It is not policy or procedure for hotline social workers to review the details of every call with management before the case is processed." County's April 8, 2004 Report of Pre-Disciplinary Conference. (Pg. 46.)

⁹ In her reply brief, Hall asserted that she had always maintained that the audio tape of the call was shortened and "doctored." Hall had also asserted that in January 2004, the Structured Decision Making Tree needed to be used only after the call had been accepted as a referral, meaning that further investigation was warranted.

On May 19, 2004, the County terminated Hall. In the Order of Removal the County cited the failure to enter the allegations of sexual and physical abuse into the narrative section and the failure to use the Structured Decision Making Tree in accordance with the County's policies and procedures. The information obtained in the phone call should have resulted in the case being assigned for investigation. Moreover, the child suffered shaken baby syndrome later that month. The County found Hall's assertions of the supervisor's dishonesty as unpersuasive.

Hall then asked the Union to grieve her termination. Among the documents the Union submitted to SERB is a May 21, 2004 Union Grievance Form for Barbara Hall because "she was unjustly terminated." (Pg. 61.) The Local Union President signed for herself and for Barbara Hall.¹⁰ The Local Union President further set this grievance for a Step 3 hearing, pursuant to the collective bargaining agreement, for the monthly June 10, 2004 meeting. On May 25, 2004, the Local Union President requested certain records from the County for the hearing, including the supervisor's discipline file and resignation letter.

¹⁰ Hall maintains that the grievant must personally sign the form.

The SERB record does not fully establish what happened at the June 10, 2004 hearing. At the end of the hearing, the Local Union President asked that the hearing be put on hold because she had not received the requested information and, in part, because the County had not finished its investigation of the alleged child abuse of the two-year-old boy. After the June 10 hearing, the Local Union President asked for more information, including the County's report on the child and the supervisor's approvals for January and February 2004. At the end of June, the County stated that it would not release its investigation records relating to the child. Also in a July 12, 2004 letter from the County on Step 3 grievances, the County noted the following for Hall's grievance: "The Union has requested that this grievance be placed on hold pending submission of additional documentation." (Pg. 68.) Nevertheless, on August 11, 2004, the Local Union President met with the County investigator and the County Labor Relations Administrator. Although the investigator did not release his file, he did state that he had substantiated the allegations of physical abuse. The Local Union President then stated that she now had all of the information and that the County should answer the grievance. (Pg. 70-71 and 76.)

The Local Union President also stated that she called Hall and discussed the case. She told Hall that this was a serious case because of the shaken baby syndrome and would not be successful at arbitration.

Hall, however, states that she never received proper documentation of her grievance, including a copy of the grievance form itself, despite her repeated requests. The only record she received was a letter from the Union, not on Union stationery, asking for further information from the County.¹¹ (Pg. 65.) Whenever she asked the Local Union President about the status of the grievance, the President would tell her to be patient and remind her of other employees for whom it took years to get their jobs back. Hall saw this pattern of evasion as evidence that the grievance was never filed and pursued and that the Union had "written her off" and was hoping she would just go away.

In her statement to SERB, the Local Union President stated that in January 2005, she discussed Hall's grievance with the County Human Resource Director who said that a response would be forthcoming and that it would probably be denied. Consequently, the Local Union President believed that the County had denied Hall's grievance in writing, and she forwarded the material to the Union Regional Office for review to determine whether the matter should be arbitrated. In December 2005, the Regional Office asked the Local Union President about the status of Hall's grievance. When the President replied that the Regional Office had the file, the Regional Office replied that it did not. At

¹¹ The Local Union President denies this and said that she gave Hall a copy of the grievance around June 10, 2004, when Hall stopped by the Union office.

that point, the Local Union President realized that the County had never issued its written Step 3 response. (Pg. 77.)

On December 20, 2006, the County denied in writing the Step 3 grievance. On January 8, 2007, the Union sent the County a written intent to arbitrate the grievance. Although this letter was within the required 30-day deadline, there is no evidence that a similar letter was sent to the Federal Mediation and Conciliation Service. In April 2007, the Union informed Hall that, upon review of the matter, her grievance did not have sufficient merit to warrant arbitration and consequently, it was withdrawing the grievance.

The Unfair Labor Practice Charge

On July 25, 2007, Hall filed an unfair labor practice charge against the Union with SERB.¹² Pursuant to its procedure, SERB assigned this matter to a labor relations specialist to determine if there was probable cause for a full investigation and hearing on the unfair labor practice charge. The specialist requested that Hall's attorney provide: (1) the effective dates of the collective bargaining agreement; (2) a specific explanation, with supporting documents, indicating how the Union's conduct violates R.C. 4117.11; (3) complete details

¹² Hall attached to the charge as exhibits, her affidavit, an additional fact statement, a copy of the only letter she says she received from the Union, a copy of the Union's 2007 letter deciding not to arbitrate, and several pages of the collective bargaining agreement showing the relevant portions of Articles 10 and 11.

regarding the harm to Hall; and (4) whether there have been any employees who should have received the same type of treatment for the same reasons and in the same manner. The specialist asked the Union to provide the following: (1) the effective dates of the collective bargaining agreement; (2) a statement with supporting documentation on whether the alleged acts occurred and whether those acts violate R.C. 4117.11; (3) any witness statements in support of its position; (4) identify any related action, such as a court case or mediation; and (5) any information supporting any jurisdictional or procedural defense.

