

ORIGINAL
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IN THE
SUPREME COURT OF OHIO

THE STATE EX REL., BARBARA HALL,	:	Case No. 09-0159
	:	
Relator-Appellee,	:	On Appeal from the
	:	Cuyahoga County Court of
-vs-	:	Appeals, 8 th District
	:	
STATE EMPLOYMENT RELATIONS BOARD,	:	Court of Appeals Case No.
	:	CA-07-090808
Respondent-Appellant.	:	

**BRIEF OF AMICUS CURIAE, OHIO EDUCATION ASSOCIATION
IN SUPPORT OF RESPONDENT- APPELLANT,
STATE EMPLOYMENT RELATIONS BOARD**

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II. STATEMENT OF THE CASE AND THE FACTS

Amicus Curiae Ohio Education Association adopts the statement of the case and facts as presented by Appellant State Employment Relations Board ("SERB") in its Merit Brief filed herein.

III. ARGUMENT

PROPOSITION OF LAW:

The Ohio State Employment Relations Board did not abuse its discretion when it dismissed Barbara Hall's unfair labor practice charge against the union for lack of probable cause.

SERB determinations regarding whether a union committed an unfair labor practice pursuant to R.C. 4117.11 are not reviewable by direct appeal to court. *Ohio Assn. of Public School Emp., Chapter 643, AFSCME/AFL-CIO v. Dayton City School Dist. Bd. of Edn. (1991), 59 Ohio St. 3d 159, 572 N.E. 2d 80.* Instead, "[a]n action in mandamus is the appropriate remedy to obtain judicial review of orders by the State Employment Relations Board dismissing unfair labor practice charges for lack of probable cause." *State ex rel. Serv. Emp. International Union, Dist. 925 v. State Emp. Relations Bd. (1998), 81 Ohio St. 3d 173, 689 N.E. 2d 962.*

The courts are authorized to issue a writ of mandamus only to remedy an abuse of discretion by SERB in its decision to dismiss an unfair labor practice charge. *State ex rel. Tritt v. State Emp. Relations Bd., 97 Ohio St. 3d 280, 2002-Ohio-6437, 779 N.E. 2d 226.* An abuse of discretion can be found if the decision of SERB is of a nature that is unreasonable, arbitrary or unconscionable. *State ex re. Grady v. State Emp. Relations Bd. (1997), 78 Ohio St. 3d 181, 183, 677 N.E. 2d 343; State ex rel. Hamilton (2004), 102 Ohio*

St. 3d 344.

Importantly, courts may not substitute their own judgment for that of the administrative agency. *University of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 1. Courts have long recognized that the law requires that the courts shall defer to SERB's interpretation of R.C. Chapter 4117. *Lorain City School Dist. Bd. of Edn. v. SERB* (1988), 40 Ohio St. 3d 257, 260; *Hamilton County Bd. of Mental Retardation and Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St. 3d 147; *The State ex rel. Portage Lakes Edn. Assn. v. SERB* (2002), 95 Ohio St. 3d 533.

SERB did not abuse its discretion when it dismissed the unfair labor practice charge, which is the basis of this mandamus action. Rather, the Eighth District Court of Appeals erred in granting a writ of mandamus based on its finding that the Union failed to take the basic and required step of notifying the Federal Mediation and Conciliation Service, substituting its judgment for SERB's in defining and applying the standard applicable to the review of whether a union breaches its duty of fair representation and basing its decision on evidence that was not before SERB.

The Court of Appeals went on a tangent that the evidence does not support, when it opined, "[i]n the present case, this court notes that the Union failed to take a basic and required step in filing for Step 5 Arbitration." *Ct. App. Dec. at 16*. The Court of Appeals itself recognized that the record was without such a finding from the SERB labor relations specialist and that the union did not address the issue. *Ct. App. Dec. at 16*. The Court of Appeals based its opinion on a fact that was not an issue in this case that triggered a different standard of review than that appropriate to the facts of this case as defined by

SERB and court precedent.

In this case, based on the language in the collective bargaining agreement between the Employer and the Union and based on the record before SERB, it was never claimed that the grievance could not proceed to arbitration because the Union had failed to take a basic and required step. The record is absent of any evidence that the grievance could not proceed to arbitration due to a failure to forward the grievance to the Federal Mediation and Conciliation Services as arbitrarily determined by the court of appeals. To the contrary, after the Union received the Employer's Step 3 response, it preserved its right to arbitrate when it sent its request to arbitrate Hall's grievance to the Employer's representative within thirty (30) days after the Union received the Employer's Step 3 response. In fact, the grievance did not proceed to arbitration because the Union made a purposeful decision not to proceed to arbitration based on the merits of the grievance.

