ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. Kay A. Kingsley,	:	
	:	
Appellant,	:	Case No. 2011-0441
	:	
v.	:	
	:	On Appeal from the Franklin
State Employment Relations Board,	:	County Court of Appeals,
	:	Tenth Appellate District
Appellee.	:	(Case No. 09AP-1085)

MERIT BRIEF OF APPELLANT KAY A. KINGSLEY

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STATEMENT OF FACTS

This case is before the Court because someone, who will not admit to it, inserted into the 2009 2,725 page budget bill (H.B. 1, 128th General Assembly) a one word amendment to R.C. 4117.02 to declassify SERB ALJs. The issues address the proper procedure to challenge the amendment as unconstitutional (because it was enacted in violation of the one subject rule, commonly called log rolling) in order to obtain reinstatement and back pay. If the amendment is unconstitutional, Ms. Kingsley remains classified. Specifically, the issue is whether Mandamus is barred because of a purported right to a futile appeal to SPBR which cannot decide the constitutional issue.

Since this case was disposed of by Civil Rule 12(B)(6) without hearing and without the taking of testimony or evidence, the facts as stated in the complaint and related pleadings are deemed true.

SERB is a quasi-judicial state agency, created by R.C. §4117.02(A), that oversees public-sector labor issues in Ohio. (Complaint for Writ of Mandamus, hereinafter referred to as "Complaint", ¶ 2) The allegations in the complaint state Kay A. Kingsley is an attorney in good standing licensed to practice in the State of Ohio. (Complaint ¶ 1) In January of 1999, Ms. Kingsley was appointed as an Administrative Law Judge (ALJ) with SERB. (Complaint, ¶ 8) Pursuant to former R.C. §4117.02(H), ALJs at SERB were in the classified service. (Complaint, ¶ 10) Thereafter, Ms. Kingsley performed her duties in a faithful and exemplary fashion. She received nothing but positive reviews.

She was never reprimanded. She earned the respect of both management and labor representatives alike. Her adherence to impartiality was, and still is, beyond reproach. She consistently rendered prompt, well-reasoned decisions. (Complaint, ¶ 11)

H.B. 1 (128th General Assembly) took effect on 7/1/2009. This 2725-page piece of legislation was hyped as a budget bill. Despite being a budget bill, this legislation contained one sentence (one word) that amended a portion of R.C. §4117.02 and declassified the administrative law judges at SERB (unclassified substituted for classified). (Complaint, ¶ 14) No legislator will take credit for sponsoring it. The Legislative Service Commission cannot ascertain who requested the inclusion of this amendment. No other portion of H.B. 1 declassified an already-classified employee. (Complaint, ¶ 17) In addition, at all times relevant to these proceedings, Ms. Kingsley was the only full-time ALJ at SERB. (Complaint ¶ 18)

In her capacity as ALJ, Ms. Kingsley was assigned a case styled *SERB v. City of Cleveland*, Case No. 2007-ULP-04-0156. In that case, the union alleged that City of Cleveland Mayor Frank Jackson committed unfair labor practices by meeting with bargaining-unit members, threatening to fire the employees and privatize their jobs, and attempting to intimidate and unfairly circumvent the bargaining process. (Complaint, ¶ 19) During the discovery phase of the proceedings, the union filed an application for a subpoena duces tecum requesting that Mayor Jackson be deposed and for him to produce any phone records, e-mails, etc. to prove that he made unlawful threats. The City of Cleveland filed a motion to quash the application, or, in the alternative, a motion for a protective order. (Complaint, ¶ 20)

Ms. Kingsley issued a procedural order granting the request for the subpoena duces tecum, denying the motion to quash and the motion for protective order, and ordering Mayor Jackson to bring the requested documents and appear for a video deposition at the office of the Union's attorney at a mutually convenient date and time. (Complaint, ¶ 21) Although procedurally precluded by O.A.C. 4117-1-04, the City of Cleveland appealed the discover order directly to the SERB board. (Complaint, ¶ 22) At the 7/9/2009 board meeting, after Chairman N. Eugene Brundige proclaimed the procedural order a "fishing expedition", the Board remanded the case back to Ms. Kingsley and Chief ALJ James Sprague with instruction to report back to the Board the outcome of their "review". (Complaint, ¶ 24 and ¶ 25)

On 8/26/2009, Chief ALJ Sprague approached Ms. Kingsley and "suggested" that she change her procedural order by rewriting it with a different outcome. (Complaint, ¶ 25) Ms. Kingsley refused, citing her own decisional independence and the fact that procedural orders, until that point, pursuant to the Ohio Administrative Code Rules governing SERB, had always been within the exclusive province of the ALJ. (Complaint, ¶ 26) The next day, 8/27/2009, Ms. Kingsley was informed she was being "laid off." (Complaint, ¶ 27) Thus, within two months of the new amendment/declassification contained in H.B. 1, Relator, an ALJ with over ten years of dedicated service and no discipline of any kind was terminated for refusing to be intimidated into rendering a "politically correct" decision. At the Board meeting of 9/3/2009, the Board granted the City of Cleveland's motion for reconsideration of the discovery order and the request for

a protective order. The Board also transferred the case from the Hearings Section to the Board itself. (Complaint, ¶ 28)

On 11/20/2009, Ms. Kingsley filed a complaint for a writ of mandamus in the Tenth District Court of Appeals requesting (1) that the court of appeals hold that portion of H.B. 1 declassifying her facially unconstitutional, and (2) a mandatory injunction ordering SERB to reinstate her and treat her as classified. On or about 12/22/2009, SERB filed a motion to dismiss under Ohio Civ. R. 12(B)(1) and (6), as well as Ohio App. R. 6, arguing that mandamus was improper because (1) Ms. Kingsley did not have a clear legal right to relief and (2) she had other adequate remedies in the ordinary course of law: either a declaratory judgment action in the court of common pleas *or* an administrative appeal through SPBR. In response, Ms. Kingsley argued that, under clear Supreme Court of Ohio precedent, she both had a clear legal right to relief and had no other adequate remedy in the ordinary course of law. Ms. Kingsley argued that a declaratory judgment would be insufficient because it must be coupled with a mandatory injunction to order SERB to reinstate her and treat her as classified. A court of common pleas cannot issue a mandatory injunction, only a prohibitory injunction. An administrative appeal would not be adequate because it is illogical and inefficient to require Ms. Kingsley to suffer through SPBR in order to get to the court of common pleas, particularly where SPBR has absolutely no authority to rule on her facial constitutional challenge. Further, H.B. 1 merged SERB and SPBR. Ms. Kingsley, in the SPBR appeal, filed a motion requesting the board members of SPBR to recuse themselves for bias. Ms. Kingsley believes she should not have to appear before SPBR,

now merged with SERB, because the boss she will complain about ("Mr. Brundige") controls the budget, ALJ and SPBR assignments and the hiring of SPBR employees. Even if a board member of SPBR would want to recuse him or herself, he or she could not do so because there is no process for replacement. Any action by the Board would be void ab initio.