In response Hall's attorney sent a letter answering the questions posed and indicating that he had already sent all the documents in his possession with the initial charge. The Union sent its investigatory file, including narrative statements from the Union's attorney and the Local Union President, the phone call transcript, the May 21, 2004 grievance form, the President's notes from the August 11, 2004 meeting, letters sent from the Union to the County requesting information, and the County's December 2006 letter denying the grievance.

In September 2007, the specialist recommended that SERB dismiss the unfair labor practice charge for lack of probable cause. In her findings, the specialist concluded that Hall charged the Union with failing to represent her fairly by not giving her copies of her grievance and by not taking the necessary and appropriate timely steps to pursue her rights, i.e., the Union ignored

rudimentary efforts to represent aggrieved members. The specialist further found that any delay by the Union was due to an honest mistake and that Hall failed to "provide any information to show that AFSCME's actions were arbitrary, discriminatory or in bad faith." (Investigator's Memorandum, Pg. 4.) In her "Discussion" section, the specialist cited SERB precedent which held that there must be a showing of arbitrariness, discrimination, or bad faith to establish an unfair labor practice for failure of fair representation. If the charging party can show that the union failed to take a basic and required step without justification, then there is an un rebutted presumption of arbitrariness; however, simple negligence provides an adequate excuse. The specialist concluded by stating: "Based on the merits of the Charging Party's grievance, it appears AFSCME acted reasonably when it determined not to proceed any further on the grievance. The investigation does not show that AFSCME's actions were arbitrary, discriminatory, or in bad faith." (Pg. 5.) In late October 2007, SERB dismissed Hall's unfair labor practice charge with prejudice for failure to show probable cause. SERB adopted verbatim the specialist's conclusion that the Union had acted reasonably when it decided not to proceed on the grievance.

DISCUSSION OF LAW

The Supreme Court of Ohio has established the rules and principles for reviewing SERB's probable cause decisions. *State ex rel. Portage Lakes Edn. Assn. v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2889, 769 N.E.2d 853. R.C. 4117.12(B) provides: "When anyone files a charge with the board alleging that an unfair labor practice has been committed, the board or its designated agent shall investigate the charge. If the board has probable cause for believing that a violation has occurred, the board shall issue a complaint and shall conduct a hearing concerning the charge." Thus, SERB must find probable cause for an unfair labor practice charge before it conducts a full hearing, including the right to some discovery. The Supreme Court of Ohio has defined "probable cause" in this context as a reasonable ground to suspect or believe that an unfair labor practice has occurred. The Court likened this determination to finding probable cause in the criminal context. Alternatively, the Court stated that a probable cause determination examines whether "it is more likely than not that an unfair labor practice has occurred." *Portage Lakes* at ¶40. Indeed, SERB, after it has conducted an initial investigation, has the duty to issue a complaint and conduct a hearing on an unfair labor practice charge upon the finding of probable cause. *Portage Lakes* at ¶37-39.

However, these probable cause determinations are not reviewable by direct appeal. *Ohio Assn. of Pub. School Emp., Chapter 648, AFSCME, AFL-CIO v.*

Dayton City School Dist. Bd. of Edn. (1991), 59 Ohio St.3d 159, 572 N.E.2d 80. Thus, "in the absence of an adequate remedy in the ordinary course of the law, '[a]n action in mandamus is the appropriate remedy to obtain judicial review of orders by the State Employment Relations Board and dismissing unfair labor practice charges for lack of probable cause.' *State ex rel. Serv. Emp. Internatl. Union, Dist. 925 v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 173, 689 N.E.2d 962, syllabus; *State ex rel. Glass, Molders, Pottery, Plastics & Allied Workers Internatl. Union, Local 333, AFL-CIO, CLC, v. State Emp. Relations Bd.* (1993), 66 Ohio St. 3d 157, 159, 609 N.E.2d 1266." *Portage Lakes* at ¶35. Mandamus will issue to correct SERB's abuse of discretion in dismissing an unfair labor practice charge. An abuse of discretion is an unreasonable, arbitrary, or unconscionable decision. *Id.* In determining whether SERB abused its discretion, the court should not substitute its judgment for that of the administrative agency and should give deference to its findings and interpretations of R.C. Chapter 4117. *Portage Lakes* at ¶41 and 47. The relator has the burden of establishing the abuse of discretion. Moreover, the Supreme Court of Ohio in *Portage Lakes* also stated that in examining the discretion of SERB, the court should generally consider the record as it was before SERB, and that it should not examine the record in the light most favorable to the relator.

