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## INTRODUCTION

According to Relator-Appellee Barbara Hall's Proposition of Law, the standard of review in this mandamus action is whether the appellate court abused its discretion when it found that SERB wrongly dismissed her unfair labor practice ("ULP") charge. Merit Brief of Appellee Barbara Hall ("Hall Br.") at 5. But no deference is due to the appellate court decision below. Instead, this Court must defer to SERB's judgment and consider only whether SERB abused its discretion in dismissing Hall's ULP charge. See *State ex rel. Tritt v. SERB*, 97 Ohio St. 3d 280, 284, 2002-Ohio-6437, ¶ 18. As demonstrated in its merit brief, SERB did not abuse its discretion when it found no probable cause to support Hall's claim against Ohio Council 8, American Federation of State, County and Municipal Employees, Local 1746, AFL-CIO ("the Union") for allegedly violating its duty of fair representation under R.C. 4117.11(B)(6).

Hall tries to defend the Eighth District's erroneous decision in three ways, but her efforts fail. First, Hall claims that notifying the Federal Mediation and Conciliation Service ("FMCS") was a basic and required step. Hall Br. at 6. But notifying an arbitrator clearinghouse is required only if a union intends to arbitrate. Here, the Union decided not to arbitrate. Hence, there was no need for the services of an arbitrator clearinghouse, and notification was not required. Second, Hall asserts that a union's conduct is arbitrary and a violation of R.C. 4117.11(B)(6) if the union's justification of its actions constitutes simple negligence. Hall Br. at 2, 7. But SERB considers "what steps were basic and required, how severe the mistake or misjudgment was, what the consequences of the union's acts were, and what the union's reasons for its act were" in deciding if a union's conduct is arbitrary. *In re SERB v. OCSEA/AFSCME, Local 11, LRP 1998 OPER (LRP) LEXIS 604*, SERB 98-010 (7-22-98), \*4. And "[i]f the justification or excuse constitutes simple negligence, [SERB] will find that the conduct is not arbitrary." *Id.* Because the Union simply made an honest mistake in not diligently following up on Hall's grievance, see

SERB Supplement (“Supp.”) 65, the Union did not violate its duty of fair representation. Third, Hall claims that the Eighth District’s consideration of material outside the SERB record should be excused because the evidence was not central to the court’s decision. Central or not, because the Eighth District improperly considered extraneous material, it is clear that the court did not defer to SERB’s expertise. To the contrary, the court substituted its own judgment, which justifies reversal.

## ARGUMENT

### **A. A union must notify a mediator clearinghouse only if the union intends to arbitrate.**

Hall claims that the Eighth District was right when it found that the Union violated its duty of fair representation for failing to notify the FMCS, the arbitrator clearinghouse, about Hall’s grievance. According to Hall—and the decision below—this notification is a basic and required step in all cases where a union preserves its right to arbitrate. Hall Br. at 6. But the relevant collective bargaining agreement states 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). After the Union decides to arbitrate, the Union “shall notify the Federal Mediation and Conciliation Service (“FMCS”) and the other party of its intent to arbitrate.” Supp. 14. Thus, notification is required only when the Union decides to arbitrate. As SERB explained in its merit brief, a contrary rule would unnecessarily involve arbitrator clearinghouses in matters when they are not needed.<sup>1</sup> SERB Br. at 12-14.

Instead of following this commonsense approach, Hall argues that because the Union sent a preservation-of-rights letter to the Cuyahoga County Department of Children and Family Services (“County Children Services” or “Employer”), Supp. 59, the Union was required to

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<sup>1</sup> The arbitrator clearinghouse’s sole function is to develop of a list of potential arbitrators. The parties then select an arbitrator for their dispute from that list.

notify FMCS of its intent to arbitrate. Hall Br. at 6. In other words, Hall claims that a letter to preserve arbitration rights necessarily triggers the Union's responsibility to contact an arbitrator clearinghouse. But the collective bargaining agreement requires the Union to notify the FMCS only of "its intent to arbitrate"; the agreement does not require the Union to notify the FMCS of a letter that simply preserves the right to arbitrate.

And that is all that happened here. The Union sent the letter to the Employer to comply with contractual timelines, so that the Union could make an informed decision on whether to arbitrate Hall's grievance. After a thorough review, the Union decided not to submit Hall's termination grievance to arbitration, because her grievance "lacked sufficient merit" to warrant an appeal to arbitration. Supp. 60, 61. Because the Union decided not to arbitrate the grievance, notifying the FMCS was not a necessary and required step.

**B. Simple negligence does not constitute a ULP, and simple negligence is all that occurred here.**

Hall also argues that the Union committed a ULP because the local union president, Pamela Brown, let Hall's grievance "languish" in her office for over a year without any action. Hall Br. at 7. But the truth is that Hall's grievance was languishing with the Employer, because only the Employer could issue an answer to the pending grievance. Without the Employer's answer, the Union could not take the next step: either appeal Hall's grievance from Step 3 to arbitration or decide not to arbitrate. It is true that Brown could have been more diligent in asking the Employer to issue its response, but once Brown realized the delay, she promptly requested an answer from the Employer. The Employer answered and denied Hall's grievance on the merits because it found that she was terminated for just cause. Supp. 58. The Union then notified Hall of its decision to not process her grievance to arbitration. Supp. 60, 61.

Thus, the Employer made the mistake that caused the delay, and the consequences were negligible. If the delay was reduced or eliminated, Hall simply would have learned sooner that the Union would not arbitrate her termination grievance because it lacked merit. Thus, SERB did not abuse its discretion when it found that the Union's inaction in not asking the Employer to issue an answer earlier was an "honest mistake." Cf. *In re Wheeland v. SERB* (10th Dist.), 1995 Ohio App. Lexis 2369, \*19 (holding that failure to notify employee that grievance had been withdrawn did not violate the duty of fair representation).