On 2/24/2010, a Tenth District magistrate issued a decision granting SERB's motion to dismiss. The magistrate's decision agreed with SERB in total.

Ms. Kingsley objected. On 2/1/2011, the court of appeals issued its decision, reversing the magistrate in part and affirming the magistrate in part. Although agreeing with Ms. Kingsley that a declaratory judgment would not afford her complete relief, the court of appeals concluded that she had an adequate remedy at law by way of an administrative appeal through SPBR.

It is from this decision that Ms. Kingsley appeals.

ARGUMENT

Proposition of Law No. I:

SPBR must apply R.C. §4117.02 as amended in H.B. 1, and find SERB ALJs are in the unclassified service. As a result, SPBR lacks jurisdiction to hear an appeal of an unclassified ALJ.

It is solely a legislative function to define whose in included in, and who is not included in, the classified service. The jurisdiction of SPBR is set forth in R.C. §124.03. Only by referring to the statutory definition, SPBR decides whether or not an employee is classified or whether or not an adverse personnel action violated the classified service protections. It has no jurisdiction to hear the appeal of the termination of an unclassified employee, *Suso v. Ohio Dept of Development* (1993) 93 Ohio App 3d 493 and *Olander v. Ohio EPA* (1999) 134 Ohio App 3d 723. Justices Resnick, Sweeney, and Douglas discussed the jurisdiction of SPBR in a vigorous dissent in *State ex rel. Weiss v. Industrial Commission of Ohio* (1992), 65 Ohio St.3d 470: "Removals from the classified service, when not considered in the context of another job action, are *not* within SPBR's jurisdiction." The crucial point is Ms. Kingsley could not, and did not, challenge before SPBR that she was classified at the time of her termination because her job duties fit a classified position. Ms. Kingsley concedes, if the amendment is constitutional, she is unclassified and could be terminated. No factual dispute existed in this case for SPBR to decide. However, she is certain that the blatant logrolling will result in a finding that the amendment was unconstitutional and when so found she will remain classified. Employment matters can not be hidden in budget bills, *State ex rel*

Ohio Civil Service Employees Assoc v. SERB (2004) 104 Ohio St 3d 122 and *State ex rel Ohio AFL-CIO v. Voinovich (1994) 69 Ohio St 3d 225.*

The salient point is that since SPBR lacked jurisdiction to hear her appeal, it cannot be an adequate remedy to require her to pursue it to SPBR.

Proposition of Law No. II:

A facial challenge to the General Assembly's declassification of a classified employee is not within SPBR's jurisdiction. SPBR lacks subject matter jurisdiction to decide whether or not the amendment to R.C. §4117.02 contained in H.B. 1, which declassified SERB ALJs in a budget bill, is unconstitutional.

Ms. Kingsley argued that the enabling legislation was facially unconstitutional as it was enacted in violation of Article II, Section 15(D), the one-subject rule. SPBR lacked jurisdiction to decide either constitutional issue, be it facial or as applied. A facial constitutional challenge need not be raised before the agency. No record is required. But, an as applied challenge must be timely raised and requires a record be developed before the agency, *City of Reading v. PUCO* (2006) 109 Ohio St 3d 193 and *Cleveland Gear Co v. Limbach* (1988) 35 Ohio St 3d 229.

Due to separation of powers, only a common pleas court, or higher, has jurisdiction to hear a facial constitutional challenge to a statute, *Maloney v. Rhodes* (1976) 45 Ohio St 2d 319 and *Pickaway County Skilled Gaming LLC v. Cordray* (2009) 183 Ohio App 3d 390 (rev on other grounds 127 Ohio St 3d 104).

The salient point is that an agency must create a record for an issue that it cannot decide. Why this is unwise and inadequate is discussed next.

Proposition of Law No. III:

A SERB ALJ, terminated as a result of the amendment of R.C. §4117.02 in H.B. 1, (declassifying her position) has no plain and adequate remedy in the ordinary course of the law through appeal to SPBR.

This Honorable Court has consistently held, as did the Tenth District, that appeal from SPBR to a common pleas court, which could decide the constitutional issue, was "an adequate remedy in the ordinary course of law", precluding mandamus. Such a finding cannot withstand scrutiny under the peculiar facts of this case. That precedent must be overruled or at least distinguished for an unclassified employee who claims a constitutional defense to termination.

The holding of this case, and precedent, if not reversed or distinguished, requires a constitutional challenge to begin at an administrative agency which lacks subject matter jurisdiction over the issue, i.e. an unclassified employee. Then, magically, jurisdiction appears in the common pleas court upon appeal. From nothing something is created. Is it legally possible for a common pleas court to acquire jurisdiction to decide the constitutionality of a statute when the appeal originates from a board without jurisdiction over the issue? A common pleas court cannot create its own jurisdiction and when the trial court was without jurisdiction it is improper for a court of appeals to pass upon the issues, *Stancourt v. Worthington City School Dist* (2005) 164 Ohio App 3d 184. Better stated, when the lower court has no jurisdiction of the subject matter, an appellate court also has none, *Armour v. L.H.* 608 N. W. 2d 599 (Neb, 2000). It is not

an adequate remedy to first to go an agency without jurisdiction and then to a court without jurisdiction.

Such a requirement is also untenable because it violates the doctrine of separation of powers. An administrative agency is part of the executive branch. A challenge from a citizen against the legislature must begin in the courts. Except for the case at bar, counsel can find no case that a challenge to facial unconstitutionality must begin an administrative proceeding.

The legislature created the limitation. R.C. 2731.05 states, "The writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law". The legislature did not define what that means. That left it to the courts.

First, what is the "remedy" that a common pleas court as a reviewing court can render? If for some reason, upon the facts of this case, upon appeal there is jurisdiction in a court of common pleas, yes, as a court it can declare the statute unconstitutional. However, since this would be a declaratory judgment, it cannot order reinstatement. There is no presumption that SERB will follow or honor any finding favorable to Ms. Kingsley. The courts have consistently held that mandamus is necessary when reinstatement is not forthcoming. See *State ex rel. Bispeck v. Board of Comm'nrs of Trumbull County* (1988), 37 Ohio St.3d 26; *State ex rel. Borsuk v. City of Cleveland* (1972), 28 Ohio St.2d 224.

It should be dispositive to note that none of the cases, be it this Court or lower courts, holding that an administrative appeal is an adequate remedy in the ordinary

course of law to preclude mandamus, involved a *facial* constitutional challenge to the enabling legislation. All of them involved whether or not an employee fit into a particular classification. The case at bar case ignores such distinction.