Thus, the issue before this court is whether SERB abused its discretion in determining there was no probable cause that the Union engaged in an unfair labor practice by failing to represent Hall in her grievance. SERB precedents serve as a benchmark for determining probable cause. In *In the Matter of State Emp. Relations Bd. v. Ohio Civil Serv. Emp. Assn., AFSCME Local 11, AFL-CIO*, SERB 2007-004, Case No. 2005-ULP-05-0296, SERB stated the relevant principles: "When an unfair labor practice is charged because a union has allegedly violated its duty of fair representation, SERB will look to see if the union's actions are arbitrary, discriminatory, or in bad faith. If any of these components are found, there is a breach of the duty."¹³ The complainant has the burden of proving that the union did not fairly represent its bargaining-unit members. *** (Citation omitted.) Where the failure to process a grievance was not based on a decision that the grievance lacked merit, but instead results from bad faith, discriminatory conduct or arbitrary behavior, a violation will be found regardless of the merit of the grievance. *** (Citation omitted). A union acts arbitrarily by failing to take a basic and required step. *** Failure to take a basic and required step while performing a representation function creates a rebuttable presumption of arbitrariness. Once that burden has been met, the

¹³ All the parties agree that neither bad faith nor discrimination apply.

Union must come forth with its justification or viable excuse for its actions or inactions." See, also, *In the Matter of State Emp. Relations Bd. v. Ohio Civil Serv. Emp. Assn., AFSCME, Local 11, AFL-CIO*, SERB 99-009, Case No. 97-ULP-09-0501.

Furthermore, negligence does not provide an excuse. "SERB explained that it has adopted the analysis of the United States Sixth Circuit Court of Appeals in order to determine whether or not conduct is arbitrary. In *Vencl v. Internatl. Union of Operating Engineers* (1988), 137 F.3d 420, 426, the court held that: 'absent justification or excuse, a union's negligent failure to take a basic and required step, unrelated to the merits of the grievance, is a clear example of arbitrary and perfunctory conduct which amounts to unfair representation.'" *District 1199, The Health Care & Social Service Union, SEIU, AFL-CIO, v. State Emp. Relations Bd., Franklin Cty. App. No. 02AP-391, 2003-Ohio-3436, at ¶38.*

In the present case, this court notes that the Union failed to take a basic and required step in filing for Step 5 Arbitration. There is no evidence in the record that the Union notified the Federal Mediation and Conciliation Service as required by the collective bargaining agreement. Moreover, there is no indication that the labor relations specialist noted this or that the Union endeavored to explain the failure to fulfill the required process.

It is also evident that the Union, especially the Local Union President, lost track of the grievance for almost a full year, from at least January 2005, when she discussed the grievance with the County Human Resource Director who orally indicated that the County would deny the grievance, until December 2005 when she realized the County had not given a written response. This failure prevented the Union from fulfilling its duty of handling suspensions and discharges promptly. It also prevented the Union from acting as a catalyst to the County to give written response to the Step 3 grievance. These failures to take a required step and to ensure that a required step was taken indicate that it is more likely than not that the Union did not fairly represent Hall in her grievance. Cf. SERB Case No. 97-ULP-09-0501 in which a union steward's allowing a grievance to "fall through the cracks" was at least partially the basis for finding that a union had engaged in an unfair labor practice in representing a union member in a grievance.

Furthermore, the labor relations specialist excused the Union's failure to pursue the grievance during 2005, as simple negligence. This standard is inconsistent with the pronouncements of the courts in *Vencl* and *District 1199* that "a union's negligent failure to take a basic and required step, unrelated to the merits of the grievance, is a clear example of arbitrary and perfunctory conduct which amounts to unfair representation." *District 1199* at ¶38.

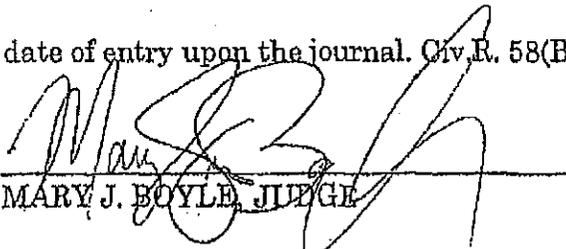
Moreover, the labor relations specialist in her final analysis did not rest upon the Union's actions or inactions in handling the grievance, but instead examined the merits of the grievance. She concluded that based on the merits the Union acted reasonably when it decided not to pursue the grievance to actual arbitration. However, Hall proffered three affidavits from her co-workers in her motion for summary judgment. The affidavit of Patricia Howard supports Hall's position on the merits of her grievance, that the Structured Decision Tree was not used for non-referrals in January 2004, and that hotline staff members were required to consult with their supervisor regarding each call. All three affiants said they supported Hall during the grievance procedure and made inquiries about the status of her grievance. They also opined that, based on their experience, the Union did not fairly represent her. Thus, there is reason to believe that these affiants would have provided their affidavits during the probable cause hearing, if invited to do so.¹⁴

Admittedly, this court should base its decision upon the evidence before SERB when it made its probable cause decision. However, it is disturbing that the labor relations specialist explicitly asked the Union for witness statements, but did not extend that invitation to Hall. It is further troubling that the

¹⁴ Hall's lawyer also confirms this in his reply brief.

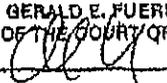
specialist based her decision on the merits of the grievance without giving each side the same opportunity to present its case. This seems unreasonable.

Accordingly, because the Union failed to take the basic and required step of notifying the Federal Mediation and Conciliation Service, because it lost track of the status of the grievance during 2005 and did not promptly pursue it, because the labor relations specialist excused the Union's actions based on a standard inconsistent with court rulings, and because the labor relations specialist did not provide each party an equal opportunity to present its case, this court concludes that SERB abused its discretion in ruling that there was no probable cause that the Union engaged in an unfair labor practice. Thus, this court grants the writ of mandamus on the first claim and orders SERB to vacate its decision in *In the Matter of Barbara Hall v. Ohio Council 8, Am. Fedn. of State, Cty. and Mun. Emp., Local 1746, AFL-CIO*, Case No. 07-ULP-07-0367, to find that there was probable cause, and to hold a hearing on the merits. This court denies Hall's public records mandamus action. Respondent to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).


MARY J. BOYLE, JUDGE
COLLEEN CONWAY COONEY, P.J., and
ANN DYKE, J., CONCUR

FILED AND JOURNALIZED
PER APP. R. 22(B)

DEC 12 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Barbara Hall,

Charging Party,

v.

Ohio Council 8, American Federation of State, County and
Municipal Employees, Local 1746, AFL-CIO,

Charged Party.

Case Number: 07-ULP-07-0367

DISMISSAL OF UNFAIR LABOR PRACTICE CHARGE

Before Chairman Mayton, Vice Chairman Gillmor, and Board Member Verich:
October 25, 2007.

Barbara Hall (Charging Party) filed an unfair labor practice charge against Ohio Council 8, American Federation of State, County and Municipal Employees, Local 1746, AFL-CIO (Charged Party). Charging Party alleged Charged Party violated Ohio Revised Code § 4117.11(B)(6) by failing to fairly represent her.

Pursuant to Ohio Revised Code § 4117.12, the Board conducted an investigation of this charge. The investigation revealed no probable cause existed to believe Charged Party violated Ohio Revised Code § 4117.11. Information gathered during the investigation revealed that based on the merits of Charging Party's grievance, Charged Party acted reasonably when it determined not to proceed any further on the grievance. Charged Party's actions were not arbitrary, discriminatory, or in bad faith. Accordingly, the charge is dismissed with prejudice.

It is so directed.

MAYTON, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.


CRAIG R. MAYTON, CHAIRMAN

DISMISSAL OF UNFAIR LABOR PRACTICE CHARGE

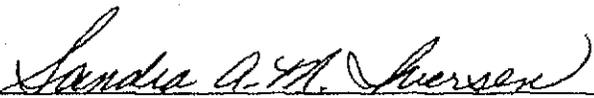
Case No. 07-ULP-07-0367

October 25, 2007

Page 2 of 2

I certify that this document was filed and a copy served upon each party or the representative of each party by certified mail, return receipt requested, on this

3rd day of December, 2007.



SANDRA A.M. IVERSEN
ADMINISTRATIVE ASSISTANT

0059B:070367:102507:5

10-25-07

EXHIBIT 6

INVESTIGATOR'S MEMORANDUM

TO: THE HONORABLE STATE EMPLOYMENT RELATIONS BOARD
FROM: Holly M. Levine, Labor Relations Specialist
DATE: September 25, 2007
RE: 07-ULP-07-0367, Barbara Hall v. Ohio Council 8, American Federation of State, County and Municipal Employees, Local 1746, AFL-CIO

PARTIES

CHARGING PARTY: Barbara Hall
P.O. Box 110304
Cleveland, Ohio 44111
(216) 476-9496

CHARGING PARTY'S REP: John J. Schneider, Esq.
Gerald R. Walton & Associates
2800 Euclid Avenue, Suite 320
Cleveland, Ohio 44115
(216) 621-1230

CHARGED PARTY: Ohio Council 8, American Federation of State, County
and Municipal Employees, Local 1746, AFL-CIO
1603 East 27th Street
Cleveland, Ohio 44114
(800) 361-86740

CHARGED PARTY'S REP: Kimm A. Massengill-Bernardin, Associate Counsel
Ohio Council 8, AFSCME
6800 North High Street
Worthington, Ohio 43085-2512
(614) 841-1918

SUMMARY OF CHARGE

On July 25, 2007, Barbara Hall (Charging Party) filed an unfair labor practice charge against Ohio Council 8, American Federation of State, County and Municipal Employees, Local 1746, AFL-CIO (AFSCME/Charged Party). Charging Party alleges AFSCME violated Ohio Revised Code § 4117.11(B)(6) by failing to fairly represent her.

FINDINGS UPON INVESTIGATION

1. AFSCME and the Cuyahoga County Department of Children and Family Services (County) are parties to a collective bargaining agreement effective through June 30, 2008. The grievance-arbitration process is binding.

2. On or about May 19, 2004, Charging Party was terminated from her employment with the County. On or about May 21, 2004, AFSCME filed a grievance.
3. On or about April 20, 2007, Charging Party was informed her termination grievance lacked merit to proceed to arbitration. It is noted that the County failed to issue a Step 3 response. AFSCME contends the error was not discovered until December of 2006 when Charging Party called to inquire about her grievance.
4. Charging Party asserts AFSCME failed to fairly represent her by not providing her with copies of her grievances, and not taking the necessary and appropriate timely steps to pursue her rights. Charging Party argues that AFSCME does not have discretion to ignore rudimentary efforts to represent aggrieved members.
5. AFSCME denies that it failed to take a basic and required step with respect to Charging Party's case. AFSCME asserts the grievance did not proceed to arbitration because it lacked merit. The delay in following up on receipt of the grievance response was due to an honest mistake.
6. Charging Party failed to provide any information to show that AFSCME's actions were arbitrary, discriminatory or in bad faith.

