

In the
Supreme Court of Ohio

Jeffrey R. Bair, Plaintiff-Appellant,

v.

Ohio Department of Mental Health, et al., Defendants-Appellees.

Case No. _____

MEMORANDUM IN SUPPORT OF JURISDICTION

**ON APPEAL FROM THE
OHIO COURT OF APPEALS, FIFTH APPELLATE JUDICIAL DISTRICT**

CASE No. 2014-AP-08-0031

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

When this Court decided *Cedar Fair, LP v. Falfas*, 140 Ohio St.3d 447, 19 N.E. 3d 893, 2014-Ohio-3943, last year, it addressed only *part* of the equation when it comes to the scope of a court's authority to vacate an arbitrator's award when challenged under Chapter 2711 of the Ohio Revised Code.

Cedar Fair holds that the scope of review under Chapter 2711 is broad enough to permit a court to vacate an arbitration award where an arbitrator exceeds his or her authority by fashioning a *remedy* falling outside of the array of possible outcomes under the contract by which the arbitrator accepted jurisdiction over the parties' dispute. Before *Cedar Fair*, an order vacating an arbitration award for exceeding arbitral powers essentially was limited to cases where the arbitrator improperly exercised jurisdiction over a dispute. After *Cedar Fair*, Chapter 2711 now can be used *both* to check arbitrator excesses when asserting jurisdiction where none exists *and* when fashioning a *remedy* falling outside of the array of remedies contemplated by the agreement of the parties submitting a dispute to arbitration.

Bair's case frames the question of relief available under Chapter 2711 in a different, but equally important fashion. Bair asks this Court to take his appeal to decide whether *Cedar Fair* also applies when the remedy fashioned by an arbitrator is the product of his or her having ignored or failed to apply lawful standards or principles of law that the parties themselves have agreed the arbitrator should apply in resolving a dispute. Unlike *Cedar Fair*, where this Court focused on whether an arbitrator can exceed his or her powers through fashioning a remedy falling wholly outside of the parties' *agreement*, Bair asks this Court to decide whether Chapter 2711 also authorizes a court to vacate an award proceeding from the arbitrator's failure to apply the very standards or principles of law that the parties lawfully stipulated in their agreement

that the arbitrator should apply ... in this case, a lawful standard requiring management to show that it had “just cause” to remove Bair.

Bair supposes that some members of this Court might wonder what purpose would be served by accepting jurisdiction over his appeal when *Cedar Fair* was decided just last year. To that end, Bair notes that at least 100,000 state, county, and local public employees are covered by collective bargaining agreements in the State of Ohio. Hundreds of thousands more are working under union contracts negotiated in the private sector. And countless thousands more – many of them corporate executives and “key” employees in corporate organizations – work under individual employment contracts spelling out the limited conditions under which their employment relationships can be terminated.

One constant in those instruments is protection against arbitrary discharge. This protection is guaranteed by clauses requiring management to administer discipline in an even-handed fashion ... *and with “just cause.”* Ultimately, this amounts to a contractual right of “due process.” In the context of organized workforces, “just cause” becomes synonymous with “due process.” And when such a “due process” right attaches to a worker in the *public* sector, there is an added measure of significance because “due process” for the *public* employee implicates his or her constitutionally guaranteed property right in continued employment.¹ In other words, an arbitrator who fails to adopt and follow agreed standards in reviewing a dispute over “just cause” violates more than just a party’s rights under a contract.

¹ *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985), *citing Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 11-12, 98 S.Ct. 1554, 1561-62, 56 L.Ed.2d 30 (1978); *Goss v. Lopez*, 419 U.S. 565, 573-74, 95 S.Ct. 729, 735-36, 42 L.Ed.2d 725 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 548 (1972); *Reagan v. United States*, 182 U.S. 419, 425, 21 S.Ct. 842, 845, 45 L.Ed. 1162 (1901).