SERB and the courts historically have recognized that unions may determine which grievances will be pursued to arbitration. See *In re Wheeland v. SERB (10th District), 1995 Ohio App. Lexis 2369; Vaca v. Sipes (1967), 386 U.S. 171*. A union's statutory duty of fair representation requires that in administering the grievance and arbitration procedure, as the employees' statutory agent, the union makes decisions as to the merits of particular grievances in good faith and in a non-arbitrary manner. *Vaca v. Sipes, 386 U.S. 171; 87 S. Ct. 903; 17 L.Ed. 842 (1967)*. The standard applied to grievances that the union decides not to take to arbitration is different than the standard applied to cases that cannot proceed to arbitration because the union failed to take a required step in processing a grievance. In the former type of case, SERB and the courts are expected to defer to the Union's determination not to proceed to arbitration on the basis of the merits. In the later case in

which the union failed to take a required step, without good excuse, the merits of the grievance are not to be considered by SERB in determining whether the union violated its duty of fair representation owed to the employee within its bargaining unit.

Again, on page 18 of the Twelfth District Court of Appeal's Journal Entry and Opinion, the Court indicates its confusion about the appropriate standard to apply for defensible disposition of the charge when it writes:

Moreover, the [SERB] 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 the actual arbitration.

In fact, the SERB labor relations specialist applied the appropriate standard to the fact pattern before her – a fact pattern that resulted in the union making a decision not to proceed to arbitration on the basis of its determination that the grievance lacked sufficient merit. *Ct. App. Dec. at 10.*

Additionally, the Court improperly substituted its judgment for SERB's determination regarding whether the Union's delay in inquiring about the Employer's issuance of the Step 3 response constituted an "honest mistake". The employer failed to file its Step 3 response to the grievance in a timely manner. The Court of Appeals determined the Union violated its duty of fair representation when it failed to "act as a catalyst" to require the employer to timely respond.

It is unreasonable to place full responsibility of the Employer's inaction on the Union. Accordingly, SERB determined that the Union's delay was excusable under these circumstances and did not constitute a failure to fairly represent the employee. Courts

have generally deferred to SERB's determination in these instances and refused to issue a writ of mandamus based on the court's own brand of justice. To hold unions responsible for the delay caused by a third party, over which the union has no control, is unreasonable and contrary to any legal standard previously imposed on unions by SERB or courts. Since the Employer failed to take action pursuant to the provisions of the collective bargaining agreement, it was reasonable for SERB to find the Union's delay was excused and/or justified. Under these circumstances, clearly SERB's determination does not constitute an abuse of discretion.

Finally, the Eighth District Court of Appeals erred when it relied on evidence that was not before SERB. On page 18 of its decision, the court admitted that it should "base its decision upon the evidence before SERB when it made its probable cause finding," but went on to consider three (3) affidavits of Hall's co-workers. In *Portage Lakes Edn. Assn.*, 95 Ohio St. 3d 533; 2002-Ohio-2839; 769 N.E. 2d 853, the Court held:

It is axiomatic that SERB could not abuse its discretion based on evidence that was not properly before the Board when it make its decision. Consequently, the review of a SERB decision is generally limited to the facts as they existed at the time SERB made its decision.

In an effort to overcome its inability to examine the new evidence submitted by Hall, the Court attempts to argue that the SERB investigator failed to offer opportunity to Ms. Hall to submit the affidavits during the investigation. The record does not support such a claim as argued by SERB in its Merit Brief. Further, review of the court's characterization of the content of the affidavits makes it clear that the information contained in them is irrelevant, duplicative of information that was already available for consideration, and/or

inappropriate opinion about the legal question of whether the union violated its legal duty of fair representation. The appellate court's reliance on these particular affidavits appears to be an effort to override the general principal espoused in *Portage Lakes Edn. Assn.* This effort by the lower court cannot be sanctioned as a means to dilute well-founded judicial precedent and policy. The Eighth District Court of Appeals erroneously considered evidence that was not before SERB and, therefore, its decision must be reversed.

V. CONCLUSION

For all of the above reasons, Amicus Curiae Ohio Education Association urges this court to reverse the Eighth District Court of Appeals and find that SERB did not abuse its discretion in dismissing Hall's unfair labor practice charge.

Respectfully submitted,



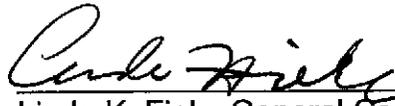
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Certificate of Service

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