The general rule is a facial constitutional challenge should go directly to court. *State ex rel Michaels v. Morse* (1956) 165 Ohio St 599 holds:

> But relator contends that the new law is unconstitutional and, therefore, respondent is specially enjoined by the law in effect prior to October 5, 1955, to proceed to hear and determine his claim thereunder. The right of relator to question, by mandamus, the constitutionality of the statute is recognized in Ohio...

Accord, *PUCO of California v. US* (1958) 355 US 534, 78 S. Ct. 446, 2 L Ed. 2d 470 (when only question is constitutionality, agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right), *Weinberger v. Concetta* (11975) 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed. 2d 522 (when only issue is constitutionality of statute, a matter which is beyond agency jurisdiction to determine, exhaustion is futile and is a commitment of administrative resources unsupported by any administrative or judicial interest), *Salsbury Labs v. Iowa Dept Environmental Quality*, 276 N.W.2d 830(Iowa, 1979) (attack on validity of agency's enabling statute, administrative remedy is inadequate), *Franklin v. Natural Resources and EPA Cabinet, Kentucky,* 799 S.W. 1 (Ky, 1990)(direct judicial relief is available, without exhaustion of administrative remedies when no disputed facts and is confined to application of statute),

What is "adequate"? Adequate encompasses not only the ultimate relief granted, but also how difficult it is to achieve the result. Adequate means "complete, beneficial,

and speedy." *Chagrin Falls*, 96 Ohio St.3d 400, *supra*. Certainly, a two-step procedure to get to the relief desired is not speedy. It is extremely costly. It requires arguing a constitutional issue before a disgruntled, disinterested and powerless board. It is presenting evidence to lay persons who have no understanding of the issue or of evidence. It subjects a terminated employee to potential procedural defaults that could defeat a constitutional challenge. In fact, that has occurred. Ms. Kingsley's appeal from SPBR was dismissed upon a procedural ground. See 2011 WL 1782208. Reconsideration is pending. Appeal to this court is for certain. Finally, as argued below, in this case, there can be no fair and impartial tribunal presiding.

Appellant understands the consternation of a court of appeals if it is required to hear evidence. However, inconvenience is not a reason to slam shut the courthouse door but claim it is open by pointing to an administrative basement window to crawl through. To do so bars an employee from direct, speedy, affordable relief. The facts of this case speak for themselves- 19 months have passed since Ms. Kingsley's termination and the obvious conclusion that this statute is unconstitutional has yet to be addressed. This Court must not ignore the fact that Ms. Kingsley was fired ten months short of twenty-five (25) years retirement. If Governor Kasich gets his way, PERS benefits will be reduced. Will Ms. Kingsley be denied her retirement benefits because this case dragged on? Mandamus will assure reinstatement as a classified employee before the axe drops.

Proposition of Law No. IV:

Mandamus coupled with a request for a mandatory

injunction requesting a declaration H.B. 1 is unconstitutional, for reinstatement and back pay is the proper remedy for a SERB ALJ who contends her declassification by H.B. 1 was enacted in violation of Ohio Constitution, Article II, Section 15(D), the one subject rule commonly referred to as logrolling.

The decision of the Tenth District correctly applied this Court's precedent insofar as it held that mandamus in the Court of Appeals was proper in this case because Ms. Kingsley could not obtain her full range of relief by way of a declaratory judgment in the court of common pleas. A court of common pleas can grant a prohibitory injunction, but it cannot grant a mandatory injunction. A prohibitory injunction cannot grant the relief of reinstatement and back pay. The courts always jealously guard "the issue" in a case. This case has to begin as a declaratory judgment. The Tenth District properly held that, while a common pleas court can declare a statute unconstitutional in a declaratory judgment action, such an action is limited to the declaration only and the court cannot grant mandamus-type relief.

However, its holding that SPBR was an adequate remedy is the error appealed herein. Mandamus is the appropriate remedy because only it grants Appellant "complete, beneficial, and speedy" relief. See *State ex rel. Village of Chagrin Falls v. Geauga County Bd. of Comm'nrs* (2002), 96 Ohio St.3d 400.

This court held in *State ex rel Carver v. Hull* (1994) 70 Ohio St 3d 570 mandamus was a proper remedy for reinstatement when SPBR lacked jurisdiction over recall rights (because SPBR lacks jurisdiction to determine recall rights under R.C. 124.03(A), Carver had no adequate remedy via appeal and has satisfied the test for

issuance of a writ of mandamus). *State ex rel Miller v. Witter* (1926) 114 Ohio St 122, *Toledo v. Osborn* (1926) 23 Ohio App 62, and *State ex rel Click v. Thormyer* (1958) 105 Ohio App 479 stand for the proposition that mandamus is the means by which a public employee may recover a classified position when the job action the employee is challenging is not appealable under the civil service laws. Here Ms. Kingsley can not appeal her unclassified status. No distinction should be drawn as to why SPBR lacks jurisdiction. In this case it possessed no jurisdiction over unclassified employees.

Proposition of Law No. V:

A formerly classified SERB ALJ terminated as a result of statutory declassification through mandamus can seek a declaratory judgment that H.B. 1 which declassified her by amending R.C. §4117.02 is unconstitutional "as applied to her".

If H.B. 1, and therefore R.C. §4117.02 as amended, is constitutional upon its face, can Ms. Kingsley include an "as applied" constitutional challenge in her mandamus action? Of first impression is the point that the legislature is not an appointing authority. When an appointing authority abolishes a classified position due to an alleged budget crisis, it must be done in good faith and not as a subterfuge. If the job does not go away, but rather is filled by someone else, the removal was unconstitutional as the abolishment was done in bad faith. Here Appellant was the only classified ALJ and SERB still refers hearings to an ALJ. The distinction without a difference is that an unclassfied SPBR ALJ now performs her duties. Recall there is no distinction between SERB and SPBR ALJs after merger. Certainly, targeting her for elimination violates classified service law. A classified employee may not be removed under the guise of

abolishing his office when, in fact, the transaction amounts to no more than a change in the name of the position and the appointment of another person, with the duties remaining substantially the same. See *Weston v. Ferguson* (1983), 8 Ohio St.3d 52. Job abolishment as a pretense to target a specific employee for termination cannot withstand scrutiny. *Penrod v. Ohio Dept of Admin. Svs.* (2007), 113 Ohio St.3d 26. The claim of cost efficiency can be refuted by evidence. Someone from SERB went to the legislature in order to accomplish the same illegal purpose. An unclassified SPBR ALJ should have been first axed for budget purposes. There is no reason in the law not to permit an employee to claim "as applied", regardless of the fact that the legislature did it and not the appointing authority. Where is the record created. The requirement to create a record before the agency cannot apply when the agency lacks jurisdiction. The Court of Appeals magistrate must be tasked to do so.

