

[Cite as *State ex rel. Clayton v. State Emp. Relations Bd.*, 2015-Ohio-2521.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102113

STATE OF OHIO, EX REL.
MELVIN CLAYTON

RELATOR

VS.

STATE EMPLOYMENT RELATIONS BOARD

RESPONDENT

JUDGMENT:
WRIT DENIED

Writ of Mandamus
Motion Nos. 484140 and 484525
Order No. 485536

RELEASE DATE: June 24, 2015

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TIM McCORMACK, P.J.:

{¶1} On October 24, 2014, the relator, Melvin Clayton, commenced this mandamus action against the respondent, the State Employment Relations Board (“SERB”), to obtain a ruling that SERB abused its discretion in finding that there was no probable cause to support his unfair labor practice charge against Ohio Council 8, American Federation of State, County, and Municipal Employees and Local 1355, AFL-CIO (hereinafter “the Union”); to issue a finding of probable cause; and to compel a hearing on the matter. Clayton’s second claim is that SERB provide him with his complete grievance file.

{¶2} On February 18, 2015, this court established a briefing schedule as follows: by March 13, 2015, SERB was to submit its entire record/investigatory file in the subject case, Melvin Clayton’s unfair labor practice charge, 2014-ULP-08-0131. The court also ordered the parties to submit briefs and reply briefs. On March 10, 2015, SERB filed its complete record. On March 30, 2015, Clayton filed his brief in the form of a motion for summary judgment, and SERB filed its brief. On April 10, 2015, Clayton filed his reply brief, and SERB filed its reply brief and cross-motion for summary judgment. The court has reviewed the filings, and this case is ripe for adjudication. The production of SERB’s record has rendered Clayton’s second claim moot. For the following reasons, this court grants SERB’s motion for summary judgment, denies Clayton’s motion for summary judgment, and denies his application for a writ of mandamus.

{¶3} Clayton had worked for Cuyahoga Metropolitan Housing Authority (CMHA) since 1979 and was a member of the Union. In 2013, CMHA assigned him to the Carver Park Estates where his duties were to collect the garbage and perform work orders, which were often plumbing and electrical repairs in the residences. CMHA employees were to enter the residences only if they had a work order.

{¶4} On March 13, 2013, another CMHA employee, James Buford, told Clayton that he had been in a CMHA housing unit at 2351 E. 40th Street in Cleveland to repair smoke alarms and that it appeared to be a “skip unit” or a unit where the tenant had left without informing CMHA. Buford further stated that he was going there to check to see if the garbage had been cleared from the unit. It is undisputed that Clayton accompanied Buford to the unit and that Buford entered the unit, took a picture that was there, and was intercepted by the resident who was coming back to her unit. The resident explained that she had not moved out yet and retrieved her picture from Buford.

{¶5} The resident then went to the CMHA office and reported the incident to the CMHA site manager, Karen Walker. The resident stated that as she walked into her unit, she saw a maintenance man walking out of her unit with one of her pictures. When she told him that she had not moved out, he returned the picture and explained that he thought she was a skip move. When Walker asked the resident if she could identify the man, the resident stated that she could identify that man and that there were two workers coming from her unit. CMHA management then summoned Buford and Clayton. After the

resident contacted CMHA police, they arrested both men for burglary and theft, and began their investigation.

{¶6} In her statement to the police, the resident stated that she caught CMHA workers leaving with one of her belongings, a picture, and she noticed that two other pictures were missing. The resident had not requested any work to be done on her unit, nor had she given the workers or any other CMHA personnel permission to enter.

{¶7} After the police gave Clayton his Miranda warnings, he talked to the police. They recorded that he admitted he had entered the unit with Buford several days earlier without permission, that they had looked around and concluded that the resident must have moved because there was no furniture. Clayton further admitted that he had accompanied Buford to the unit on March 13, 2013, but did not enter immediately; instead he walked around and then entered through the front door. When he saw Buford talking with the resident, he immediately left. Although he said he did not take anything, he admitted that he had screwed up. He had entered a residence without permission, although he had not done so previously in his many years of work with CMHA.

{¶8} After being advised of his Miranda rights, Buford also agreed to talk. He admitted that he and Clayton had entered the unit several days earlier. On that occasion, Buford took two other pictures, which were in his truck, but Clayton had not taken anything. Buford said that on March 13, 2013, he and Clayton had gone to the unit with the intent of entering it, without a work order or permission, to clean it out. They both

entered the unit together. Buford admitted taking the picture, and as they were exiting, they met the resident. Buford consented to the search of his truck, and the police retrieved the other two pictures.