In Bair's case, the arbitrator indicated that she would apply the so-called "Daugherty Test"² in assessing management's "just cause" for removing Bair. This Court has endorsed the seven-part "Daugherty Test" as a standard for arbitrators in Ohio to use in determining whether management acted with "just cause" in disciplining a bargaining unit member.³ The sixth and seventh parts of that test focus on (1) whether management applied its rules and penalties "evenhandedly and without discrimination to all employees" and (2) whether the degree of discipline administered by management in a particular case "reasonably related" to the "seriousness" of the "proven offense" and the employment record of the employee.⁴

The important questions presented in this case that are of great public or general interest are (1) whether the seven-part "Daugherty Test" continues to have vitality in this state,

² This seven-part test for "just cause" – commonly referred to as the "Daugherty Test" – is found in *Ent. Wire Co.*, 46 Lab. Arb. Rep. 359 (1966).

³ The "Daugherty Test" was endorsed by this Court as an appropriate standard for "just cause" in *Summit County Children Services Board v. Communications Workers of America, Local 4546*, 113 Ohio St.3d 291, 292-93, 865 N.E.2d 31, 33, 2007-Ohio-1949, ¶ 9 and n.1.

⁴ *Summit County Children Services Board v. Communications Workers of America, Local 4546*, *supra*, 113 Ohio St.3d at 293, 865 N.E.2d at 33, n.1; *see also Board of Trustees of Miami Township v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 81 Ohio St.3d 269, 271-72, 690 N.E.2d 1262, 1264, 1998-Ohio-629, expressing the concept a bit differently in terms of a two-part test:

Disciplinary cases constitute the largest single group of cases which are brought to arbitration Arbitrators have noted that the contractual right of the employer to discipline and discharge employees for 'just cause' requires the arbitrators to make two determinations in considering cases: (1) whether a cause for discipline exists and (2) whether the amount of discipline was proper under the circumstances. For example, Arbitrator Burton B. Turkus explained:

In applying the test of "just cause[.]" the arbitrator is generally required to determine ... the reasonableness of the disciplinary penalty imposed in the light of the nature, character and gravity thereof—for as frequently as not the reasonableness of the penalty (as well as the actual commission of the misconduct itself) is questioned or challenged in arbitration. [Citations omitted.]

(2) whether an arbitrator is free upon invoking the “Daugherty Test” selectively to ignore the sixth and seventh parts of that test to resolve a dispute over “just cause,” and (3) whether a court has authority under Chapter 2711 of the Ohio Revised Code to vacate an arbitration award when an arbitrator is not faithful to the standard of review specified by the parties in their contract.

Once the parties to an agreement have defined *both* the standards to be employed in resolving a dispute *and* the array of possible remedies, an arbitrator with jurisdiction over such a dispute should be obligated to fashion his or her award in a manner not inconsistent with the standards that the parties chose to incorporate into their agreement.

Unless reversed or modified in this appeal, the decision of the appellate court in this case will serve to compromise the interests of each party to any agreement with an arbitration clause and will leave the door open for an arbitrator essentially to rewrite standards of review or drawing distinctions that do not exist or were not even contemplated by the parties in defining the standards by which a dispute under the agreement could be adjusted through arbitration. All such parties are entitled to (1) faithful adherence to lawful standards of review incorporated into the contract conferring arbitral jurisdiction and (2) uniform application of all such lawful standards. Such interests only are amplified when a dispute arise out of a work setting in the public sector, where workers customarily are constitutionally guaranteed “due process” in matters threatening to compromise their property rights in continued employment.

This Court says that when the “Daugherty Test” is invoked in resolving a “just cause” dispute in the work setting, an analysis must be undertaken into whether management’s sanction of discharge was not excessive under the circumstances. To justify avoiding the need to undertake that analysis, the arbitrator here invented a “crucial distinction” that is **not** found included among the terms of the collective bargaining agreement. In doing so, the arbitrator essen-