DISCUSSION

Charging Party alleges AFSCME violated Ohio Revised Code § 4117.11(B)(6) by failing to fairly represent her.

In In re OCSEA/AFSCME Local 11, SERB 98-010 (7-22-98), SERB modified In re AFSCME, Local 2312, SERB 89-029 (10-16-89) to hold that arbitrariness, discrimination and bad faith are distinct components of the same duty and should be reviewed on an equal basis. The definition of "arbitrary" conduct was modified to include a failure to take a basic and required step without justification or viable excuse. SERB also held that a union's failure to state the reasons behind its actions, which was not previously called for under In re Ohio Civil Service Employees Assn/AFSCME, Local 11, SERB 93-019 (12-20-93), *aff'd* In re Wheeland v. SERB, 1994 SERB 4-86 (CP, Franklin, 9-2-94), *aff'd* In re Wheeland, 1995 SERB 4-19 (10th Dist Ct App, Franklin, 6-6-95), may result in an un rebutted presumption of arbitrariness.

When an unfair labor practice is filed because a union has allegedly violated its duty of fair representation, the SERB will look to see if the union's actions are arbitrary, discriminatory, or in bad faith. If the SERB finds any of these components, there is a breach of the duty. The Complainant has the burden of proving that the union did not fairly represent its bargaining-unit members. As to the component of arbitrariness, when the Complainant meets its burden of proof, a breach of the duty of fair representation will be found if the union cannot rebut the findings by providing justification or viable excuse for its conduct; if the justification or excuse constitutes simple negligence, we will find that the conduct is not arbitrary.

Based on the merits of Charging Party's grievance, it appears AFSCME acted reasonably when it determined not to proceed any further on the grievance. The investigation does not show that AFSCME's actions were arbitrary, discriminatory, or in bad faith.

RECOMMENDATION

That the Board dismiss the charge with prejudice for lack of probable cause to believe that an unfair labor practice has been committed by Charged Party.

INDEX OF ATTACHMENTS

Attachment A Unfair Labor Practice Charge



State of Ohio
 State Employment Relations Board
 65 East State Street, 12th Floor
 Columbus, Ohio 43215-4213
 (614) 644-8573

<http://www.serb.state.oh.us/2000%20forms/ULP/ULPC.PDF>

STATE EMPLOYMENT
 RELATIONS BOARD

Case No.

2007 - ULP - 07 - 0367

w/att. & noa

2007 JUL 25 A 11:41

UNFAIR LABOR PRACTICE CHARGE

INSTRUCTIONS: File *one original and one copy* of this form with the State Employment Relations Board at the above address. Serve *one copy* on the party against whom the charge is brought. See Ohio Administrative Code Rule 4117-1-02. If more space is required for any item, attach additional sheets; please number the items accordingly.
 NOTE: If you wish to file unfair labor practice charges against both the employer and the union, then separate Unfair Labor Practice Charge forms must be filled out. For the form(s) to be filed against the union, fill out all sections of this form. For the form(s) to be filed against the employer, fill out all sections except section four, which is used to identify the employer for charges filed against the union or its representative(s).

1. Party Filing Charge: (Check One)

Employee Organization/Union Employee Employer Other

Name:

Barbara Hall

Address:

P.O. Box 110304

Telephone: work ()

home (216) 476-9496

City, County, State, Zip:

Cleveland, Ohio 44111

Fax:

()

2. Name of Person Representing the Party Filing Charge:

(Representative must file a Notice of Appearance form.)

Gerald R. Walton, Esq., John J. Schneider, Esq. (Gerald R. Walton & Associates)

Address:

2800 Euclid Avenue, Suite 320

Telephone:

(216) 621-1230

City, State, Zip:

Cleveland, Ohio 44115

Fax:

(216) 621-3039

3. Party Against Whom This Charge is Brought: (Check Only One)

Employee Organization/Union Employee Employer Other

Name:

AFSCME Local 1746/AFSCME Ohio Council 8

Address:

1605 East 27th Street

Telephone:

(800) 361-8740

City, County, State, Zip:

Cleveland, Ohio 44114

Fax:

(216) 241-0015

4. Employer: (If different from item 1 or 3)

Cuyahoga County Department of Children and Family Services

Address:

3955 Euclid Avenue

Telephone:

(216) 431-4500

City, County, State, Zip:

Cleveland, Ohio 44115

Fax:

()

5. Basis of Charge: The party against whom this charge is brought was engaged in or is engaged in unfair labor practices within the meaning of Ohio Revised Code Section 4117.11. (Check appropriate subsections only.)

