

[Cite as *State ex rel. Crumbley v. State Emp. Relations Bd.*, 2011-Ohio-735.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95299

**STATE OF OHIO, EX REL.
JESSIE CRUMBLEY**

RELATOR

vs.

STATE EMPLOYMENT RELATIONS BOARD

RESPONDENT

**JUDGMENT:
WRIT DENIED**

Writ of Mandamus
Motion Nos. 438603 and 439485
Order No. 440860

RELEASE DATE: February 16, 2011

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KATHLEEN A. KEOUGH, J.:

{¶ 1} On June 21, 2010, the relator, Jessie Crumbley, commenced this mandamus action against the respondent, the State Employment Relations Board (hereinafter “SERB”), to compel SERB to vacate its dismissal of the underlying unfair labor practice

charge, *Jessie Crumbley v. Ohio Patrolmen's Benevolent Assn.*,¹ SERB Case No. 2010-ULP-02-0050, and to hold a hearing on the charge. Crumbley had filed this unfair labor practice charge on the grounds that the Union had failed to represent him in obtaining back pay for wrongful termination; SERB dismissed the charge as untimely. On August 18, 2010, SERB filed the record from the underlying unfair labor practice charge.

On October 21, 2010, SERB filed its motion for summary judgment. On November 19, 2010, Crumbley filed his motion for summary judgment, and on December 13, 2010, SERB filed its brief in opposition to Crumbley's dispositive motion. For the following reasons, this court grants SERB's motion for summary judgment, denies Crumbley's motion for summary judgment, and denies the application for a writ of mandamus.

FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} Crumbley has worked as a corrections officer for the City of Cleveland since 1990. In December 1997, Cleveland terminated him on the charge of excessive force against a prisoner. The Union grieved this termination through arbitration, and the arbitrator ruled that Cleveland had unjustly terminated Crumbley and ordered the City to reinstate him with back pay minus any interim earnings. Cleveland sought to vacate the arbitrator's award in *Cleveland v. Ohio Patrolmen's Benevolent Assn.*, Cuyahoga County Common Pleas Court Case No. CV-426128. After the common pleas court overruled the application to vacate the award in October 2001, Cleveland appealed to this

¹ The court will refer to the Ohio Patrolmen's Benevolent Association as "the Union."

court. However, Cleveland withdrew the appeal and reinstated Crumbley in 2002, but did not give him back pay.

{¶ 3} The Union, in an effort to obtain Crumbley's back pay filed a motion to show cause in the common pleas court case in July 2002. The court scheduled a hearing on this motion for May 13, 2003. On May 7, 2003, the court issued the following journal entry: "Hearing scheduled for 05/13/2003 at 10:00 AM is cancelled. * * * Reason: Defendant requested continuance of hearing in order to retain new counsel." In response, the Union's attorney moved to withdraw the next day. The Union's attorney also sent Crumbley a certified letter notifying him that he was moving to withdraw from the case. The Union's lawyer advised Crumbley that he would forward his file to Crumbley's new attorney upon request and that Crumbley would be responsible for all costs and fees. On June 20, 2003, the court overruled the motion to show cause and the request for a hearing.

{¶ 4} In December 2006, Crumbley retained Sandra Rosenthal to aid him in obtaining the back pay. Crumbley agreed to a \$2,000 retainer and paid at least \$690 toward this amount. (April 26, 2007 invoice under Tag 12 – SERB record.) In January 2008, Rosenthal filed a mandamus action in this court to obtain Crumbley's arbitration award. *State ex rel. Crumbley v. Cleveland*, Cuyahoga App. No. 90900. In September 2008, she withdrew from representation, and Crumbley's current attorney, Fred Middleton, entered into a contingent fee agreement with Crumbley to litigate the

mandamus action. On November 13, 2009, this court granted the writ of mandamus and ordered Cleveland to pay Crumbley his back pay including contributions to PERS. Unfortunately, in the interim, Crumbley had declared bankruptcy, and the money went to the bankruptcy trustee. This court also ruled that Crumbley was not entitled to attorney fees, pursuant to R.C.2731.11 and the general rule that a prevailing party cannot recover attorney fees absent express statutory authorization.

{¶ 5} On Tuesday, February 16, 2010, Crumbley filed the underlying unfair labor practice charge that the Union breached its duty to represent him in obtaining the back pay award. After conducting an investigation, SERB on June 4, 2010, dismissed the charge as untimely pursuant to R.C. 4117.12(B). This mandamus action followed.