tially rewrote the “just cause” term to exclude from the standard of review any evidence relevant to the sixth and seventh parts of the “Daugherty Test.” So, expressed another way, this Court should accept Bair’s appeal to determine whether the holding of *Cedar Fair* is broad enough to offer a party aggrieved by the outcome of an arbitration proceeding the ability to vacate an award when the *standards* that the parties lawfully agreed the arbitrator should apply are ignored or avoided. Given the widespread use of “just cause” as a standard of review in employment contracts, this Court’s decision would have wide-ranging implications.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellant Jeffrey R. Bair (“Bair”) brought this action under Chapter 2711 of the Ohio Revised Code seeking to vacate or modify an arbitrator’s October 10, 2011, award affirming management’s decision to remove him from his position in state service on a first offense. The trial court at first ruled that Bair lacked standing to continue invoking his right under O.R.C. § 4117.03(A)(5) by bringing his Chapter 2711 challenge without the intervention of his union. The Fifth Appellate Judicial District, however, reversed the trial court on this issue on June 17, 2013, and remanded the case for consideration of Bair’s challenge on the merits.⁵ The trial court, on remand, decided on July 15, 2014, that the arbitrator’s award should not be vacated or modified and “dismissed” Bair’s claim “with prejudice.” *See Appendix 2*. A motion for reconsideration was laid before the trial court, but that motion was overruled on August 12, 2014. *See Appendix 3*. The Fifth Appellate Judicial District affirmed the trial court’s decision on June 23, 2015, and this discretionary appeal followed. *See Appendix 1*.

⁵ *Bair v. ODMH*, Case No. 2012-AP-08-0053, 2013-Ohio-2589, 2013 WL 3193598, ¶ 26.

Bair had been working for Defendant-Appellee Ohio Department of Mental Health (“ODMH”)⁶ for eleven (11) years when management removed Bair from his position as Psychiatric/MR Nurse for ODMH’s Heartland Behavioral Healthcare (“HBH”) facility in Stark County. Bair’s employment terms were spelled out in a collective bargaining agreement between ODMH and Defendant-Appellee Service Employees International Union, District 1199 (“the Union”). At the time disciplinary action was taken in this case, there was no disciplinary record against Bair and Bair was not on probation, under any “Last Chance Agreement,” or subject to any form of performance improvement plan. For purposes of the policies of ODMH and HBH, therefore, the offense with which Bair was charged in this case constituted a *first offense*.

Bair initiated his own grievance challenging his removal by invoking his right under O.R.C. § 4117.03(A)(5) to proceed “without the intervention of the bargaining representative.” Eventually, the final step in adjusting Bair’s grievance was to submit the issue of “just cause” to arbitration and Bair again undertook this step with the help of only his private counsel “without the intervention of the bargaining representative.”

The arbitrator announced in the course of the proceedings on Bair’s grievance that the “Daugherty Test” would be followed in determining whether management sustained its burden of proving “just cause” to remove Bair on a first offense. However, in spite of admitting *stipulated* evidence of **20 other incidents** involving offenses considered serious enough under ODMH and HBH policies to expose the accused HBH employees to the possible sanction of immediate discharge, the arbitrator undertook **no review** of such evidence and instead *exempted* herself from undertaking any such an analysis for the following reasons:

⁶ During the course of this litigation, ODMH changed its name to the “Ohio Department of Mental Health & Addiction Services.” The parties and the courts below, however, have continued to refer to ODMH by the name in effect as of the date Bair commenced this action.

... [Bair's] position of authority [as a charge nurse] over the co-worker to whom he spoke [the racially insensitive remarks] heightens the already egregious nature of [his] misconduct.

[Bair's] attempt to show disparate treatment fails. There is no record evidence any of the employees he attempts to compare himself to [*sic*] were charge nurses or had supervisory authority. This is a crucial distinction between [Bair] and other employees who were found to have committed misconduct.

In essence, then, the arbitrator skirted the seven-part "Daugherty Test" all together by refusing to consider *any* of the evidence of the **20 other incidents** that she had admitted ... evidence plainly revealing not only that the "crucial distinction" on which the arbitrator relied not only **did not exist**,⁷ but also that *each and every one* of the employees involved in the other 20 incidents⁸ had

⁷ The record does **not** support the arbitrator's assertion that there is "no record evidence" that any of Bair's comparators "had supervisory authority." *To the contrary*, four (4) of the 20 incidents cited by Bair involved a nurse supervisor, a staff doctor with supervisory responsibilities, and a non-medical supervisor. The arbitrator's excuse for not applying the "Daugherty Test" to Bair's comparators, therefore, is completely unsustainable in light of the very evidence that she admitted on this specific issue.

