In the Supreme Court of Ohio

The State of Ohio, *ex rel.*

KATHARINA A. SNYDER
Relator

v.

CRAIG W. BUTLER, Director,
Ohio Environmental Protection Agency, *et al.*
Respondents

Case No. 2018-0647

ORIGINAL ACTION

AMENDED AND RESTATED MEMORANDUM OF RELATOR IN SUPPORT OF APPLICATION FOR WRIT OF MANDAMUS AND APPLICATION FOR ALTERNATIVE WRIT

ORAL ARGUMENT REQUESTED

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Pursuant to Rule 12.02(B)(1) of the Rules of Practice of the Supreme Court of Ohio, Relator Katharina A. Snyder ("Snyder") hereby submits the following memorandum in support of her verified complaint and application for writ of mandamus and application for alternative writ.

This is an original action commenced pursuant to Sections 2(B)(1)(b) and 2(B)(1)-(f) of Article IV of the Ohio Constitution and O.R.C. §§ 2731.02 and 2503.37(A), each of which confers original jurisdiction on this Court over the subject matter hereof.

In this original action, Snyder seeks issuance of a writ of mandamus directing (1) the Director of the Ohio Environmental Protection Agency ("OEPA"), Respondent Craig W. Butler ("the OEPA Director"), duly appointed and discharging duties as the administrative head of the agency in accordance with O.R.C. § 3745.01, and (2) the Deputy Director of the Office of Collective Bargaining of the Ohio Department of Administrative Services, Respondent Mark Tackett ("Tackett"), duly appointed and serving as acting head of the state office that facilitates the processing of grievances initiated by public sector employees in Ohio to arbitration under collective bargaining agreements, to discharge their shared clear legal duties imposed by O.R.C. § 4117.03-(A)(5) to allow Snyder to proceed without the intervention of her collective bargaining unit representative, Respondent Ohio Civil Service Employees Association, Local 11, AFSCME (OCSEA) ("the Union"), in the adjustment of her pending grievance respecting the failure of the Northeast District Office of the OEPA to promote her following administration of an examination and candidate selection process for a promotional opportunity awarded instead to another employee.

Alternatively, Snyder seeks issuance of an alternative writ or a preemptory writ allowing for the presentation of evidence and the filing and service of briefs or other pleadings on an expedited basis.

REASONS FOR SCHEDULING ORAL ARGUMENT

This case will require this Court to interpret and apply an important statute for public sector bargaining unit workers in this state … a statute from which the Eighth Appellate Judicial District has gleaned a meaning at odds with the express terms chosen by the General Assembly in crafting it in 1983. One of those rights – reserved by the legislature exclusively for bargaining unit employees in the public sector in Ohio – is to say "thank you, but no thank you" to one's union and "go it alone" in mounting an effort to adjust a grievance "without the intervention of the bargaining representative" if the public employee so elects.

There are thousands upon thousands of state, county, and local public employees covered by union contracts in Ohio who are entitled to exercise rights under O.R.C. § 4117.03-(A)(5) and to pursue – *independently of their unions* – action on grievances brought in defense of their constitutionally protected property rights in continued public sector employment. For purpose of this original action, it is significant that the plain words of this statute do **not** impose any deadline on the exercise of the right to elect to "go it alone" beyond requiring that such election be made before the end of the process spelled out in a collective bargaining agreement for the adjustment of grievances … typically, through arbitration.

This fundamental statutory right of public sector bargaining unit workers is under attack by public employers – and some public employees' unions – in Ohio, all of whom are relying on *dicta* in a couple of unreported decisions of the Eighth Appellate Judicial District that have read *temporal restrictions* into the statute, thereby effectively imposing an unwritten, unpublished "deadline" of sorts on a bargaining unit worker's election to "go it alone" by offering the opinion that notice of an O.R.C. § 4117.03(A)(5) election must be given by the employee *at the earliest stage of the grievance process*, lest the employee effectively "waive" the right.