DISCUSSION OF LAW

{¶ 6} First, this court notes that mandamus is the proper remedy for “reviewing” a denial of an unfair labor practice charge for lack of probable cause. In *State ex rel. Leigh v. State Emp. Relations Bd.* (1996), 76 Ohio St.3d 143, 666 N.E.2d 1128, the Supreme Court of Ohio noted a probable cause determination by SERB under R.C. 4117.12(B) is not reviewable by direct appeal. Rather, in the absence of an adequate remedy in the ordinary course of the law, mandamus is the appropriate remedy to obtain judicial review of a SERB order dismissing an unfair labor practice charge.² “A writ of

²The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief and (3) there must be no adequate remedy at law. Additionally, although mandamus may be used to

mandamus will issue to correct an abuse of discretion by SERB to dismiss unfair labor practice charges. * * * An abuse of discretion implies an attitude that is unreasonable, arbitrary or unconscionable.” *Id.* at 145. *State ex rel. Portage Lakes Edn Assn., OEA/NEA v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2839, 769 N.E.2d 853; and *State ex rel. Hamilton Cty. Bd. of Commrs. v. State Emp. Relations Bd.*, 102 Ohio St.3d 344, 2004-Ohio-3122, 810 N.E.2d 944. As a corollary, SERB cannot abuse its discretion based on evidence that was not properly before the board when it made its decision. Thus, the review of a SERB decision is limited to the facts as they existed at the time SERB made its decision, as shown by the SERB record. *Portage Lakes* and *State ex rel. Hall v. State Emp. Relations Bd.*, 122 Ohio St.3d 538, 2009-Ohio-3603, 912 N.E.2d 1120. Furthermore, the courts must give deference to SERB’s findings and interpretation of R.C. Chapter 4117, and the court may not substitute its judgment for that of SERB, even if there is conflicting evidence on an issue. *Portage Lakes* and *Hall*.

compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E.2d 914. Furthermore, mandamus is not a substitute for appeal. *State ex rel. Pressley v. Industrial Comm. of Ohio* (1967), 11 Ohio St.2d 141, 228 N.E.2d 631, paragraph three of the syllabus. Thus, mandamus does not lie to correct errors and procedural irregularities in the course of a case. *State ex rel. Jerningham v. Gaughan* (Sept. 26, 1994), Cuyahoga App. No. 67787. Furthermore, if the relator had an adequate remedy, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 1997-Ohio-245, 676 N.E.2d 108. Moreover, mandamus is an extraordinary remedy which is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 364 N.E.2d 1.

{¶ 7} R.C. 4117.12(B) provides in pertinent part as follows: “The board may not issue a notice of hearing based upon any unfair labor practice occurring more than ninety days prior to the filing of the charge with the board * * *.” “In interpreting this provision, SERB has set forth a twofold standard to be applied when determining when the ninety-day period commences. The ninety-day period begins to run when the charging party acquires knowledge of, and suffers actual damage from the allegedly unfair labor practice. *In re Barberton* (July 5, 1988), SERB No. 88-008.” *Franklin Cty. Sheriff’s Dept. v. Fraternal Order of Police, Capital City Lodge No. 9* (1992), 78 Ohio App.3d 158, 161, 604 N.E.2d 189.

{¶ 8} Assuming arguendo that the Union attorney’s withdrawal from the common pleas court case in May 2003, when the court had scheduled a hearing on the motion to show cause, constitutes the unfair labor practice of failure to represent, Crumbley had knowledge of the occurrence no later than May 8, 2003, when he signed for the certified letter from the Union attorney, stating his withdrawal. (Ex. 3 to the Union’s response in the SERB record.) Crumbley suffered damages at three early events: (1) when he received the letter, and the Union lawyer informed him that he will be responsible for all costs and fees; (2) when the common pleas court overruled the motion to show cause in June 2003, and (3) when he, in December 2006, agreed to pay Rosenthal \$2,000 as a retainer to pursue back pay, and paid at least \$690 toward that retainer in 2007. The actual expenditure of money would be damages. Thus, the limitations period began to

run no later than April 2007, approximately three years before the filing of the unfair labor practice charge.

{¶ 9} Crumbley argues that he was not damaged until this court released its decision in the back pay mandamus on November 13, 2009, and ruled that Crumbley would not be entitled to attorney fees; this decision removed the uncertainty that he would be able to recoup his money and thus avoid damages.³ However, the evidence in SERB's record contradicts that position.

{¶ 10} Therefore, this court rules that SERB did not abuse its discretion in dismissing the unfair labor practice charge as untimely and that SERB is entitled to judgment as a matter of law.

{¶ 11} Accordingly, this court grants SERB's motion for summary judgment, denies Crumbley's motion for summary judgment, and denies the application for a writ of mandamus. Relator to pay costs. This court directs the clerk of courts to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

Writ denied.

³ Crumbley argues that the limitations period did not begin to run until November 16, 2009. Ohio Administrative Code Section 4117-1-03(B) provides for an additional three days to take a required action when service of a document is made by United States mail. Ninety days from November 16, 2009, was Sunday, February 14, 2010. Allowing for the Presidents' Day holiday on Monday, February 15, the unfair labor charge was arguably timely filed on February 16, 2010.

KATHLEEN A. KEOUGH, JUDGE

KENNETH A. ROCCO, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR