

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 APPELLEE  
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## INTRODUCTION

The State Employment Relations Board (hereinafter "SERB") is charged by the General Assembly with administering R.C. Chapter 4117, the Public Employee's Collective Bargaining statute. These administrative duties of SERB include the investigation of unfair labor practice charges filed by a charging party. If SERB determines that probable cause exists that the charged party did in fact commit an unfair labor practice charge, then SERB is required to issue a complaint and set the matter for a hearing pursuant to R.C. 4117.12(B). In the absence of a finding of probable cause SERB dismisses the matter.

The only scheme by which a charging party and/or the charged party can challenge a SERB dismissal or non-dismissal is by way of an original action seeking a writ of mandamus. In the matter at hand, Relator-Appellee Barbara Hall timely filed just such a complaint.

In the original matter at hand, the Eight District found that SERB abused its discretion when it found that there was no probable cause that Local 1746 and/or Ohio Council failed to fairly represent the Appellee in pursuing her grievance.

The Eight District correctly determined that the Union failed to take a basic and required step of notifying the Federal Mediation Service of its intent to arbitrate at the same time it notified the Employer. The Eight District noted that this is a required step pursuant to the terms of the bargaining agreement between the County Employer and the Union. Counsel for Appellant cannot and does not refute this factual finding. Appellant tries to diminish the effect of this finding by stating the Union did not have a recognized obligation to notify the Mediation Service. The labor contract between the Union and the

County is determinative of this fact, not the dismissive assertions of Appellant's counsel. Thus the Eighth District correctly found that the Union failed to undertake a necessary step or obligation it had assumed under the terms of the labor contract.

The Eight District also correctly found that the Union, by and through its Local President, failed to fairly represent the Appellee when it let the Appellee's grievance languish in her office for over a year without any action. The Eighth District correctly determined that the SERB investigator had incorrectly applied a "simple negligence" standard to the Local President's actions and that standard did not comply with the controlling law.

Counsel for Appellant fails to consider that by the very terms of the operative labor contract a grievance is not advanced to consideration for arbitration until the Employer issues a written response under Step 3 of the grievance process. The SERB finding of "simple negligence", even if were the correct standard, is not supported by the record. SERB astoundingly credited an experienced Union President's lame assertion that she thought she had advanced the file to the Union District. This is despite the undisputable fact that the President never presented the grievance for Step 3 consideration at the monthly labor conference under the terms of the contract and could not have mistaken the fact that she never received a written Step 3 response from the Employer.

The Eighth District also correctly noted that the SERB investigator improperly determined the lack of probable cause by considering the actual merits of the grievance. The Court noted that this is not the proper standard under the controlling law, including SERB's precedential decisions, which holds that the merits of a grievance are only a

## ARGUMENT

### APPELLEE'S PROPOSITION OF LAW

*The Eighth District did not abuse its discretion when it found that SERB abused its discretion when it dismissed Appellee Hall's unfair labor practice charge*

#### **A. SERB Failure to Investigate the Union's Failure to Notify the Federal Mediation Service of Arbitration**

R.C. 4117.12(B) provides: [w]hen 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 prevailing law sets forth that any "decision of SERB dismissing an unfair labor practice charge on the basis of no probable cause is subject to judicial review through an action in mandamus. *The State ex rel. Service Employees International Union, District 925, et al. v. SERB et al.*, (1998), 81 Ohio St.3d 173, 177. SERB abuses its discretion in dismissing an unfair labor practice charge when there is clearly probable cause supporting a finding of an unfair labor practice charge. *Id.* SERB has discretion in determining probable cause, but that discretion is not unlimited and is subject to review in mandamus. *Id.* at 178. A reviewing Court should not substitute its judgment for that of the administrative agency. *State ex rel. Portage Lakes Educational Association, OEA/NEA v. SERB*, (2002) 95 Ohio St.3d 533.

In the matter at hand, the Eighth District clearly found that SERB had indeed abused its discretion when it adopted its agent's investigative report of no probable cause. App. Opp. at 19. The Eighth District clearly found that SERB never even addressed the fact "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.’ App. Opp. at 16.

Unable to dispute the factual basis of the Eighth District finding, Appellant has resorted to a couple of irrelevant “red herring” arguments in an attempt to mislead this Court. For instance, Appellant now asserts that the Union was not required by the labor agreement to notify the federal mediation service. Appellant asserts that since the contract states that the Union “may” submit a matter to arbitration, it was not a required step that the Union notify the Federal Mediation and Conciliation Service. (Appellant’s Merit Brief – p.12). This position is directly contradicted by the very terms of the labor agreement. The labor contract sections in question (S-9 of Appellants’ Supplement) at Step 5 explicitly states: “ 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 (“FMCS”) and the other party of its intent to arbitrate.**” (Emphasis added).

Clearly this is pejorative language. Once the Union decided on its own accord to submit the issue to arbitration by sending a letter stating the same to the Employer (S-59), its duty to notify the federal service became mandatory under the terms of the contract. Since the Union ultimately decided to withdraw the matter from arbitration we will never know if the County would have challenged either the timeliness of the request or the failure to follow procedure of any attempt to arbitrate. The Eighth District got it right when they found that SERB abused its discretion when clearly the record contained this failure of the Union to undertake such a basic step.

Furthermore, Appellant's citation to caselaw regarding whether a Union has a duty to process every grievance to arbitration is not on point. The Union decided apparently on its own to submit the matter to arbitration by letter to the Employer. Their corresponding mandatory duty to notify the federal service followed from their actions and choice.

Undersigned counsel takes issue with Appellants assertion regarding common labor-management practice. Undersigned counsel, prior to entering law school, was both a union steward and union local officer in the Machinists Union. I am unaware that the Union actions in this regard are common.

**B. SERB's finding of simple negligence is not supported by the record**

The SERB investigator found that the Union President's actions in letting the Appellant's grievance languish in her office for over a year was simple negligence and a honest mistake. The Eighth District correctly found this to be unfounded and an application of the wrong legal standard. (App. Opp. at p. 17 citing to *Vencl v. Internatl. Union of Operating Engineers* (1988), 137 F.3d 420, *District 1199, The Health Care & Social Service Union, SEIU, AFL-CIO, v. SERB*, (Franklin Cty. 2003), App. No. 02AP-391 at ¶38, and SERB Case No. 97-ULP-09-051.)

In fact SERB's conclusion in this regard is clearly not even supported by the Union President's own assertions contained in her unsworn statement. (S-63).

“8. When I didn't get a response by January 2005, I called the HR director, Dennis Madden, who advised me that the response would be coming and that the grievance would probably be denied. 9. Because of that conversation with the HR director, I later believed I had received a written Step 3 grievance response, and given the file to the OC8 Cleveland staff for review for possible arbitration.

The SERB investigator's conclusion of simple negligence in this regard is perverse. The experienced Local President was told a response would be coming and later claims she believed she had received such a written response. She then claims that she thought she had

passed the file on. According to the contract the arbitration review is not commenced until the Employer's actual written Step 3 response is received. ( The extent to which the Eighth District tried to defer to SERB's findings is obvious. The Court didn't question the investigator's conclusion that the Local President's statements were incredulous on their face). Perhaps the Union President's confusion was the result of her own failure to go back before the Employer at the monthly meeting when both parties discussed Step 3 grievances in general. This not to mention the sheer nonsense of the conclusion that it was simple negligence to let a file gather dust in one's office for over a year.

The Eighth District did not challenge SERB's factual findings in this regard, merely it's legal conclusion of simple negligence. Serb's own precedential authority supports a finding of arbitrariness and a violation *In re OCSEA, AFSCME, Local 11, SERB 99-009 (5-21-99)*.

**C. The Eighth District's Finding that the investigator did not provide the parties with equal opportunity to submit witness statements is based upon the record**

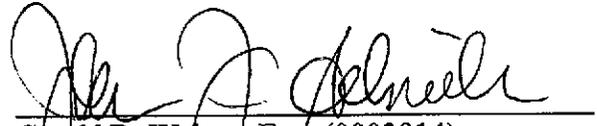
Appellant takes issue with the Eight District's conclusion that it was troubled by the SERB investigator's failure to equally request witness statements from both parties. Even the Eighth District admitted that this conclusion went beyond its usual review. (App. Opp. at p. 18). The Eighth District determined that caused an objective viewer to question the reasonableness of the investigation.

Despite Appellant's protestations, this conclusion by the Eighth District is not central to conclusion nor its finding that SERB abused its discretion. The Court clearly found that SERB's finding of a lack of probable cause was not supported because of the Union's failure to take a basic step of notifying the federal mediation service and by SERB's application of the wrong legal standard to the Union President's failure to timely expedite the Appellant's grievance.

## CONCLUSION

Appellee has waited a long time for simple justice. Justice delayed is justice denied. The Eighth District properly granted the Writ of Mandamus. This Honorable Court should affirm the Eighth District's well reasoned opinion.

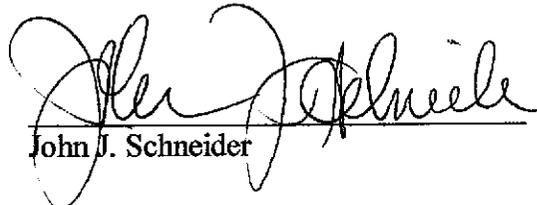
Respectfully submitted,



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## CERTIFICATE OF SERVICE

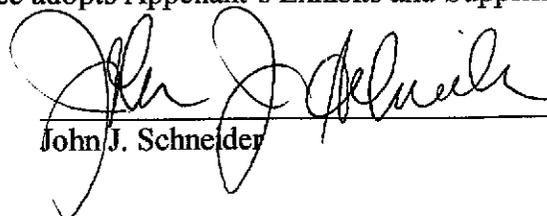
The undersigned hereby certifies that a true and accurate copy of the Merit Brief of Appellee was served this 6<sup>th</sup> day of May 2009 upon Benjamin Mizer, Esq. , Kimberly Olson, Esq., and upon Anne Light Hoke, Esq. at the Ohio Attorney General, Labor Relations Section, 30 East Broad Street, 26<sup>th</sup> Floor, Columbus, Ohio 43215-3400 and to all amicus counsel.



John J. Schneider

## ADOPTION OF APPELLANT'S EXHIBITS AND SUPPLEMENTS

Pursuant to S. Ct. Prac. R. VI, §3, Appellee adopts Appellant's Exhibits and Supplement as being herein.



John J. Schneider