This statute embraces the General Assembly's policy of favoring the exercise of a public sector bargaining unit worker's right to choose to take control of the adjustment of a his or her own grievance without the intervention of his or her union. A 2013 decision of the Fifth Appellate Judicial District is closer to the true meaning of O.R.C. § 4117.03(A)(5), holding that in that case, a public sector employee's right to "go it alone" meant that employee had standing to mount a Chapter 2711 challenge to an arbitration ruling where the union never participated in the process, refused to join the employee in his Chapter 2711 challenge, and took positions at odds with that employee's interests. In this case, the state agency respondents (**not** the relator's union) have taken the position that the relator's pre-mediation election to "go it alone" on her grievance and be represented by her own private counsel through the end of the grievance process (*i.e.*, through the final step of arbitration) will **not** be recognized merely because the relator did not make that election when she first filed her grievance on June 14, 2017.

If the *dicta* at the heart of the proposition that a public sector bargaining unit worker effectively *waives* his or her rights under O.R.C. § 4117.03(A)(5) are to become the law of this state by judicial activism for time immemorial, it should be *this* Court that articulates such policy. Before taking such a step, however, every opportunity should be given to allow the parties and the justices of this Court to interact on all of the dimensions of this issue of first impression. Oral argument would afford a more refined opportunity of making sure all considerations are taken into account and the most important questions are answered through a meaningful exchange designed to make sure no reasonable opportunity for complete understanding is missed or sacrificed for the sake of expediency. Moreover, the parties act in this case more or less as representatives of all public sector bargaining unit workers and all public sector employers operating under collective bargaining agreements, so they should be entitled to at least one "day in court."

STATEMENT OF FACTS

Snyder is an OEPA employee holding the position of Environmental Specialist 2 and working out of the agency's Northeast District Office in the City of Twinsburg in Summit County.[1] The OEPA Director is the duly appointed administrative head of the OEPA and discharges duties in managing the agency granted to him by O.R.C. § 3745.01.[2] Tackett, in his role as acting administrative head of the Office of Collective Bargaining of the Ohio Department of Administrative Services, administers labor contracts for agencies of state government, including facilitation of the arbitration of grievances in the manner outlined in collective bargaining agreements involving state agencies, and his actions in that regard are subject to other requirements of state law respecting the rights of bargaining unit workers in the public sector in Ohio.[3]

The Union is the collective bargaining representative for bargaining unit employees of the OEPA and on behalf of its members has entered into a collective bargaining agreement establishing terms and conditions of employment for the represented workers of that agency, including the bargaining unit members working at the OEPA's Northeast District Office ("the Union Contract").[4] As a member of the Union and an employee holding a position located within the collective bargaining unit at the OEPA's Northeast District Office, Snyder is one of the members of the Union for whom the Union Contract was negotiated.[5]

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[1] **Verified Complaint**, ¶ 1.

[2] *Id.*, ¶ 2.

[3] *Id.*, ¶ 4.

[4] *Id.*, ¶ 3.

[5] *Id.*, ¶ 5.

The Union Contract provides standards and procedures for administering promotional opportunities within the OEPA's Northeast District Office[6] and affords each member of the bargaining unit a means for lodging grievances against OEPA management for alleged violations of the Union Contract, including the provisions regulating the administration of promotional opportunities.[7]

On June 14, 2017, Snyder initiated a grievance challenging OEPA management's administration of a promotion examination and selection process in such a manner as to award a promotional opportunity to an employee other than herself.[8] At the time she filed this grievance, Snyder was given no notice of her right to make an election to "go it alone" under O.R.C. § 4117.03(A)(5) or that it would be the position of the OEPA or the Union that her failure to make such an election at the very inception of her grievance would constitute any sort of "waiver" of her right ever to do so.[9]

Snyder's grievance, still pending without final adjustment as OEPA Grievance No. EPA-2017-02279-13, had been prosecuted by Snyder and the Union jointly through Step 2 of the grievance process outlined in the Union Contract until January 30, 2018.[10] On that date, Snyder gave the Union and the OEPA staff member designated by the OEPA Director as responsible for administering Snyder's grievance written notices of (1) her election to exercise her right under

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[6] *Id.*, ¶ 2 and Ex. A (Article 17, Union Contract, pp. 44-50).

[7] *Id.* (Article 25, Union Contract, pp. 96-106).

[8] *Id.*, ¶ 7 and Ex. B.

[9] *Id.*, ¶ 7.

[10] *Id.* This type of grievance *begins* under the Union Contract at Step 2. *Id.*, ¶8.

O.R.C. § 4117.03(A)(5) to proceed with adjustment of OEPA Grievance No. EPA-2017-02279-13 without the intervention of the Union and (2) her waiver of union representation after the initial Step 2 of the grievance process,[11] thereby declaring her intention instead to rely on the services of her undersigned counsel as her sole representative in the balance of the administration of her grievance.

At the time Snyder gave her written notice of her election to "go it alone" under O.R.C. § 4117.03(A)(5), Snyder's promotion challenge grievance was awaiting processing at the mediation phase of the grievance process.[12] In the meantime, on March 14, 2018, the OEPA Director, acting through his agency's Chief Legal Counsel, sent a letter to Snyder's undersigned counsel indicating that OEPA management would **not** recognize him as Snyder's representative in respect of the adjustment of Snyder's grievance.[13]

On April 5, 2018, Snyder and the Union participated in a mediation session intended by the terms of the Union Contract to serve as an intermediate option between Step 2 of the grievance process and arbitration to provide the parties, including Snyder, OEPA management, and the Union, with a formal opportunity to negotiate a possible compromise of Snyder's grievance before invoking arbitration as the last step in the grievance process.[14] Such mediation session was conducted in the Union's offices in Westerville, Ohio, and Snyder directed her counsel to stay

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[11] *Id.*, ¶ 2 and Ex. C, pp. 2-3. The other grievance referenced in Snyder's notice is Grievance No. EPA-2017-04271-13 involving an overtime issue referenced in another original action now pending before this Court in a separate mandamus action arising under the Public Records Act, *sub nom. State ex rel. Snyder v. Butler*, Case No. 2018-0630.

[12] *Id.*, ¶ 8.

[13] *Id.*, ¶ 9 and Ex. D.

[14] *Id.*, ¶ 10.

home, as she would represent herself at this informal session designed merely to explore settlement possibilities.[15] While Snyder did not object to the Union's presence during the mediation session, she made it clear that she was representing herself with the assistance of her undersigned counsel who was available to her, by telephone, "on call," if needed, following his pre-mediation consultations with her and with the General Counsel of the Union.[16]

After the mediation session concluded without the parties achieving settlement, the Union requested an opportunity to review additional facts and related details associated with the process of administering the promotional examination in the OEPA's Northeast District Office and selecting a candidate to promote for the promotional opportunity for which pre-qualified employees, including Snyder, applied and were examined.[17] Snyder has joined the Union in such request and hence the Union Contract's deadline for making a decision to proceed with arbitration of Snyder's grievance is *tolled* as of the date this original action in mandamus was commenced.[18]

Snyder consulted with her private counsel following his consultation with the General Counsel of the Union in the aftermath of the unsuccessful mediation session and learned that the Union will **not** commit presently to taking her grievance to arbitration.[19] Upon reflection on the results of conversations with the General Counsel of the Union, as relayed to her by her undersigned counsel, and following her own interaction with representatives of the Union in attendance during the April 5, 2018, mediation session, Snyder is now keenly aware of the *conflict inherent*

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[15] *Id.*

[16] *Id.*

[17] *Id.*, ¶ 11.

[18] *Id.*

[19] *Id.*, ¶ 12.

in the Union's administration of her grievance respecting a lost promotional opportunity in that a successful prosecution of Grievance No. EPA-2017-02279-13 necessarily would mean that the successful candidate who was promoted (also a member of the Union) would be displaced, and Snyder therefore harbors a genuine concern that the Union is not likely to prosecute her grievance aggressively and zealously through the arbitration process or – *worse yet* – ultimately may choose instead to *avoid* such inherent conflict by declining to proceed to arbitration after completing the review process referenced in Paragraph 11 of Snyder's verified complaint.[20]

LAW AND ARGUMENT

Snyder's election to "go it alone" in the adjustment of her pending grievance is a right guaranteed by the General Assembly upon enactment of O.R.C. § 4117.03(A)(5), providing:

> Public employees have the right to:
>
> * * *
>
> > (5) Present grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment.

Since this statute points to remedies available to employees in the public sector in the State of Ohio, O.R.C. § 4117.03(A)(5) is to be *liberally* construed[21] in order to promote the object of protecting Snyder's rights as a state employee and to assist Snyder in obtaining justice respecting the

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[20] *Id.*

[21] O.R.C. § 1.11; *Clark v. Scarpelli*, 91 Ohio St.3d 271, 275, 744 N.E.2d 719, 724, 2001-Ohio-39, ¶ 6; *see also Kaiser v. Buckeye Youth Center*, 812 F.Supp. 118, 120 (S.D.Ohio 1993) (under a liberal construction of a remedial statute, a court generally should construe the language of the statute, whenever, possible, to provide a remedy for every wrong).

grievance she has lodged with the OEPA. When a statute is to be construed liberally, a court is to give "freely," "generously," "largely," and "beneficially" *all* that the statute purports to give.[22] If that means that the most *comprehensive* meaning of the terms used in the statute should be employed, a court is required to do just that.[23]

With her written notice to the OEPA and the Union on January 30, 2018,[24] Snyder exercised her right to pursue adjustment of her grievance through arbitration without the intervention of her bargaining representative on the authority of O.R.C. § 4117.03(A)(5), a statute that *specifically* confers rights *limited* to public sector employees. The General Assembly most recently amended other subsections of Section 4117.03 in 2004,[25] and again in 2011,[26] but has **never** altered the essential rights conferred by this statute when originally enacted in 1983.

When it enacted O.R.C. § 4117.03(A)(5), the General Assembly did **not** impose any restrictions on an employee beyond not interfering with his or her union's privilege of being "present" at the adjustment of the grievance. Hence, the legislature did **not** impose any restrictions on a bargaining unit employee's privilege of participating as a "party" to an arbitration process by which a grievance ultimately might be adjusted.

Likewise, the General Assembly imposed **no temporal restrictions** on the exercise of a public sector employee's right to "go it alone" in the course of adjusting his or her grievance

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[22] 85 O.JUR.3D *Statutes*, § 250 (collecting authorities).

[23] *Schaefer v. Berhhardt*, 76 Ohio St. 443, 448, 81 N.E. 640, 641 (1907).

[24] Snyder's written notice and formal waivers of union representation were shared with Tackett on March 2, 2018. *See* **Verified Complaint**, Ex. C.

[25] Sub. H.B. 262, 2004 Ohio Laws File 80 (effective May 7, 2004).

[26] Sub. S.B. 171, 2011 Ohio Laws File 39 (effective June 30, 2011).

arising under a union contract. The legislature, for example, has **not** imposed a deadline for exercising this right or a condition that the employee make up his or her mind *before* "accepting" the union's assistance in starting a grievance or working with the employee through the earliest few steps of the grievance process. In short, the General Assembly has left it up to the public sector employee who is represented by a union to decide whether to invoke a bargaining representative's help at all or whether to choose to "go it alone" for any reason, in his or her discretion, *at any point in the grievance process*, right through final adjustment via arbitration.

There is only *one condition* on Snyder's exercise of her right to "go it alone." That condition is that she not interfere with the bargaining representative's right to "be present at the adjustment" of the grievance. It is plain from the record in this case that Snyder not only has honored this O.R.C. § 4117.03(A)(5) condition, but already has *invited* the Union to participate with her at the mediation session conducted with respect to her grievance on April 5, 2018. To this end, Snyder therefore does **not** assert that she is the only "party" to her promotion challenge grievance adjustment process, including possible arbitration. Indeed, if Snyder's grievance does proceed to arbitration, **nothing** in O.R.C. § 4117.03(A)(5) suggests that there can be only two "parties" to an arbitration proceeding. If the Union were to feel threatened by the possibility that Snyder might win in an arbitration proceeding that the Union would rather not even take place at all, or if the Union ultimately were to harbor doubts about Snyder's private counsel's ability to protect the Union's concurrent interests or the individual interests of one of its members through that arbitration process, or were to become concerned that the individual adjustment of Snyder's grievance in her favor might jeopardize or compromise the interest of other members of the bargaining unit, the Union remains free to participate actively in such proceeding – even to the point of calling its own witnesses, cross-examining Snyder's witnesses, and making motions and

offering arguments and briefs at odds with Snyder's individual interests. None of those rights or privileges would stand to be compromised or threatened by Snyder's election to "go it alone."

I. THE STATE AGENCY RESPONDENTS HAVE CLEAR LEGAL DUTIES TO RECOGNIZE SNYDER'S O.R.C. § 4117.03(A)(5) ELECTION.

A. The General Assembly's enactment of O.R.C. § 4117.03(A)(5) promotes a policy of recognizing the interest an individual bargaining unit member has in protecting his or her own property interest in continued public sector employment without having to depend on the intervention of his or her bargaining representative.

The General Assembly intended for a "party" to a grievance proceeding to have recourse in the individual defense of his or her constitutionally protected property right in continued employment in the public sector[27] to say to his or her union, "Thanks, but no thanks, I'll go it alone." This public policy objective underlying O.R.C. § 4117.03(A)(5) is clear … the owner of such a vital property right should be permitted the opportunity to defend his or her interests when it comes to rights or privileges of employment in the public sector in his or her discretion and whether or not it seems to him or her that the union is incapable of doing so, is conflicted, lacks the resources or incentive to serve as the employee's advocate, demonstrates incompetence or some other impediment to serving the individual employee's interests, or actually does not believe in the individual employee's cause or does not want such employee to prevail out of fear for how an individual victory may have an adverse impact on other members of the bargaining unit.

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[27] *See, e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 601-02, 92 S.Ct. 2694, 2699-700, 33 L.Ed. 2d 570 (1972) (a public employee's conditions of employment can create a constitutionally protected property interest in his or her position); *McDonald v. City of Dayton*, 146 Ohio App.3d 598, 606, 767 N.E.2d 764, 770 (2001) (express contract creating protected property interest); *Woodbran Realty Corp. v. Orange Village*, 67 Ohio App.3d 207, 214, 586 N.E.2d 248, 252 (1990) (implied contract or mutual understanding giving rise to protected property interest). This constitutional right therefore cannot be compromised or ended without Due Process. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1492 (1985).

In other words, the General Assembly has made the public policy judgment that a public servant's constitutionally protected property right in continued employment in the public sector is so important that he or she cannot be *forced* to let his or her fate rest on the tender mercies of an underfunded, unmotivated, or conflicted bargaining representative.

Based on discussions that Snyder's undersigned counsel has had with the General Counsel of the Union, it is believed that the Union does not disagree with Snyder's interpretation of O.R.C. § 4117.03(A)(5).[28] Rather, it is the OEPA and the Office of Collective Bargaining who take the position that Snyder needs to stick with the Union throughout the entire process of adjusting her grievance, ostensibly because Ohio law somehow does not require recognition of Snyder's private counsel as her representative in the adjustment of her grievance in spite of the plain language of O.R.C. § 4117.03(A)(5). For the reasons that follow, Snyder urges this Court to find that the position taken by or on behalf of the OEPA Director and/or the current head of the Office of Collective Bargaining is misplaced and unsupported in light of the policy objectives embraced by the General Assembly upon enactment of this statute 35 years ago.

In his March 14, 2018, letter to Snyder's undersigned counsel,[29] the Chief Legal Counsel of the OEPA asserts that the OEPA's position in refusing to honor Snyder's election to "go it alone" with the help of only her private counsel is rooted in two unreported intermediate

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[28] The Union has been named in this original action as a party needed for just adjudication because, as a practical matter, "complete relief" probably cannot be accorded among the other parties named in Snyder's verified complaint absent the Union's opportunity to participate in this original action and because disposition may thereby impair or impede the Union's ability to protect whatever interest it may claim and the failure to name the Union therefore could leave the remaining parties named in the verified complaint subject to a substantial risk of multiple judgments and/or inconsistent obligations by reason of the Union's potential interest in the subject matter of this original action. Ohio R.Civ.P. 19(A)(1) and (2).