Proposition of Law No. VI:

SPBR cannot hear the appeal of a SERB employee as the two boards merged and there is no procedure to challenge, recuse and replace a SPBR member for bias, *Ohio Transp. Inc. v. Pub. Util. Comm'n* (1955) 164 Ohio St. 98, overruled as unconstitutional.

Appellant addressed this issue in her SPBR Pre Hearing Brief and again in her Memorandum Contra to Dismiss, under Paragraph D, Illusionary Relief. The court ignored this argument in regard to whether or not relief could be adequate. H.B. 1 merged SERB and SPBR. There is no longer a distinction between a SERB ALJ and a SPBR ALJ. A SERB ALJ will hear a SPBR case and vice-versa. SERB's chairman assigns an ALJ to a case, either SERB or SPBR. The chairman of SERB assumed the lion's

share of oversight of SPBR. It appears that the chairman of SERB makes all administrative decisions for both boards. It includes budget, hiring, and firing of employees. The only thing he does not control is the actual board decisions. It is not an adequate remedy to require a SERB employee to appeal to SPBR when the SPBR board will be listening to unfavorable allegations against the person who controls its purse strings. Using any test, the board members must recuse themselves.

The problem is that Ohio administrative law lacks any procedure to challenge a board member for cause. It lacks any procedure to allow a board member to voluntarily recuse themselves. There is no procedure to replace a board member removed for cause or voluntarily recused. The holding of this Court, in *Ohio Transport Inc. v. Pub. Util. Comm'n* (1955) 164 Ohio St. 98 is that a biased tribunal is not subject to challenge. Under Ohio law, Daniel had no remedy to protest entering the lion's den. The absence of a procedure for recusal denies federal due process of law. Administrative proceedings are subject to due process. It is axiomatic that a hearing conducted before a biased tribunal does not fulfill a requisite element of fundamental fairness that must predominate in all quasi-judicial proceedings. A rule that requires a litigant to submit his controversy to a tribunal of which his adversary is a member, violates due process. See *Ward v. Village of Monroeville* (1972), 409 U.S. 57 (right to appeal is not sufficient remedy for denial of due process resulting from biased trier of fact), *Withrow v. Larkin* (1975), 421 U.S. 35 (probability of unfairness should always be prevented), *Tumey v. Ohio* (1927), 273 U.S. 510; see also, *Gibralter Mausoleum Corp. v. City of Cincinnati*

(1981), 1 Ohio App.3d 107 and *Sorin v. Bd. of Ed. of Warrensville Heights Sch. Dist.* (1974), 39 Ohio Misc. 108.

Certainly requiring a hearing before a biased board is not an adequate remedy.

CONCLUSION

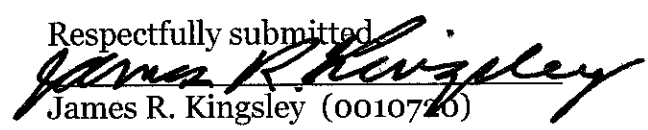
The error arose because mandamus case law for a classified employee was mistakenly used as precedent for an unclassified employee. The classified employee must appeal to and through SPBR. The unclassified employee is not permitted to appeal to SPBR. The distinction, not recognized, is paramount. If this decision is allowed to stand, a facial constitutional challenge to statutes must begin in an administrative agency which lacks jurisdiction, is powerless to grant relief and is hostile to the issue. It ends in a court which must create its own jurisdiction. A facial constitutional challenge to a statute is within the exclusive, original jurisdiction of the courts because, to hold otherwise, would violate the doctrine of separation of powers. The issue of logrolling is not a SPBR personnel issue even though the outcome of the challenge will ultimately be applied by SPBR. An appeal to SPBR, and then to common pleas court, cannot grant complete relief.

An "as applied" challenge to the relevant statute must be heard somewhere. The only forum with jurisdiction is the court hearing the mandamus action. SERB, attempted to hoodwink the legislature to be its fall-guy to accomplish declassification without legislative hearing. Denying that agency bias can exist, or acknowledging that it does exist and not providing any mechanism for challenge, recusal and removal violates federal due process. This Honorable Court should rule that: (1) Since SPBR lacks

jurisdiction to hear the appeal of the termination of an unclassified employee, a requirement to appeal to it can not be an adequate remedy; (2) For an unclassified employee, Mandamus is a proper remedy to challenge termination; (3) Mandamus in the Court of Appeals alleging a statute is unconstitutional upon its face and requesting a mandatory injunction is the proper way to challenge H.B 1; (4) When a facial constitutional challenge to a statute is raised, appeal to an administrative agency is not an "adequate remedy in the ordinary course of law"; (5) The record for an "as applied" constitutional challenge to a statute accompanying a facial challenge may be added to a facial challenge in Mandamus or may be created without a facial challenge; (6) An administrative board cannot be biased. In the absence of a procedure to challenge, recuse and replace, the board can not act to remove. If action is taken, it is void ab initio. The legislature must be advised of this constitutional infirmity.

This cause must be reversed and remanded with an order for the Mandamus to proceed.

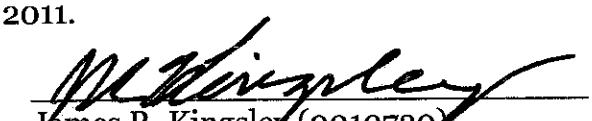
Respectfully submitted,



James R. Kingsley (0010720)
COUNSEL FOR APPELLANT,

CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief was sent by ordinary U.S. mail from Circleville, Ohio to counsel for Appellee, Michael C. McPhillips and Reid T. Caryer, Ohio Attorney General's Office, Employment Law Section, 30 East Broad Street, 23rd Floor, Columbus, Ohio 43215-3400, on June 13, 2011.



James R. Kingsley (0010720)
COUNSEL FOR APPELLANT

APPENDIX

IN THE SUPREME COURT OF OHIO

State ex rel. Kay A. Kingsley	:	11-0441
Appellant	:	On Appeal from the Franklin County Court of Appeals,
-vs-	:	Tenth Appellate District
State Employment Relations Board	:	Court of Appeals Case No. 09AP-1085
Appellee	:	

NOTICE OF APPEAL OF APPELLANT KAY A. KINGSLEY

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COUNSEL FOR APPELLEE, STATE EMPLOYMENT RELATIONS BOARD

FILED
MAR 17 2011
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SUPREME COURT OF OHIO

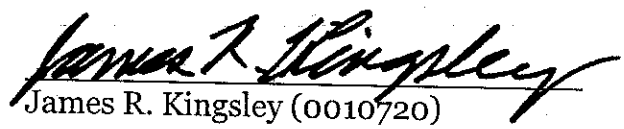
Notice of Appeal of Appellant Kay A. Kingsley

Appellant Kay A. Kingsley hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 09AP-1085 on February 1, 2011.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

KINGSLEY LAW OFFICE, by

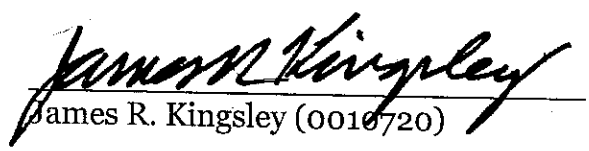


James R. Kingsley (0010720)

COUNSEL FOR APPELLANT,
KAY A. KINGSLEY

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail from Circleville, Ohio to counsel for Appellee, Michael C. McPhillips and Reid T. Caryer, Ohio Attorney General's Office, Employment Law Section, 30 East Broad Street, 23rd Floor, Columbus, Ohio 43215-3400, on March 17, 2011.



James R. Kingsley (0010720)

COUNSEL FOR APPELLANT,
KAY A. KINGSLEY

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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State ex rel. Kay A. Kingsley,

Relator,

v.

State Employment Relations Board,

Respondent.

No. 09AP-1085

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on February 1, 2011, the objections to the decision of the magistrate are overruled, the decision of the magistrate is approved and adopted by the court as its own, and it is the judgment and order of this court that this original action is hereby dismissed. Costs shall be assessed against relator.

Respondent's February 22, 2010 Motion for Protective Order Staying Discovery is hereby denied as rendered moot.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

Judith French

Judge Judith L. French

Peggy Bryant

Judge Peggy Bryant, P.J.

G. Gary Tyack

Judge G. Gary Tyack

EXHIBIT 2

APPX PG 13

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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State ex rel. Kay A. Kingsley,

Relator,

v.

State Employment Relations Board,

Respondent.

No. 09AP-1085

(REGULAR CALENDAR)

D E C I S I O N

Rendered on February 1, 2011

Kingsley Law Office, and *James R. Kingsley*, for relator.

Michael DeWine, Attorney General, *Michael C. McPhillips*, and *Reid T. Caryer*, for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Kay A. Kingsley ("relator"), commenced this original action in mandamus seeking a declaration that Am.Sub.H.B. 1, 128th General Assembly ("H.B. 1"), is unconstitutional and an order that respondent, the State Employment Relations Board ("SERB"), recognize relator as a classified employee and reinstate her to her

EXHIBIT 1
APPX PG. 4

former position as an administrative law judge. SERB has filed a motion to dismiss relator's action, pursuant to Civ.R. 12(B)(1), (B)(6), and App.R. 6.

{¶2} SERB employed relator as an administrative law judge from January 1999 to October 2009. Effective July 17, 2009, the General Assembly enacted H.B. 1, Ohio's biennial budget bill, which, in part, revised portions of R.C. Chapter 4117, including a revision to R.C. 4117.02(H) that changed relator's position from the classified service to the unclassified service. On October 26, 2009, SERB notified relator that her employment as an unclassified administrative law judge was being terminated, effective October 30, 2009. On November 20, 2009, relator filed this mandamus action, asserting that H.B. 1 is unconstitutional, both on its face and as applied to her, and requested an order that SERB recognize her as a classified employee and reinstate her to her former position.[1] Relator claims that H.B. 1 is facially unconstitutional because it violated Ohio's one-subject rule, Section 15(D), Article II, Ohio Constitution, and that SERB unconstitutionally applied amended R.C. 4117.02(H) to her retroactively.

{¶3} The Ohio Constitution confers upon the Supreme Court of Ohio and the Ohio courts of appeals concurrent, original jurisdiction over writs of mandamus--written orders, in the name of the state, that command a public officer or agency to perform an official act. Sections 2 and 3, Article IV, Ohio Constitution; R.C. 2731.01. To be entitled to a writ of mandamus, a relator must demonstrate the following: (1) the relator has a clear legal right to the requested relief; (2) the respondent is under a clear legal duty to

[1] Relator also filed an appeal from her removal with the State Personnel Board of Review ("SPBR"), but SPBR dismissed relator's appeal for lack of jurisdiction because relator was removed from an unclassified position.

perform the requested act; and (3) the relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Natl. City Bank v. Bd. of Edn.* (1977), 52 Ohio St.2d 81, 84. In its motion to dismiss, SERB focuses on the third requirement and argues that relator could find adequate relief in the court of common pleas by filing an action for a declaratory judgment that H.B. 1 is unconstitutional and/or through the administrative appeal process, by appealing her removal to SPBR and, if necessary, from SPBR to the court of common pleas.

{¶4} Pursuant to Civ.R. 53(D) and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate agreed with SERB's arguments and concluded that the true objective of relator's action is a declaratory judgment, over which this court lacks jurisdiction, and that relator could obtain adequate relief in the court of common pleas through an action for a declaratory judgment. Therefore, the magistrate recommended that the court grant SERB's motion to dismiss.

{¶5} Relator has filed timely objections to the magistrate's conclusions of law. First, relator asserts that the magistrate erroneously concluded that the objective of her action is a declaratory judgment and that she could obtain adequate relief in the court of common pleas. In her second objection, relator contends that the magistrate failed to consider binding precedent that a facial constitutional challenge may be initially raised in the court of appeals.

{¶6} In opposition to SERB's motion to dismiss and in support of her contention that a writ of mandamus is the appropriate form of relief here, relator relies on *State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363 ("*OCSEA*"). In that case, the OCSEA, the exclusive bargaining representative for certain collective-bargaining units in Ohio, sought to include within those units the employees of the Ohio School Facilities Commission ("OSFC"), and filed petitions with SERB for amendment of certification and clarification of a bargaining unit. While OCSEA's petitions were pending before SERB, the General Assembly enacted Am.Sub.H.B. 405 ("H.B. 405"), a budget corrections bill that amended R.C. 3318.31(B) to exempt OSFC employees from R.C. Chapter 4117, and to exclude OSFC employees from the statutory definition of public employees. SERB dismissed OCSEA's petitions based on the statutory amendment, and OCSEA filed an action for a writ of mandamus in this court. OCSEA argued that the amendment to R.C. 3318.31(B), upon which SERB relied, was unconstitutional because it violated the one-subject rule. Although a magistrate of this court concluded that this court lacked jurisdiction because the real object of OCSEA's action was a declaration that H.B. 405 was unconstitutional, we rejected the magistrate's conclusions of law. Instead, we "determined that an action for declaratory judgment would not provide OCSEA with a plain and adequate remedy at law [and] that OCSEA's petition for a writ of mandamus was the appropriate vehicle by which to challenge SERB's dismissal order." *OCSEA* at ¶6. The Supreme Court affirmed.

