

In The  
**Supreme Court of Ohio**

State ex rel. Kay A. Kingsley,	:	Case No. 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.	:	

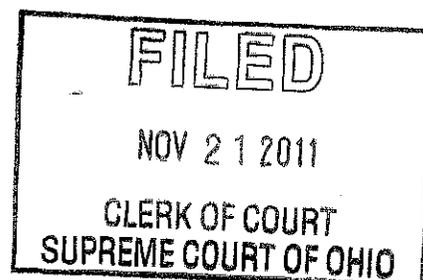
**APPELLEE'S MEMORANDUM IN OPPOSITION  
TO MOTION FOR RECONSIDERATION**

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**APPELLEE'S MEMORANDUM IN OPPOSITION TO APPELLANT'S  
MOTION FOR RECONSIDERATION**

The Court's November 1, 2011 opinion affirming the Tenth District Court of Appeals' dismissal of Relator-Appellant Kay Kingsley's petition for a writ of mandamus should not be disturbed because it was consistent with this Court's long-held position that "[e]xtraordinary relief is not available as a substitute for civil service appeals." *State ex rel. Baker v. State Personnel Bd. of Review*, 85 Ohio St.3d 640, 1999-Ohio-328, 710 N.E.2d 706. Moreover, almost 20 years ago, this Court stated in *State ex rel. Weiss v. Indus. Comm.* (1992), 65 Ohio St.3d 470, 476, 605 N.E.2d 37, "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 [State Personnel Board of Review], a local civil service commission, or other quasi-judicial authority that the employee was wrongfully excluded from employment." (Internal quotations omitted.) 65 Ohio St.3d at 476-477. Nowhere in her initial complaint in the Tenth District Court of Appeals or in any subsequent briefs in that court or this Court has Kingsley alleged that the SPBR or any other entity has determined that she was wrongfully excluded from employment.

The Court in its November 1, 2011 opinion properly found that mandamus did not lie because Kingsley had an adequate remedy at law by way of an appeal to the SPBR and subsequent appeal to common pleas court through R.C. 119.12. Kingsley's argument that her appeal to SPBR was futile because her position had been designated by the General Assembly as unclassified is unavailing. This Court has established that the SPBR's jurisdiction extends to appeals by classified employees of removals from employment "regardless of how they have been designated by their appointing authorities." *Yarosh v. Becane* (1980), 63 Ohio St.2d 5, 17 O.O.3d 3, 406 N.E.2d 1355, paragraph two of the syllabus. Nonetheless, Kingsley, focusing on

the language “designated by their appointing authorities,” attempts to narrow this holding’s applicability to situations in which a public employee should have been treated as classified by their appointing authority but was wrongfully treated as unclassified. She argues the *Yarosh* holding is inapplicable to situations, like her own, in which the General Assembly changed a position from classified to unclassified.

This, however, is not the first reported case in which a public employee experienced an adverse job action after the legislature redesignated her position from classified to unclassified. In *Lawrence v. Edwin Shaw Hosp.* (1986), 34 Ohio App.3d 137, 517 N.E.2d 984, legislation changed the status of employees of county-owned hospitals from classified to unclassified. Two employees were subsequently laid off and challenged the action to the SPBR as violative of their constitutional rights to be free from takings, impairment of contracts, deprivation of due process, and retroactivity of laws. After they were unsuccessful at the SPBR, the employees appealed the matter to common pleas court and the court of appeals. The court of appeals fully addressed each of the employees’ constitutional challenges. 34 Ohio App.3d at 137-141. Accord, *Shearer v. Cuyahoga County Hosp.* (1986), 34 Ohio App.3d 59, 516 N.E.2d 1287. The *Lawrence* and *Shearer* cases illustrate that an adequate remedy at law is available for a public employee to challenge an adverse employment action after his or her position is redesignated by the General Assembly from classified to unclassified.

SERB submits that the holding in *Yarosh* applies to the present situation because SERB did “designate” Kingsley as unclassified. All state appointing authorities designate their employees as either classified or unclassified, whether the designation is based on a legislative directive or an analysis of the employees’ job duties. See R.C. 124.11 (A). When the General Assembly in 2009 amended R.C. 4117.02 (H) through Am. Sub. H.B. 1 (“H.B. 1”) so as to designate

administrative law judges at the State Employment Relations Board (“SERB”), like Kingsley, as unclassified, SERB in turn designated Kingsley as unclassified. Nonetheless, following the amendment, Kingsley asserted that she remained classified. Per *Yarosh*, the R.C. Chapter 119 process through the SPBR and common pleas court was the proper procedure for Kingsley to prosecute her appeal.