Charges against employers: (A)(1) (A)(2) (A)(3) (A)(4) (A)(5) (A)(6) (A)(7) (A)(8)

Charges against union or its employees: (B)(1) (B)(2) (B)(3) (B)(4) (B)(5) (B)(6) (B)(7) (B)(8)

rec'd 7/26/07 Miami

6. Statement of Facts: Provide a clear and concise statement of the facts constituting the alleged unfair labor practice(s), including the names of individuals involved and the dates and places of the occurrences giving rise to the charge. (If more space is required, add additional sheets.)

On January 8, 2004, Claimant/Petitioner Barbara Hall, a Social Services Worker 3 with Cuyahoga County Ohio Department of Children and Family Services, received a 696-Kids Hotline call from a mandatory referral source at Cleveland MetroHealth Medical Center. The call was entered into a computer database system as a non-referral by Ms. Hall. Ms. Hall states that she was instructed by her supervisor: Melissa Keith to enter the call as a non-referral due to a lack of sufficient information and the fact that the subject family had just been the subject of a Children and Family Services investigation that had been closed. (A non-referral means that a matter is documented, but not referred for investigation.) The child's aunt called MetroHealth but stated that the child did not presently have bruises nor marks. On January 26, 2004, the child Anthony Garcia was admitted to MetroHealth allegedly suffering from shaken baby syndrome. The case was then re-opened. (Additional fact sheets attached hereto.)

A failure to provide the above information could result in the charge being dismissed for failure to provide a clear and concise statement.

DECLARATION

I declare that I have read the contents of this Unfair Labor Practice Charge and that the statements it contains are true and correct to the best of my knowledge and belief.

To distinguish originals, please do not use black ink for signatures.

Barbara Hall
Signature of Person Attesting to Content of Form

July 21, 2007
Date

Barbara A. Hall
Print or Type Name

THIS UNFAIR LABOR PRACTICE CHARGE WILL NOT BE ACCEPTED FOR FILING UNLESS THE PROOF OF SERVICE IS FULLY COMPLETED AND BEARS AN ORIGINAL SIGNATURE OF A REPRESENTATIVE OF THE PARTY FILING THE CHARGE.

PROOF OF SERVICE

I certify that an exact copy of the foregoing Unfair Labor Practice Charge has been sent or delivered to:

AFSCME Local 1746/AFSCME Ohio Council 8, 1603 East 27th Street, Cleveland, Oh. 44114

(Name and complete address of party against whom this charge is brought)

By: Regular U.S. Mail Certified U.S. Mail Hand Delivery Other _____

this 23rd (day) of July (month), 2007 (year).

John J. Schneider
Signature of Person Attesting to Service of Form

John J. Schneider, Esq. (0073671)
Print or Type Name

BARBARA HALL UNFAIR LABOR PRACTICE
(ADDITIONAL FACTS SHEETS)

In March of 2004, the agency by and through Bethlyn Fox summoned Ms. Hall and requested that she turn in her agency badge and leave the premises. It was not explained to Ms. Hall whether she was being suspended or placed on administrative leave. Ms. Hall contacted AFSCME Local 1746 President Pamela Brown and requested to grieve the matter. Ms. Hall was informed by Ms. Fox that the agency would be investigating the handling of the referral call of January 8, 2004. On March 11, 2004, the agency held a predisciplinary hearing, which was conducted by Harold Harrison, the agency's Personnel Director. Subsequently on April 13, 2004 the agency issued a notice to Ms. Hall that retroactively she was being placed on administrative leave with pay. At no time during this period was Ms. Barbara Hall provided with any grievance step procedures pursuant to Local 1746's contract with Cuyahoga County.

Subsequently Ms. Hall's employment with Cuyahoga County was terminated by an Order of Removal signed by the Cuyahoga County Commissioners with a stated effective date of termination of May 19, 2004. Once again, Ms. Hall requested through Ms. Pamela Brown that Local 1746 grieve her termination. At no time was Ms. Hall provided with a copy of a written grievance letter addressed to the Cuyahoga County Administrator of Labor Relations as required by both Article 10, Section 5 and Article 11, Section 2, Step 3 of the then current labor contract between Local 1746 and Cuyahoga County.

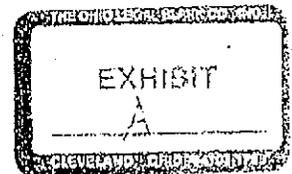
Subsequently Ms. Hall requested a copy of her grievance file pursuant to her pro se attempts to gain unemployment benefits in Unemployment review Commission Docket matter No. H2004270006. Local 1746 provided Ms. Hall with a letter ostensibly from Local 1746 President Pamela Brown addressed to the Administrator of the Cuyahoga County Labor Relations; Mr. Egdilio Morales dated June 16, 2004. Notably the letter is not written on Local 1746 official letterhead, leading an objective viewer to question whether the letter was ever sent. The letter does inquire as to information regarding Barbara Hall grievance #04-PDB-07. This letter is the only document provided to Ms. Hall that even provides Ms. Hall with any evidence that the matter of her being placed on leave and being terminated was ever possibly grieved.

Article 11, Section 2, Step 3 requires the grievance to be submitted in writing by the Local 1746 President to the Labor Administrator. After a monthly grievance meeting the county is to provide a written response. **Ms. Hall has never been provided with either a copy of the grievance supposedly submitted to Cuyahoga County or the written response to the grievance from Cuyahoga County.**

Subsequent to her grievance being allegedly submitted, and despite Ms. Hall's continued verbal and written communications with Local 1746, Ms. Hall has never been provided with the details of her grievance process. Local 1746 President Pamela Brown repeatedly told Ms. Hall to be patient and to recall that another employee terminated from the Cuyahoga County Department of Children and Family Services: Larry Lampley, took three years to get reinstated to his employment. President Brown repeatedly assured Ms. Hall that her matter would be arbitrated.

By a letter dated April 26, 2007, a copy of which is included herein, AFSCME Ohio Council 8 informed Ms. Hall that her grievance would not be appealed to arbitration.

The fact that it took AFSCME Local 1746 and Ohio Council 8 three years to inform Ms. Hall that her termination would not be appealed is *prima facie* proof and evidence that AFSCME failed to fairly represent Ms. Barbara Hall in violation of Ohio Revised Code Chapter 41, Section

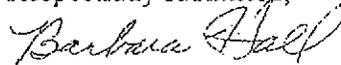


Claimant/Petitioner Barbara Hall's possession tends also to suggest that her matter and the matter of Larry Lamprey are evidence of not only Local 1746 unfair labor practices, but also of the complicity of Cuyahoga County with the union in a violation of Ohio Revised Code Chapter 41, Section 4117.11(A)(8). Ms. Hall is expressly requesting the right to later amend this charge to include a relevant charge against Cuyahoga County.

The contract between Local 1746 and Cuyahoga County at Article 11, Step 5, entitled: Expedited Arbitration, expressly acknowledges that grievances involving removals should be arbitrated on an expedited basis if not resolved at Step 3. The decision by AFSCME to arbitrate or not arbitrate Ms. Hall's termination can certainly not be claimed to have been expedited in any manner, shape, or form. Both parties to the contract acknowledge at Article 10, Section 5, that matters of removal should be handled promptly. The prejudice to Ms. Hall is obvious. Not only has she been separated from her employment for three (3) years, but also likely the failure of the union to promptly handle her matter has likely prejudiced Ms. Hall ability to independently file suit in a court of law claiming a breach of contract and unfair representation, since the administrative grievance process was never concluded until the letter of April 26, 2007 to Ms. Hall. The failure of AFSCME Local 1746/AFSCME Ohio Council 8 to fairly and adequately represent me did not become readily apparent until the letter of April 26, 2007. Until this time the Union continued to assure me that my matter was being pursued. The ninety (90) day period for filing a charge pursuant to Ohio Revised Code Section 4117.12(B) commenced at that time.

Claimant/Petitioner Barbara Hall, respectfully requests that SERB provide her with the opportunity to engage in discovery during the investigation process. Particularly Ms. Hall would like to be able to obtain her grievance file, if any, and be able to depose Local 1746 President Pamela Brown since Ms. Hall was not provided previously any evidence of AFSCME's efforts on her behalf.

Respectfully submitted,



Barbara A. Hall

4117.11 Unfair labor practice.

EXHIBIT 7

(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

(1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances;

(2) Initiate, create, dominate, or interfere with the formation or administration of any employee organization, or contribute financial or other support to it; except that a public employer may permit employees to confer with it during working hours without loss of time or pay, permit the exclusive representative to use the facilities of the public employer for membership or other meetings, or permit the exclusive representative to use the internal mail system or other internal communications system;

(3) Discriminate in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117. of the Revised Code. Nothing precludes any employer from making and enforcing an agreement pursuant to division (C) of section 4117.09 of the Revised Code.

(4) Discharge or otherwise discriminate against an employee because he has filed charges or given testimony under Chapter 4117. of the Revised Code;

(5) Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117. of the Revised Code;

(6) Establish a pattern or practice of repeated failures to timely process grievances and requests for arbitration of grievances;

(7) Lock out or otherwise prevent employees from performing their regularly assigned duties where an object thereof is to bring pressure on the employees or an employee organization to compromise or capitulate to the employer's terms regarding a labor relations dispute;

(8) Cause or attempt to cause an employee organization, its agents, or representatives to violate division (B) of this section.

(B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

(1) Restrain or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code. This division does not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein, or an employer in the selection of his representative for the purpose of collective bargaining or the adjustment of grievances.

(2) Cause or attempt to cause an employer to violate division (A) of this section;

(3) Refuse to bargain collectively with a public employer if the employee organization is recognized as the exclusive representative or certified as the exclusive representative of public employees in a bargaining unit;

(4) Call, institute, maintain, or conduct a boycott against any public employer, or picket any place of business of a public employer, on account of any jurisdictional work dispute;

(5) Induce or encourage any individual employed by any person to engage in a strike in violation of Chapter 4117. of the Revised Code or refusal to handle goods or perform services; or threaten, coerce, or restrain any person where an

object thereof is to force or require any public employee to cease dealing or doing business with any other person, or force or require a public employer to recognize for representation purposes an employee organization not certified by the state employment relations board;

(6) Fail to fairly represent all public employees in a bargaining unit;

(7) Induce or encourage any individual in connection with a labor relations dispute to picket the residence or any place of private employment of any public official or representative of the public employer;

(8) Engage in any picketing, striking, or other concerted refusal to work without giving written notice to the public employer and to the state employment relations board not less than ten days prior to the action. The notice shall state the date and time that the action will commence and, once the notice is given, the parties may extend it by the written agreement of both.