{¶9} On March 20, 2013, CMHA held a pre-disciplinary hearing for Clayton at which he faced charges for, inter alia, (1) theft, improper removal; (2) acts of dishonesty; (3) poor treatment of CMHA residents; (4) violation of CMHA rules, regulations, policies and procedures; and (5) conduct unbecoming of an employee in public service. At the hearing, both Buford and Clayton testified that Clayton did not enter the unit. In late March 2013, the grand jury indicted Clayton and Buford for burglary and petty theft. On April 3, 2013, CMHA terminated Clayton because he had entered a resident's unit twice without a work order and that he was present with another employee when a theft occurred. The termination letter also mentioned that he was facing criminal charges arising from this incident.

{¶10} Pursuant to the collective bargaining agreement, Section 12.5, the grievance procedure for termination is to commence at Step III. After the Union president presents the grievance in writing to CMHA's Human Resources Department, that department must meet with the Union president and the employee to review the matter. The Union president presented the grievance on April 12, 2013, and the meeting was held on June 7, 2013. On Friday, July 5, 2013, CMHA denied the Step III grievance.

{¶11} The collective bargaining agreement then provides that if the matter is not satisfactorily resolved at Step III, then within 45 calendar days after receipt of the Step III answer, the Union may submit the issue to arbitration (Step IV). Section 12.8 of the collective bargaining agreement provides that in determining the time period for the grievance procedure Saturdays, Sundays, and holidays are to be excluded. The Union issued its written notice to take the matter to arbitration on September 4, 2013.¹

{¶12} In the meantime, Clayton had entered into the diversion program for his criminal case. Upon his successful completion, the charges were dismissed and the case “expunged.”² In July 2013, the trial court found Buford guilty of burglary and petty theft and, on August 28, 2013, sentenced him to two years in prison. There had also been a change in Union leadership, which reviewed all pending arbitration cases. On May 7, 2014, the Union withdrew Clayton’s arbitration. On August 5, 2014, Clayton served his unfair labor practice charge upon the Union and filed it with SERB on August 7, 2014.

{¶13} Clayton alleged that in withdrawing the arbitration, the Union committed an unfair labor practice under R.C. 4117.11(B)(6) by failing to fairly represent all public

¹The court notes that this filing is timely. Although September 4, is 61 calendar days from July 5, excluding Saturdays, Sundays, and Labor Day, September 2, 2013, puts the filing on the 42nd day.

²There are no longer any references to Clayton’s criminal case on the Cuyahoga County Clerk of Court’s website; only references to Buford’s case show on that case number, Cuyahoga C.P. No. CR-13-572599. Searching the clerk’s website for Clayton’s name does not reveal charges for this incident.

employees in a bargaining unit. In support of the unfair labor practice charge, Clayton submitted his own unsworn statement that he never entered the unit.

{¶14} He also submitted the affidavit of the Union president, Elknard Smith.³ Smith stated that upon his review of the incident, Clayton never entered the unit. He averred that the resident's statement was contradictory because she first states that there was one worker with her picture, then added that there were two workers leaving her residence. Based upon his experience with CMHA, Smith said that it is obvious that CMHA had "doctored" the facts and induced the resident to say that there were two workers coming from her unit so that they could terminate an older employee, like Clayton. Smith further averred that he attended the pre-disciplinary hearing, the Step III grievance hearing, and Buford's trial, and at all three hearings, Smith swore that there was no evidence that Clayton ever entered the unit. Smith also posited that the Union and CMHA had established a practice that CMHA would hold grievances of employees facing criminal charges in abeyance until the resolution of the criminal charges. Smith attached records showing that in at least one case CMHA did that. Finally, Clayton argued that the "expungement" of the criminal charges must be given some sort of "claim preclusion" or "law of the case" effect that exonerates Clayton from any wrongdoing.