⁸ Some of Bair's comparators included (1) a security guard falling asleep while on duty at a hospital full of patients institutionalized for mental illnesses (a **fifth** offense), (2) HBH employees charged with providing therapeutic care who yelled at patients and slammed doors in their faces (each a **first** offense) and another employee who dragged one patient into his room to rough him up (a **fifth** offense), (3) a male employee caught *three times* during a single year making inappropriate sexual remarks to a female employee, placing a dildo on the desk of another female employee, and stuffing \$10.00 bills into a female co-worker's cleavage and then grabbing her buttocks (**first**, **second**, and **third** offenses, respectively), (4) two employees caught falsifying patient records to conceal an escape (each a **first** offense), (5) a security guard caught leaving his shift early and leaving the institution without required police supervision (a **second** offense), (6) a security guard who engaged in an inappropriate vehicular pursuit on HBH's grounds that placed patients, co-workers, and member of the public in harm's way (a **sixth** offense), (7) a security guard who raced a fellow HBH employee on a public highway with a state vehicle and then uttered false statement to law enforcement investigating the incident (a **fourth** offense), (8) two employees engaging in "inappropriate conduct" with a co-worker of the opposite sex in a conference room (each a **first** offense), (9) insubordinate behavior of an employee while expressing displeasure with management action (a **first** offense), and (10) unauthorized leave taken by three different HBH employees (**second**, **third**, **fourth**, and **fifth** offenses, respectively).

engaged in conduct at least as “egregious” as the conduct with which Bair was charged and for which ODMH and HBH policies prescribed removal as a possible disciplinary action, *and yet in each and every one of those other 20 instances, ODMH management allowed each employee to keep his or her job!*

Rather than sustain Bair’s challenge to the arbitrator’s award for failure to apply the seven-part “Daugherty Test” for “just cause,” the trial court merely *parroted* the test without explaining how the arbitrator managed to remain faithful to her duty to analyze the evidence against the sixth and seventh parts of that test in spite of failing to consider *any* of the **20 other incidents** of comparable misconduct of employees management did not remove. The trial court did so by reciting, in a perfunctory manner, that “[u]pon review of the record and the Daugherty [T]est, the Court **FINDS** that the Arbitrator’s determination that the State met the seven tests of just cause was not unreasonable.”

Bair deserved more from the trial court on remand ... and so do the hundreds of thousands of bargaining unit members statewide who are protected by guarantees that disciplinary action can be predicated only on “just cause.” Bair seeks discretionary review to address the important issues at play here ... and to seek further guidance from this Court respecting the remedy a court should fashion under Chapter 2711 of the Ohio Revised Code when an arbitrator abrogates his or her duty to apply lawful standards that the parties have directed the arbitrator to use in assessing “just cause.”

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1

Where the parties refer a contract dispute for arbitration and specify in their agreement the standards the arbitrator should apply in lawfully resolving such dispute, a court has authority under R.C. 2711.10(D) to vacate an arbitration award where the arbitrator either rewrites or fails to apply such standards (*Cedar*

Fair, LP v. Falfas, 140 Ohio St.3d 447, 19 N.E.3d 893, 2014-Ohio-3943, explained and extended).

In order to survive a motion to vacate, an arbitrator's decision must be rationally supported by the collective bargaining agreement or, at least, be capable of being rationally derived from it.⁹ And while a court generally is not to use Chapter 2711 of the Ohio Revised Code merely to correct any arbitrator misinterpretation of the collective bargaining agreement on the *merits* of a grievance, it nevertheless remains that in order to *misinterpret* the contract, “the arbitrator first had to *attempt* to interpret it” in a manner that did not “ignore the plain language of the contract.”¹⁰