{¶7} "It is well settled that 'if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus.' " Id. at ¶11, quoting *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 634, 1999-Ohio-130. The Supreme Court of Ohio and the Ohio courts of appeals lack original jurisdiction over actions that, although styled in mandamus, actually seek a declaration of rights, status or other legal relations. *OCSEA* at ¶11. Nevertheless, " 'where declaratory judgment would not be a complete remedy unless coupled with ancillary relief in the nature of mandatory injunction, the availability of declaratory injunction is not an appropriate basis to deny a writ to which the relator is otherwise entitled.' " *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd.* (1986), 22 Ohio St.3d 1, 8, quoting *State ex rel. Fenske v. McGovern* (1984), 11 Ohio St.3d 129, paragraph two of the syllabus. A declaratory judgment that merely announces the existence of a duty has generally not been deemed as adequate as a writ of mandamus that compels performance. *OCSEA* at ¶16, citing 1 Antieau, The Practice of Extraordinary Remedies (1987) 300, Section 2.06.

{¶8} The crux of the parties' initial disagreement in *OCSEA* was the third requirement for mandamus relief, whether the relators lacked a plain and adequate remedy in the ordinary course of law. SERB argued that OCSEA had a plain and adequate remedy in an action for declaratory judgment.[2] The Supreme Court, however,

[2] SERB also argued that OCSEA had an adequate remedy in an administrative appeal from SERB's dismissal of the petitions, but the Supreme Court did not address that argument because it determined that SERB had waived it by not raising it before this court.

determined that a declaration of H.B. 405's unconstitutionality would not provide OCSEA with a complete remedy. Specifically, "[b]ecause SERB had dismissed [OCSEA's] petitions, it would be under no obligation to reinstate the petitions if a trial court held that [H.B. 405] was unconstitutional; only a declaratory judgment coupled with a mandatory injunction ordering the reinstatement of the six petitions would provide complete relief." *OCSEA* at ¶17. Thus, the Supreme Court rejected SERB's argument that OCSEA had a plain and adequate remedy in the ordinary course of law through an action for a declaratory judgment. The court stated, at ¶20, "we have jurisdiction to entertain this cause because the relators seek an order mandating SERB, a public agency, to comply with the affirmative statutory duties required of it[.]"

{¶9} Since *OCSEA*, the Supreme Court of Ohio has decided *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327 ("*UAW*"). There, the court affirmed the dismissal of a mandamus action because the relator's true objectives were a declaratory judgment and prohibitory injunction and because the relator had an adequate remedy at law via a declaratory judgment action. *UAW* involved the constitutionality of amendments to R.C. 4123.93 and 4123.931, manifestly intended to comply with the Supreme Court's holding in *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 135, 2001-Ohio-109, that the former version of R.C. 4123.931 was unconstitutional.[3] Five days after the amendments took effect, the relator, a labor union (the "union"), filed a

[3] R.C. 4123.93 and 4123.931 created statutory subrogation in favor of identified subgrogees that pay workers' compensation benefits.

complaint in this court against the Ohio Bureau of Workers' Compensation and its administrator (collectively, "BWC"), alleging that the amended statutes were unconstitutional for the same reasons as former R.C. 4123.931 and requesting a writ of mandamus compelling BWC to follow the law set forth in *Holeton* and *Glaspell v. Ohio Edison Co.* (1987), 29 Ohio St.3d 44. The union did not allege that it or any of its members had been harmed by the enactment or application of the amended statute.

{¶10} This court dismissed the union's action in *UAW* upon determining that the union's real objects were a declaratory judgment and prohibitory injunction and that the union had an adequate remedy in the ordinary course of law, through a declaratory judgment action. The Supreme Court agreed with our determination of the true nature of the union's complaint, stating, at ¶42, as follows:

> Although the allegations of UAW's complaint are couched in terms of compelling affirmative duties, i.e., to "follow the law" in *Holeton* and *Glaspell*, the manifest objectives of relator's complaint are (1) a declaratory judgment that R.C. 4123.93 and 4123.931, as amended by S.B. 227, are unconstitutional under this court's holdings in *Holeton* and *Glaspell* and (2) a prohibitory injunction preventing the BWC from applying the amended statutory provisions.

The court also stated, at ¶57, as follows:

> * * *if a common pleas court should find S.B. 227 unconstitutional and issue a prohibitory injunction preventing BWC from applying S.B. 227, there would be no need for a mandatory injunction that BWC not apply the predecessor statute, because it was found unconstitutional in *Holeton*.

Accordingly, the Supreme Court held that an action for declaratory relief and a prohibitory injunction would constitute an adequate legal remedy.

{¶11} Despite the general rule that it lacks jurisdiction to consider mandamus actions challenging the constitutionality of new legislation because they constitute disguised actions for declaratory judgment and prohibitory injunction, the Supreme Court acknowledged in *UAW*, at ¶44, that it has recognized limited circumstances in which a mandamus action may test a statute's constitutionality. See, e.g., *State ex rel. Watson v. Hamilton Cty. Bd. of Elections*, 88 Ohio St.3d 239, 242, 2000-Ohio-318 (considering a constitutional claim in mandamus where an action for a declaratory judgment and prohibitory injunction would not have been sufficiently speedy in an expedited election case); *State ex rel. Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 504, 1999-Ohio-123 (considering a constitutional challenge to the tort-reform act in mandamus, but noting that the Court would "entertain a public action only '*in the rare and extraordinary case*' where the challenged statute operates, '*directly and broadly, to divest the courts of judicial power.*' (Emphasis added.) We will not entertain a public action to review the constitutionality of a legislative enactment unless it is of a magnitude and scope comparable to that of [the tort-reform act].").

{¶12} In *UAW*, the Supreme Court distinguished both *OCSEA* and *Sheward*. The Court noted that, unlike the relator in *OCSEA*, the union in *UAW* did not allege any specific case in which BWC failed to comply with its alleged legal duty. The general rule precludes a mandamus action that presents "only a general and abstract question concerning the constitutionality of a legislative act instead of a claim that a 'specific public entity had failed to perform its clear legal duty[.]' " *UAW* at ¶51, quoting *OCSEA* at ¶19. In distinguishing *Sheward*, the Court stated that *UAW* was not a rare and

extraordinary case where the challenged legislation operated directly and broadly to divest courts of judicial power. Thus, the Supreme Court concluded that neither it nor the court of appeals had jurisdiction over the relator's claims, the real objects of which were a declaratory judgment and prohibitory injunction. The Supreme Court also held that a declaratory judgment action would offer the union an adequate remedy and that mandamus was, therefore, inappropriate.

{¶13} This case is more akin to *OCSEA* than *UAW*. Relator's complaint does not present only a general and abstract question concerning the constitutionality of H.B. 1. To the contrary, similar to OCSEA's claim that SERB failed to comply with a legal duty by dismissing its petitions, relator here contends that SERB failed to comply with legal duties applicable to the removal of classified employees when it terminated her employment. In both instances, SERB's duty turned on the status of its employees' positions, which in turn depended on the constitutionality of a statutory amendment. Moreover, like in *OCSEA*, relator argues that she could not obtain complete relief in an action for a declaratory judgment. A declaration that H.B. 1 is unconstitutional, and an injunction prohibiting its continued application, absent a mandatory injunction, would not provide relator complete relief because it would not require the reinstatement of relator's employment. Accordingly, the availability of a declaratory judgment action does not provide a basis for precluding relator's mandamus action. For these reasons, we sustain relator's first objection.

{¶14} Although we agree with relator that an action for a declaratory judgment and prohibitory injunction in the court of common pleas would not offer her adequate

relief so as to foreclose a mandamus action, we must also consider, unlike the Supreme Court in *OCSEA,* whether the availability of an administrative appeal constitutes an adequate legal remedy that would preclude this mandamus action. Here, SERB raised the availability of the administrative appeal process as an adequate remedy at law in its motion to dismiss relator's action, although the magistrate did not discuss that potential remedy in her decision.

{¶15} Relator did file an appeal with SPBR from her removal, but SPBR dismissed the appeal upon SERB's motion to dismiss. According to SPBR's opinion, relator argued that H.B. 1 was unconstitutional because it violated Ohio's one-subject rule. SPBR, however, concluded that it possessed neither the authority to consider an appeal from the removal of an unclassified employee nor the jurisdiction to determine the constitutionality of H.B. 1.[4] SPBR stated that it was required to presume the constitutionality of the statutory amendment placing relator's position in the unclassified service and, accordingly, dismissed relator's appeal for lack of subject-matter jurisdiction.

{¶16} Relator concedes that she was entitled to appeal SPBR's dismissal to the court of common pleas pursuant to R.C. 119.12. Nevertheless, she argues that, even if her right to appeal her removal to SPBR were an adequate remedy, which she contests, her right to appeal *from* SPBR to the common pleas court "is not only not adequate but also not part of the concept." This court has previously rejected relator's argument. In *State ex rel. Rennell v. Indus. Comm.*, 10th Dist. No. 07AP-67, 2007-Ohio-4597, the

[4] The parties concede that SPBR lacks jurisdiction to declare a statute unconstitutional.

relator argued that an administrative appeal from SPBR's dismissal of his appeal for lack of jurisdiction was not an adequate remedy where SPBR lacked authority to hear his claim. We held that the relator's contention regarding SPBR's authority was irrelevant because "[t]he relevant issue is whether an adequate remedy at law existed because [the relator] could have appealed the SPBR's [dismissal] to the court of common pleas." Id. at ¶4. We concluded that, because "R.C. 119.12 permitted relator to appeal the SPBR's order to the common pleas court[,] an adequate remedy existed." Id. Clearly then, the availability of a R.C. 119.12 appeal from SPBR's dismissal order is relevant to the existence of an adequate remedy at law.

{¶17} Relator also argues that the common pleas court would have lacked authority to hear her constitutional challenge and to declare H.B. 1 unconstitutional in a R.C. 119.12 appeal. Rather, relator states, "[t]he only issue on appeal [would have been] whether or not [S]PBR did have jurisdiction to hear the as applied [retroactivity] challenge, conceding that it can not hear the facial [one-subject] challenge." We disagree. SPBR determined that it lacked jurisdiction to hear relator's appeal because relator was not a classified employee, based on SERB's mandatory presumption that the statute removing her position from the classified service was valid. The question before the common pleas court in an administrative appeal would have been whether SPBR had jurisdiction to consider relator's appeal from her removal, not whether SPBR had jurisdiction to decide constitutional questions.

{¶18} The Supreme Court of Ohio has held that an appellant may raise a facial constitutional challenge in an administrative appeal even where the appellant did not

raise that challenge before the commission or agency. See *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 195-96, 2006-Ohio-2181; see also *Derakhshan v. State Med. Bd. of Ohio*, 10th Dist. No. 07AP-261, 2007-Ohio-5802 (permitting an appellant to raise a facial constitutional challenge to the statute upon which the medical board relied to revoke his medical license on appeal); *Leon v. Ohio Bd. of Psychology*, 63 Ohio St.3d 683, 1992-Ohio-105 (considering argument that the regulation upon which the board relied to revoke the appellant's psychology license was unconstitutionally vague). A court may also consider an as-applied constitutional challenge in an administrative appeal. In contrast to a facial challenge, however, when a litigant challenges the constitutionality of a statute as applied to a specific set of facts, extrinsic facts are needed, and the litigant must raise the as-applied challenge, in the first instance, before the administrative agency to allow the parties to develop an evidentiary record. *Reading* at ¶15-16.

{¶19} On administrative appeal from SPBR, the common pleas court could have determined the constitutionality of H.B. 1 and, should the court have determined that H.B. 1 was unconstitutional, determined that relator remained a classified employee at the time of her removal. See *Barr v. Harrison Cty. Common Pleas Court*, 10th Dist. No. 05AP-760, 2006-Ohio-1348 (common pleas court and court of appeals considered and determined appellant's employment status on appeal from SPBR dismissal for lack of jurisdiction based on appellant's unclassified status). While relator points out that no factual record was created before SPBR, it is not clear from the record before this court whether relator actually raised her as-applied challenge to H.B. 1 in her SPBR appeal,

so as to preserve that argument. Nevertheless, assuming relator did preserve that argument, if the trial court had concluded that H.B. 1 was not facially unconstitutional and that extrinsic facts were necessary to determine whether application of amended R.C. 4117.02(H) to relator was an unconstitutional, retroactive application, the court could have returned the matter to SPBR for creation of a factual record. Regardless, contrary to relator's argument, the common pleas court would not have been precluded from considering and determining the constitutionality of H.B. 1 in its review of SPBR's dismissal.

{¶20} Relator next contends that an administrative appeal would not provide an adequate remedy because the common pleas court lacks the authority to order her reinstatement, but, instead, would have been constrained to ordering SPBR to accept jurisdiction over her appeal. While relator is correct that the common pleas court could not order her reinstatement, that fact does not render the remedy offered by the administrative appeal process inadequate. Of particular relevance in this regard is *State ex rel. Weiss v. Indus. Comm.*, 65 Ohio St.3d 470, 1992-Ohio-71. In *Weiss*, the Supreme Court denied an action for a writ of mandamus to compel reinstatement and payment of back wages where the relator was terminated after her position was removed from the classified service. In one of several separate SPBR appeals, the relator contested the removal of her position from the classified service. The Court noted the relator's concession that SPBR lacked jurisdiction over her appeal because the board did not have authority to issue a declaratory judgment determining the classified or unclassified status of an employee's position, but stated that the relator's

decision to forgo the completion of the administrative appellate process "does not make [that] process unavailable or inadequate." Id. at 474. As here, the common pleas court would have lacked authority in an administrative appeal to order the relator's reinstatement, which she sought in her mandamus action. Nevertheless, the Supreme Court held that the administrative appeal process was an adequate remedy, precluding mandamus. The Supreme Court went on to state, "before a writ of mandamus will issue to compel a classified employee's reinstatement or back pay, there must first be a final determination made in an appeal *from* SPBR * * * that the employee was 'wrongfully excluded from employment.' * * * Until this determination is made, a 'wrongful exlcu[sion]' has not occurred, and mandamus does not lie." Id. at 476-77. (Emphasis added.)