{¶15} In response, the Union submitted that it determined that the grievance lacked the merit to proceed to arbitration because (1) the resident identified Clayton as one

³Smith was the Union president at the time of the incident. However, in March 2014, he was removed as president at the election of officers.

of the two men she saw exiting her home, (2) Buford told the police that he and Clayton entered the residence twice, and (3) Clayton admitted that he went to the unit and intended to enter. The Union further countered that entering and completing the diversion program was not an exoneration, but rather a means of accepting responsibility and did not change the fact that he was involved with the theft of a CMHA resident's personal property. The Union also enunciated the proper standard for determining when a union breaches its duty of fair representation: the union's actions must be either arbitrary, discriminatory, or in bad faith. "A union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside the wide range of reasonableness as to be irrational." *In re Ohio Civil Service Employees Assn./AFCME, Local 11*, SERB 93-019 (12-20-93), citing *Airline Pilots Assn. Intl. v. O'Neill*, 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991). In other words, if a union's action passes the rational basis test, it will not have violated its duty of fair representation. Finally, the Union submitted that the filing of the unfair labor practice charge was untimely.⁴

{¶16} As shown by the September 3, 2014 Investigator's Memorandum, SERB thoroughly reviewed the materials submitted and concluded that the Union took the basic

⁴R.C. 4117.12(B) provides in pertinent part that "[t]he 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 * * *." The Union included in its material to SERB the certified mail receipt showing that Clayton received notice of the withdrawal of his arbitration on May 8, 2014. Thursday August 7, 2014 was the 91st day after May 8, 2014 (23 remaining days in May + 30 days in June + 31 days in July + 7 days in August = 91).

and required steps. Therefore, the Union's actions were not arbitrary or in bad faith. SERB dismissed the unfair labor practice charge on October 10, 2014, finding that there was no probable cause to believe that the Union violated its duty to fairly represent all public employees in a bargaining unit. Clayton then commenced this mandamus action.

{¶17} 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.*, 76 Ohio St.3d 143, 666 N.E.2d 1128 (1996), 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.⁵ “A writ of 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 Education Assn., OEA/NEA v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2839, 769 N.E.2d 853; *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. SERB cannot abuse its discretion based on

⁵The 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. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). Moreover, mandamus is an extraordinary remedy that 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*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977).

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; 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; Hall*.

{¶18} Thus, the issue before this court is whether SERB abused its discretion in determining that there was a rational basis for the Union to withdraw its arbitration demand for Clayton. This court rules that the facts as developed by the initial CMHA police investigation on March 13, 2013, provided a rational basis for the Union to withdraw its demand for arbitration. The complaining resident in her written police statement stated that when she walked into her unit she caught CMHA workers leaving with one of her belongings. Nor are her statements to the site manager necessarily contradictory. The fact that she initially focused on the CMHA worker who had possession of her property does not mean that he had to be alone. Moreover, Clayton incriminated himself in his statements to the CMHA police. He admitted that on March 13, 2013, he entered the unit through the front door, and when he saw Buford and the resident talking, he left. He also admitted that he had previously entered the unit a few days before and saw no furniture there, and that he had screwed up. Finally, Buford confirmed in that initial investigation that both he and Clayton had entered the residence twice.

{¶19} Clayton's argument that his successful completion of the diversionary program acts as an exoneration and must be given "law of the case" effect is not persuasive. The Supreme Court of Ohio enunciated the principles of the law of the case in *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). [T]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceeding in the case at both the trial and reviewing levels.

The doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results.

(Citations omitted.) In the syllabus, the Supreme Court of Ohio distilled the rule to "an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Id.* Thus, the fundamental requisite of an appeal to a higher court, as compared to an adjudication by a trial court, is absent in this matter and law of the case does not apply.

{¶20} Clayton's reliance on the sealing statutes, R.C. 2953.33 (sealing after a conviction) and 2953.52 (sealing of official records after dismissal) is misplaced. There was no sealing order before SERB. Thus, it could not assume that the records were sealed and the benefits of those statutes obtained.

{¶21} Finally, there was a conflict of evidence before SERB. On the one hand, there was the resident's initial complaint stating there were two CMHA workers coming out her unit and the incriminating statements Clayton and Buford made to the police in the initial investigation. On the other hand, there is Clayton's unsworn statement that he never entered the residence, the Union president's affidavit about the matter, and the dismissal of Clayton's criminal charges for satisfactorily completing the diversion

program. The successful completion of the diversion program does not mean that Clayton did not break CMHA's regulations about entering a residence. Regardless of any hearsay problems with the Union president's affidavit, it is still just one piece of evidence in conflict with those initial reports. Following the Supreme Court of Ohio's admonitions in *Hall* and *Portage Lakes*, this court will not substitute its own judgment for that of the administrative board if there is conflicting evidence. Accordingly, SERB could reasonably conclude that there was no probable cause to believe that the Union failed to fairly represent all of its employees when it withdrew Clayton's request for arbitration.

{¶22} Accordingly we grant the cross-motion by respondent for summary judgment. Relator to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶23} Writ denied.

TIM McCORMACK, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
MELODY J. STEWART, J., CONCUR