Bair’s challenge to the arbitration award in his case relates to the arbitrator’s *failure* to discharge her solemn duty to apply *all* of the seven parts of the “Daugherty Test” for “just cause” to the evidence she admitted. It is apparent from a review of the record that the arbitrator made *no attempt* to interpret and apply the sixth and seventh parts of this “just cause” standard to the evidence in the record. She made no genuine analysis of the way ODMH applied its rules and penalties to discern whether management did so “evenhandedly and without discrimination” to Bair. And she failed to address the question of whether the degree of dismissal administered in Bair’s case (*viz.*, removal on a first offense) was reasonably related to the seriousness of Bair’s offense and the spotless record that Bair amassed in service to ODMH. In short, after giving

⁹ *Piqua v. Fraternal Order of Police*, 185 Ohio App.3d 496, 508-09, 924 N.E.2d 876, 886, 2009-Ohio-6591, ¶ 24, *citing Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Assn., Local 11*, 59 Ohio St.39 177, 572 N.E.2d 71 (1991) (syllabus).

¹⁰ *Stow Firefighters, IAFF Local 1662 v. City of Stow*, 193 Ohio App.3d 148, 160, 951 N.E.2d 152, 162, ¶ 34 (emphasis supplied), *citing United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 370-71, 98 L.Ed.2d 286 (1987).

mere “lip service” to the “Daugherty Test,” the arbitrator failed to apply the “just cause” standards called for in the collective bargaining agreement.

The appropriateness of the sanction always is an issue in the context of a review for “just cause.”¹¹ The fundamental question before this court is whether an arbitrator simply can selectively ignore the sixth and seventh parts of the “Daugherty Test” and remain faithful to his or her duty to adjust a grievance in a manner consistent with the terms of a collective bargaining agreement when the “Daugherty Test” for “just cause” is invoked to decide the “just cause” issue.

This Court should use this case to confirm that merely paying “lip service” to the “Daugherty Test” *without actually applying it* is insufficient because the question of the appropriateness of the selected sanction in a disciplinary action *always* stands as part of any “just cause” inquiry.¹² This is because an arbitrator’s award has to “draw its essence from the collective bargaining agreement” ... and in Bair’s case, in particular, this means that the arbitrator’s award had to “draw its essence” from *the “just cause” guarantee* incorporated into Section 8.01 of the contract.¹³ If it were to agree that the arbitrator failed to apply the sixth and seventh parts of the “Daugherty Test” at all or unreasonably or irrationally drew a “crucial distinction” from the record that plainly did not exist to justify her election to gloss over those parts, this Court can

¹¹ See *Eberhard Foods, Inc. v. Handy*, 868 F.2d 890, 893 (6th Cir.1989), citing *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, *supra*, 484 U.S. at 41, 108 S.Ct. 1537.

¹² See *Summit County Children Services Board v. Communications Workers of America, Local 4546*, 113 Ohio St.3d 291, 292, 865 N.E.2d 31, 33, 2007-Ohio-1949, ¶ 9, n.1 (this is the focus of the sixth and seventh parts of the “Daugherty Test”).

¹³ **Bair Ex. 1**, p. 25, § 8.01 (also reproduced in **Defendant’s Ex. N**, OhioMHAS 047, attached to ODMH’s January 21, 2014, opposition to Bair’s motion to vacate or modify the arbitration award).

make it plain through a decision in Bair's appeal that all parts of the "Daugherty Test" remain just as viable in 2015 as they were when this Court endorsed that test in 2007 and therefore must be applied when that test is invoked to assess "just cause." Reversing the courts below and remanding Bair's case for further proceedings would be warranted as a necessary response to an arbitration award that is "arbitrary, capricious, or unlawful" because it lacks a "rational nexus [to] the ["just cause" standard of review found in the] agreement."¹⁴

Expressed in the *mandatory* terms of O.R.C. § 2711.10(D), the award in this case ultimately should be vacated because the arbitrator executed her powers "so imperfectly ... that a mutual, final, and definite award upon the subject matter [of Bair's grievance] was not made." The parties specified that "just cause" would be the standard of review. The arbitrator declared that the "Daugherty Test" would be used to assess "just cause." But the arbitrator failed to apply the sixth and seventh parts of that test upon drawing a "crucial distinction" that is **not** rooted in the parties' collective bargaining agreement, thereby rewriting the "just cause" standard to mean something contrary to what the parties intended.

The error committed by the courts below was **not** that the trial court failed to engage in a sweeping analysis of the record, but rather that those courts failed to allow Chapter 2711 to be used to vacate an award based on the arbitrator's failure to apply the standard of review that the parties had directed her to apply when the "just cause" standard was incorporated into their collective bargaining agreement. When the arbitrator decided for herself to invoke the "Daugherty Test," but then selectively ignore the two most important parts of that test based on the evidence Bair presented, she acted arbitrarily, capriciously, unlawfully, irrationally, or unrea-

¹⁴ See *Board of Trustees of Miami Twp. v. Fraternal Order of Police*, 81 Ohio St.3d 269, 271-72, 690 N.E.2d 1262, 1264, 1998-Ohio-629.

sonably in concluding that the evidence supported a “just cause” finding *without conducting any review of that evidence whatsoever* against the sixth and seventh parts of that test! The trial court only compounded that error by *claiming* that the excuse given by the arbitrator for not engaging in an extensive incident-by-incident analysis of Bair’s 20 comparators was justified by the arbitrator’s finding that Bair – as an employee with “supervisory authority” – allegedly had failed to point to a single one of those comparators as an individuals also having “supervisory authority” in spite of the fact that the record included four (4) examples of supervisory employees who were allowed to keep their jobs after committing offenses that subjected them to the possible sanction of immediate discharge under ODMH and HBH policies.¹⁵ The fact that the collective bargaining agreement says **nothing** about authorizing or reserving harsher disciplinary action for employees with “supervisory authority” than for any other employees proved to mean nothing to the arbitrator or either of the courts below. So the arbitrator essentially got away with rewriting the parties’ collective bargaining agreement to include a “crucial distinction” that cannot be discerned from any of the provisions inserted by the parties in negotiating the agreement.

In accepting her appointment, the arbitrator assumed a *duty* to safeguard Bair’s due process rights in securing an *independent and impartial* assessment of *all* of the evidence bearing on the “just cause” question. Only then could the trial court have concluded that the arbitrator’s award should not be vacated under O.R.C. § 2711.10(D). Absent faithful adherence to

¹⁵ As indicated at Note 7, *supra*, there are **four instances** in the record of employees with “supervisory authority” who were allowed to escape the sanction of immediate discharge in spite of committing offenses that ODMH’s rules regarded as worthy of immediate removal. Yet, the trial court blithely “rubber-stamped” the arbitrator’s purported “crucial distinction” without so much as determining whether the arbitrator could conceivably conclude that **none** of the “supervisory” employees would qualify as a comparator even under the arbitrator’s narrow vision of what evidence could be considered in applying the sixth and seventh parts of the “Daugherty Test.”

her sworn duty, the arbitrator executed her powers in Bair's case "so imperfectly ... that a mutual, final, and definite award" upon the subject matter of Bair's grievance was not made on the question of "just cause" in a manner consistent with this Court's seven-part "Daugherty Test." Merely reciting that test or acknowledging its existence and applicability is **not** enough. This Court should expect all arbitrators to *apply* all seven parts of the "Daugherty Test" when that test is invoked in adjusting grievances hinging on "just cause" findings. Mere "lip service" cannot suffice.

Bair presented unassailable evidence of **20 other incidents** where ODMH employees at his facility committed offenses judged by ODMH itself to be worthy of the sanction of possible removal, each involving acts at least as offensive or harmful to ODMH's interests as those with which Bair was accused. Yet, neither the arbitrator nor the court below conducted (or required) a fact-specific inquiry into *any* of that evidence let alone weighing the same for the purpose of being faithful to the duty to apply the sixth and seventh parts of the "Daugherty Test" for "just cause" to Bair's situation. The fact that Bair held a position conferring in him a constitutionally protected property right in continued employment in the public sector only makes the results in this case all the harder for anyone committed to the principle of due process to accept.