In her Motion for Reconsideration, Kingsley also argues that an exception should be made to the holdings of *State ex rel. Weiss*, *State ex rel. Baker*, and *Yarosh* when a relator raises claims of unconstitutionality. SERB submits that the Court passed on this issue in *State ex rel. Weiss* and found that a relator’s assertions that she was unconstitutionally removed from employment do not permit the relator to bypass the administrative appeal process and obtain relief in mandamus. Kingsley attempts to distinguish *State ex rel. Weiss* by discussing pleadings and briefs in that case that are not part of the record herein and were not attached to her Motion for Reconsideration. What is clear from the language of the reported opinion in *State ex rel. Weiss* is that its operational facts were the same as in the present case. Weiss was an employee who had once been classified, but was redesignated as unclassified and subsequently terminated by her appointing authority. In *State ex rel. Weiss*, as here, the relator argued that change of her position from classified to unclassified was unconstitutional. This Court ultimately held that mandamus did not lie, however, because Weiss had an adequate remedy at law though an appeal of her discharge to the SPBR. 65 Ohio St.3d at 473. Similarly, the Court properly held that Kingsley had, and in fact exercised, an adequate remedy at law precluding mandamus, when she appealed her discharge to the SPBR.

Notably, as the Court recognized in its November 1, 2011 Opinion, Kingsley challenged her discharge before the SPBR on grounds that did not require a determination of the

constitutionality of H.B. 1. Specifically, Kingsley argued that the amendments to R.C. 4117.02 (H) within H.B. 1 which made SERB ALJs unclassified only applied to ALJs who were appointed by the SERB Chair and not to ALJs, like herself, who were appointed by the full SERB board.<sup>1</sup> This Court has held that although administrative agencies cannot pass on the constitutionality of a statute, they can pass upon the “proper application or construction of a statute.” *Office of Consumers’ Counsel v. Public Utilities Comm. of Ohio*, 70 Ohio St.3d 244, 247, 1994-Ohio-469, 638 N.E.2d 550. Kingsley’s argument that the R.C. 4117.02 (H) amendment only impacted SERB ALJs who were appointed by the SERB Chair did not have constitutional implications and SPBR had jurisdiction to pass upon it. This further exemplifies the adequate remedy at law that Kingsley had which precluded mandamus relief.

While Kingsley now protests that the SPBR and R.C. 119.12 appeal processes were inadequate remedies at law, it is noteworthy that at the same time she was bringing the present mandamus action, she was invoking the jurisdiction of the SPBR and the common plea court (and later the Tenth District Court of Appeals) to raise the same arguments she raises here. The fact that Kingsley did not prevail in her exercise of her administrative and Chapter 119 remedies does not render them “futile,” as she claims, or inadequate.

Although Kingsley’s arguments are confusing, she seems to say that the Court failed to recognize that the SPBR lacked jurisdiction to decide her constitutional challenges. SERB submits that nothing in the November 1, 2011 Opinion suggests that the Court failed to recognize this. Moreover, SERB has agreed with Kingsley on this issue since the inception of the case. However, the fact that SPBR would have been without authority to find that Kingsley was

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<sup>1</sup> In 2003, the General Assembly amended R.C. Chapter 4117 by, among other things, changing the appointing authority of SERB employees from the SERB Board to the Chair of SERB. See H.B. 95, effective September 26, 2003.

“wrongfully excluded from employment” based on an unconstitutional statute does not mean that the common pleas court and/or court of appeals could not have made that determination in an appeal from the SPBR. Kingsley in fact sought such a determination in her other cases, but was unsuccessful.

Kingsley next argues that a common pleas court cannot exercise jurisdiction over a constitutional issue which SPBR could not have addressed. In Kingsley’s words, “a court of common pleas court cannot create jurisdiction from nothing.” (Appellant’s Motion for Reconsideration, at 7). However, it is long-established in this Court that a facial challenge that could not have been raised at the agency level can be raised in a judicial review of the agency order. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, 520 N.E.2d 188. When a common pleas court entertains such a facial challenge, it is not creating jurisdiction “from nothing”; it is exercising its jurisdiction to review final agency orders pursuant to R.C. 119.12.

For these reasons and reasons set forth in the Appellee’s Brief, SERB respectfully requests that the Court deny Kingsley’s Motion for Reconsideration and that the Court issue a mandate affirming the underlying judgment of the Tenth District Court of Appeal, pursuant to S.Ct. Prac. R. 11.4 (A)(1).

Respectfully submitted,



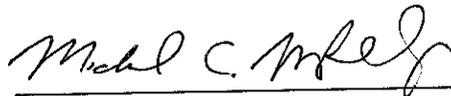
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of this *Appellee's Memorandum in Opposition to Motion for Reconsideration* was served by ordinary U.S. mail to counsel for Appellant, James R. Kingsley, Kingsley Law Office, 157 West Main Street, Circleville, OH 43113, this 21<sup>st</sup> day of November, 2011.



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Michael C. McPhillips