(C) The determination by the board or any court that a public officer or employee has committed any of the acts prohibited by divisions (A) and (B) of this section shall not be made the basis of any charge for the removal from office or recall of the public officer or the suspension from or termination of employment of or disciplinary acts against an employee, nor shall the officer or employee be found subject to any suit for damages based on such a determination; however nothing in this division prevents any party to a collective bargaining agreement from seeking enforcement or damages for a violation thereof against the other party to the agreement.

(D) As to jurisdictional work disputes, the board shall hear and determine the dispute unless, within ten days after notice to the board by a party to the dispute that a dispute exists, the parties to the dispute submit to the board satisfactory evidence that they have adjusted, or agreed upon the method for the voluntary adjustment of, the dispute.

Effective Date: 04-01-1984

4117.12 Board to investigate charge of violation.

EXHIBIT 8

(A) Whoever violates section 4117.11 of the Revised Code is guilty of an unfair labor practice re employment relations board as specified in this section.

(B) When anyone files a charge with the board alleging that an unfair labor practice has been committed, the board or its designated agent shall investigate the charge. If the board has probable cause for believing that a violation has occurred, the board shall issue a complaint and shall conduct a hearing concerning the charge. The board shall cause the complaint to be served upon the charged party which shall contain a notice of the time at which the hearing on the complaint will be held either before the board, a board member, or a hearing officer. The board may not issue a notice of hearing based upon any unfair labor practice occurring more than ninety days prior to the filing of the charge with the board, unless the person aggrieved thereby is prevented from filing the charge by reason of service in the armed forces, in which event the ninety-day period shall be computed from the day of his discharge. If the board dismisses a complaint as frivolous, it shall assess costs to the complainant pursuant to its standards governing such matters, and for that purpose, the board shall adopt a rule defining the standards by which the board will declare a complaint to be frivolous and the costs that will be assessed accordingly.

(1) The board, board member, or hearing officer shall hold a hearing on the charge within ten days after service of the complaint. The board may amend a complaint, upon receipt of a notice from the charging party, at any time prior to the close of the hearing, and the charged party shall within ten days from receipt of the complaint or amendment to the complaint, file an answer to the complaint or amendment to the complaint. The charged party may file an answer to an original or amended complaint. The agents of the board and the person charged are parties and may appear or otherwise give evidence at the hearing. At the discretion of the board, board member, or hearing officer, any interested party may intervene and present evidence at the hearing. The board, board member, or hearing officer is not bound by the rules of evidence prevailing in the courts.

(2) A board member or hearing officer who conducts the hearing shall reduce the evidence taken to writing and file it with the board. The board member or the hearing officer may thereafter take further evidence or hear further argument if notice is given to all interested parties. The hearing officer or board member shall issue to the parties a proposed decision, together with a recommended order and file it with the board. If the parties file no exceptions within twenty days after service thereof, the recommended order becomes the order of the board effective as therein prescribed. If the parties file exceptions to the proposed report, the board shall determine whether substantial issues have been raised. The board may rescind or modify the proposed order of the board member or hearing officer; however, if the board determines that the exceptions do not raise substantial issues of fact or law, it may refuse to grant review, and the recommended order becomes effective as therein prescribed.

(3) If upon the preponderance of the evidence taken, the board believes that any person named in the complaint has engaged in any unfair labor practice, the board shall state its findings of fact and issue and cause to be served on the person an order requiring that he cease and desist from these unfair labor practices, and take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of Chapter 4117. of the Revised Code. If upon a preponderance of the evidence taken, the board believes that the person named in the complaint has not engaged in an unfair labor practice it shall state its findings of fact and issue an order dismissing the complaint.

(4) The board may order the public employer to reinstate the public employee and further may order either the public employer or the employee organization, depending on who was responsible for the discrimination suffered by the public employee, to make such payment of back pay to the public employee as the board determines. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or require the payment to him of any back pay, if the suspension or discharge was for just cause not related to rights provided in section 4117.03 of the Revised Code and the procedure contained in the collective bargaining agreement governing suspension or discharge was followed. The order of the board may require the party against whom the

order is issued to make periodic reports showing the extent to which he has complied with the order.

(C) Whenever a complaint alleges that a person has engaged in an unfair labor practice and that the complainant will suffer substantial and irreparable injury if not granted temporary relief, the board may petition the court of common pleas for any county wherein the alleged unfair labor practice in question occurs, or wherein any person charged with the commission of any unfair labor practice resides or transacts business for appropriate injunctive relief, pending the final adjudication by the board with respect to the matter. Upon the filing of any petition, the court shall cause notice thereof to be served upon the parties, and thereupon has jurisdiction to grant the temporary relief or restraining order it considers just and proper.

(D) Until the record in a case is filed in a court, as specified in Chapter 4117. of the Revised Code, the board may at any time upon reasonable notice and in a manner it considers proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Effective Date: 04-01-1984