While a court's review of the "just cause" issue in an arbitration context is narrow, it is **not** as narrowly confined as ODMH has urged in briefs it has filed in the courts below. Relief can be granted to Bair under O.R.C. § 2711.10(D) because the record supports a finding that the arbitration award is the result of the work of an arbitrator who executed her powers "so imperfectly ... that a mutual, final, and definite award" upon the subject matter of Bair's grievance was not made in light of the evidence presented on the "just cause" issue (including evidence of employees with "supervisory authority" who were allowed to keep their jobs). All of

this implicates the sixth and seventh parts of the “Daugherty Test” that the arbitrator invoked. What remains, then, is for this Court to confirm the continued viability of that test and the remedy a court is to order when an arbitrator fails to apply that test to the evidence admitted on the “just cause” issue presented in adjustment of a grievance.

In the end, Bair does **not** ask this Court – or *any* court – to substitute its judgment on the merits of his grievance for that of the arbitrator. Nor does he seek wholesale intervention by the courts below upon a full review of the record. Rather, Bair’s challenge to the arbitrator’s award is *limited* to her handling of the “just cause” issue – or, perhaps more precisely, her *failure* to handle the “just cause” issue – in a manner consistent with this Court’s endorsement of the “Daugherty Test” once the arbitrator chose to invoke that test as the standard for review. He asks this court to adopt his proposition of law to make it clear that a court is **not** constrained to honor an arbitrator’s award or to refrain from vacating that award when the record demonstrates that the arbitrator has failed to do his or her job.

Bair’s case presents an extremely well-developed and highly-organized record ideally suited to addressing this issue in this court of last resort. That record establishes that the arbitrator (1) failed to discharge her solemn duty to review the record fairly and accurately under *all* parts of the “Daugherty Test, then (2) drew a so-called “crucial distinction” without a difference to rationalize skipping the sixth and seventh parts of that test, then (3) falsely claimed evidence was not offered by Bair on the “just cause” issue when it plainly is in the record, and then (4) offered but “lip service” to the “Daugherty Test” instead of conducting a fact-specific analysis of the record against all seven parts of that test.

In other words, in spite of being charged by law with the *duty* to assess *all* of the evidence bearing on the question of the reasonableness of ODMH’s imposition of the sanction of

removal of Bair so as to assure herself that management in fact acted “evenhandedly and without discrimination” and that the “degree of discipline administered” by HBH in this case in fact was “reasonably related” to the “seriousness” of Bair’s alleged offense, *the arbitrator failed to discharge this duty* ... and the question before this Court, as a result, is whether the courts below should have allowed Bair to secure an order vacating or modifying the arbitration award as the appropriate remedy for that failure.

CONCLUSION

For the foregoing reasons, Bair respectfully submits that his appeal presents issues of public or great general interest and that this Court should accept jurisdiction over such appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2015, a copy of the foregoing was duly served on counsel for defendants [*method(s) of service checked*] by ordinary U. S. Mail, first-class postage prepaid, addressed to counsel for Defendant Ohio Department of Mental Health, Joseph N. Rosenthal, Esq., Senior Assistant Attorney General, and Matthew J. Karam, Esq., Assistant Attorney General, Employment Law Section, 30 East Broad Street, 23rd Floor, Columbus, Ohio 43215-3167 (**Facsimile Telephone No. 614-752-4677**), Counsel for Defendant Service Employees International Union, District 1199, The Healthcare and Social Service Union, Change to Win, CLC, Mdmes. Cathrine Harshman and Jaclyn Tipton, Attorneys at Law, Hunter, Carnahan, Shoub, Byard & Harshman, 3360 Tremont Road, 2nd Floor, Columbus, Ohio 43221 (**Facsimile Telephone No. 614-442-5625**), and to Defendant Ms. Susan Grody-Ruben, 30799 Pinetree Road, #226, Cleveland, Ohio 44124 (**Facsimile Telephone No. 216-382-7610**), by facsimile transmission to the facsimile telephone number of counsel referenced above, and/or by the following alternate means of service: _____

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