In her brief, Hall adds a new allegation against the Union: Hall claims that Brown did not present Hall's grievance for Step 3 consideration at the monthly labor conference. Hall Br. at 2. (SERB assumes that Hall refers to the grievance hearing between the Union and the Employer at which time the parties discuss pending grievances, and the Employer decides whether to accept or deny each grievance.) Hall was, in fact, represented by Brown at such a hearing on June 10, 2004. Supp. 24. At the conclusion of the hearing, Brown asked that Hall's grievance be placed on hold, because Brown was waiting for additional documents from the Employer. Supp. 24-25, 62. In particular, Brown wanted the results of the Employer's investigation about whether the child—the subject of the non-referred phone call—was later hospitalized because of abuse. See Supp. 28-30, 45, 46.

Brown's follow-up to this conference was diligent and reasonable. Approximately two months after Hall's grievance was stayed, Brown met with the Employer's investigator. Supp. 56-57. The investigator told Brown that the young child had shaken baby syndrome. The young child was diagnosed with the condition just two and one-half weeks after Hall's non-referral for further investigation of the reported abuse. Supp. 56-57. Based on the investigator's report, Brown asked the Employer to answer Hall's termination grievance, because the Employer and

the Union now had all the relevant evidence. Supp. 62. Brown also advised Hall that she would most likely lose her termination grievance because shaken baby syndrome is a serious matter. Supp. 62-63.

Hall further contends that the court below got it right because the duty of fair representation attaches to union conduct during the grievance process. Hall Br. at 2-3. SERB agrees that a union must fairly represent a member during the grievance process, regardless of the merits of the grievance, and that the union violates that duty if its actions are arbitrary, discriminatory, or in bad faith. See *Wheeland*, 1995 Ohio App. Lexis 2369 at \*10-11 (citing *Vaca v. Sipes* (1967), 386 U.S. 171). Applying this standard, the Union's actions in this case pass muster. Hall's grievance was delayed for two reasons: (1) an ongoing child abuse investigation; and then (2) the Employer's failure to issue its Step 3 response. As soon as the Union realized that the Employer had not issued its response, the Union acted. Therefore, SERB did not abuse its discretion when it found the evidence did not show that the Union failed to process Hall's termination grievance.

Hall's true complaint here is that she disagrees with the Union's decision not to arbitrate her termination grievance. But a union does not commit a per se violation of its duty of fair representation if it does not arbitrate a grievance. To the contrary, a union acts reasonably when it does not arbitrate a grievance that lacks merit. *Wheeland*, 1995 Ohio App. Lexis 2369 at \*\*17-18.

**C. Considering evidence outside the SERB record justifies reversal, regardless of the Eighth District's claim that it did not rely heavily on the extraneous material.**

In its decision, the Eighth District discussed—and clearly considered—three affidavits outside the SERB record. *State ex rel. Hall v. SERB*, 2008 Ohio App. Lexis 5558, 2008-Ohio-6661, (“App. Op.” attached at Appendix A-6) ¶ 18. The court below speculated that the SERB

investigator might have found differently if she had reviewed these affidavits. *Id.* The court also found it “troubling” that the SERB investigator did not receive the affidavits and, therefore, concluded that the SERB investigator must not have provided both parties an equal opportunity to present evidence. App. Op. at ¶¶ 29-30. But, as SERB discussed in its merit brief, SERB Br. 19-21, Hall had opportunities to present these affidavits and chose not to. Moreover, the Eighth District’s reasoning relieves Hall of her responsibility to provide all necessary documents to SERB. SERB relies on parties to participate in the process and provide relevant information. It was Hall’s responsibility to provide the SERB investigator with all the information supporting her allegation that the Union violated its duty of fair representation.

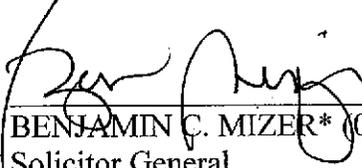
Hall tries to minimize the effect of the Eighth District’s improper consideration of evidence by claiming that it was not central to the court’s decision to grant the writ. Hall Br. at 8. But, as this Court stated, “[i]t is axiomatic that SERB could not abuse its discretion based on evidence that was not properly before the board when it made its decision.” *State ex rel. Portage Lakes Educ. Ass’n, OEA/NEA v. SERB*, 95 Ohio St. 3d 533, 2002-Ohio-2839, ¶ 55. Thus, even if the newly submitted evidence might not have been central to the appellate court’s decision—and SERB submits that it was—the Eighth District’s reliance on this improper evidence justifies reversal. An appellate court reviewing a SERB decision may not substitute its judgment for SERB’s; instead, it must defer. See *State ex rel. Stewart v. SERB*, 108 Ohio St. 3d 203, 2006-Ohio-661, ¶ 15. Because the Eighth District considered evidence outside the SERB record, the only logical conclusion is that the court did not defer to SERB’s judgment but substituted its own judgment.

## 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,

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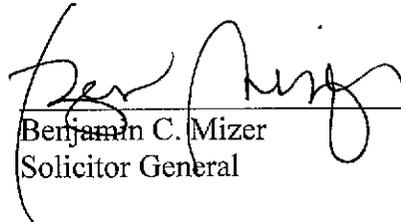
State Employment Relations Board

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the Reply Brief of Appellant State Employment Relations Board was served this 21th day of May, 2009 by regular U.S. Mail on the following:

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