{¶21} Had the common pleas court determined that H.B. 1 was unconstitutional, SPBR would have had jurisdiction on remand to consider whether relator was properly removed from her classified position and, if not, to order her reinstatement. Until that determination is made, a wrongful exclusion has not occurred, and mandamus is inappropriate. See *Weiss* at 477. For these reasons, we conclude that the administrative appeal process provided relator an adequate remedy at law.

{¶22} In her second objection to the magistrate's decision, relator states that the magistrate failed to consider binding precedent holding that a facial constitutional challenge may be initially raised in the court of appeals. Relator cites cases holding that a facial constitutional challenge to a statute may be raised on administrative appeal even if not raised at the agency level. See *Reading*; *Cleveland Gear Co. v. Limbach*

(1988), 35 Ohio St.3d 229. Those cases, however, do not address the availability of a writ of mandamus. Here, unlike in the cited cases, relator seeks to bypass the administrative appeal process and initially raise a constitutional challenge in a mandamus action. Both the magistrate and this court have concluded that relator's mandamus action fails because she had an adequate remedy in the ordinary course of law. In this regard, we discern no error in the magistrate's decision, and we overrule relator's second objection.

{¶23} For these reasons, although our reasoning differs from that of the magistrate, we conclude that relator is not entitled to a writ of mandamus, and we grant SERB's motion to dismiss.

Objections sustained in part and overruled in part;
motion to dismiss granted and cause dismissed.

BRYANT, P.J., and TYACK, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Kay A. Kingsley,	:	
Relator,	:	No. 09AP-1085
v.	:	(REGULAR CALENDAR)
State Employment Relations Board,	:	
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on February 24, 2010

James R. Kingsley, and *Nickolas D. Owen*, for relator.

Richard Cordray, Attorney General, *Michael C. McPhillips*, and *Reid T. Caryer*, for respondent.

IN MANDAMUS
ON MOTION TO DISMISS

{¶24} Relator, Kay A. Kingsley, has filed this original action requesting that this court issue a writ of mandamus finding that H.B. No. 1, 128th General Assembly is unconstitutional, ordering respondent, State Employment Relations Board ("SERB"), to

recognize relator as a classified employee, to reinstate relator to her former position of employment, and to award her the cost of her action and attorney fees. SERB has filed a motion to dismiss on grounds that relator's action is actually for declaratory judgment and not mandamus.

Findings of Fact:

{¶25} 1. SERB employed relator as an administrative law judge beginning January 1999.

{¶26} 2. At that time, relator was considered a classified employee.

{¶27} 3. Effective July 17, 2009, the 128th General Assembly passed Am.Sub.H.B. No. 1 ("H.B. No. 1"), Ohio's bi-annual budget bill. Among the changes implemented were revisions to R.C. Chapter 4117. As part of the revisions, several positions, including relator's, were changed from classified service to unclassified service.

{¶28} 4. On October 26, 2009, SERB notified relator that her employment as an unclassified administrative law judge was being terminated, effective October 30, 2009.

{¶29} 5. Relator contends she was terminated because certain board members disagreed with her ruling in a particular case. SERB asserts that her termination was a result of budgetary cuts made by SERB.

{¶30} 6. On November 20, 2009, relator filed the instant mandamus action asserting that H.B. No. 1 is unconstitutional and asking this court to order SERB to reinstate her to her former position and make her a classified employee.

{¶31} 7. On December 22, 2009, SERB filed a motion to dismiss.

{¶32} 8. On January 21, 2010, relator filed a motion opposing SERB's motion to dismiss.

{¶33} 9. The matter is currently before the magistrate on SERB's motion to dismiss.

Conclusions of Law:

{¶34} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545. In reviewing the complaint, the court must take all the material allegations as admitted and construe all reasonable inferences in favor of the nonmoving party. Id.

{¶35} For the reasons that follow, it is this magistrate's decision that this court should grant SERB's motion and dismiss relator's action.

{¶36} As above stated, relator is asking this court to declare H.B. No. 1 unconstitutional. If the statute is found to be unconstitutional, relator contends that she would again be a classified employee and her dismissal by SERB would be improper. Relator also asks this court to order SERB to reinstate her to her position and again designate her as a classified employee.

{¶37} In her memorandum in opposition to SERB's motion to dismiss, relator states that her complaint pleads the following three causes of action:

1. Amended RC §4117.02(H) is facially unconstitutional.

2. Amended RC §4117.02(H) is unconstitutional as applied to Relator's termination.

> 3. Amended RC §4117.02(H) violates RC §1.48 if it is applied retroactively to allow the chairman, and not the Board, to discharge her.

{¶38} Relator does not deny that she seeks declaratory relief in this court. Instead, relator contends that this is the only court wherein the statute can be found unconstitutional and SERB can be required to reinstate her to her position as a classified employee.

{¶39} As part of its argument, SERB contends that relator has an adequate remedy at law. Specifically, SERB argues that relator could file a declaratory judgment action and, if successful, SERB would have no choice but to consider her a classified employee. As a classified employee, relator would have certain rights which SERB would be required to provide her before terminating her from employment. Applying that reasoning, SERB argues that relator does have a plain and adequate remedy in the ordinary course of the law.

{¶40} This magistrate agrees with SERB's argument. Prior to the amendment to R.C. 4117.02, relator was a classified employee and, as such, had certain employment rights that an unclassified employee does not enjoy. In the event that the common pleas court found H.B. No. 1 unconstitutional, the amendments to R.C. 4117.02 could not be applied to her. Relator's termination would no longer be valid and SERB would be required to apply the former law to her. As such, the magistrate disagrees with relator's assertion that this court is the only court which can return her to her former position of employment. Instead, if the statute is found to be unconstitutional, her

termination was improper and she would be returned to her former position of employment as a natural result of the court's decision.

{¶41} In general, when the allegations of a complaint for a writ of mandamus indicate that the real objective of a special writ action is declaratory, then the complaint does not state a cause of action and must be dismissed for want of jurisdiction. *State ex rel. McGrath v. Ohio Adult Parole Auth.*, 100 Ohio St.3d 72, 2003-Ohio-5062. The court of appeals does not have original jurisdiction over declaratory judgment actions. Id. *State ex rel. Ministerial Day Care Assn. v. Zelman*, 100 Ohio St.3d 347, 2003-Ohio-6447.

{¶42} Because the magistrate finds that the true objective of relator's action is declaratory judgment and because relator can find adequate relief in the common pleas court, it is this magistrate's decision that this court should grant SERB's motion and relator's action should be dismissed.

s/s Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).