[29] This letter is reproduced in **Exhibit D** of Snyder's verified complaint.

appellate division cases out of the Eighth Appellate Judicial District in Cleveland, *Johnson v. Metro Health Medical Center*, Case No. 79403, 2001-Ohio-4259, 2001 WL 1685585 (8th App. Jud.Dist., Dec. 20, 2001) (unreported) (also reproduced as part of **Exhibit D** of Snyder's verified complaint), and *Waiters v. Lavelle*, Case No. 95270, 2011-Ohio-116, 2011 WL 242797 (8th App.Jud. Dist., Jan. 13, 2011) (unreported) (reproduced as part of **Exhibit D** of Snyder's verified complaint). What the OEPA's in-house counsel evidently did not realize at the time he composed his letter is that Snyder's undersigned counsel represented one of the parties to one of those Eighth Appellate Judicial Districts cases (the *Waiters* case), knows the record in that case thoroughly,[30] and then two years later achieved a vastly different result in a case involving the rights of a public

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[30] The *Waiters* case arose in the context of an action for an injunction to prevent an arbitrator from conducting further proceedings respecting a pending grievance unless the employee were permitted to present her own case the rest of the way without the intervention of her union. Following an award of reinstatement, an arbitration hearing was scheduled for the remedy phase. During the first day of that hearing, the union's president's incomplete and misleading testimony respecting the way the union administered its "Hiring Hall" played into management's hand by *undermining* the employee's position in response to management's defense that she had failed to mitigate damages. In the meantime, management pursued an ultimately unsuccessful Chapter 2711 challenge to the arbitrator's reinstatement award and a trial court issued a mandate for immediate reinstatement to enforce that part of the award. However, the union did nothing for months on end to get her back to work in defiance of the trial court's order, so the employee hired Snyder's undersigned counsel to petition for a writ of mandamus to carry out the reinstatement order and to pursue the injunction action to let the employee to take control of the balance of the arbitration process since her union had done nothing to help her get back to work and the testimony of the union's president had misstated her efforts to find other work through the union's "Hiring Hall," thereby *undermining* her interests in maximizing her back pay award. After Waiters's undersigned counsel commenced the injunction action, he learned that the union's attorney *also* had *waived* the employee's claim to some $9,300.00 in lost vacation pay without first securing the employee's approval in taking that position! It was against this backdrop that the employee in *Waiters* asked the common pleas court to enjoin the pending arbitration proceeding so she could "go it alone" the rest of the way under O.R.C. § 4117.03(A)(5) without risking further compromises to her rights to full back pay and the restoration of all of her perquisites of employment through further intervention of the bargaining representative. All of these details, known to Snyder's undersigned counsel because he was counsel of record in *Waiters*, are in the record of the *Waiters* case, if not the unreported decision, and can be developed fully through proceedings conducted on an alternative writ under S.Ct.Prac.R. 12.10, if necessary.

sector employee under O.R.C. § 4117.03(A)(5) decided by the Fifth Appellate Judicial District in Canton, *Bair v. Ohio Department of Mental Health*, Case No. 2012-AP-08-0053, 2013-Ohio-2589, 2013 WL 3193598 (5th App.Jud.Dist., June 17, 2013) (unreported).

This original action in mandamus now presents this Court with the opportunity to decide, once and for all, whether the words expressly used by the General Assembly in crafting O.R.C. § 4117.03(A)(5) are unambiguous or truly mean what the Eighth Appellate Judicial District said they mean, *viz.*, that a public sector employee forever "waives"[31] his or her rights to elect to "go it alone" if he or she fails to reject the union's offer of assistance from the very earliest moments in the course of initiating a grievance. For the reasons that follow, this Court is urged to apply the plain and unambiguous language of the statute and resist any urgings by the state agency respondents to read temporal restrictions into a statute where none and none can be implied from any fair reading of what the General Assembly actually enacted.

B. The state agency respondents may not rely on the unreported decisions of the Eighth Appellate Judicial District to compromise Snyder's election to invoke a fundamental right guaranteed by the General Assembly to "go it alone" in respect of the adjustment of her pending grievance through arbitration.

Relying on *Johnson* and *Waiters*, the OEPA's in-house counsel reasoned in his March 14, 2018, letter that because Snyder had "already elected the representation of the union," she "no longer has the right to process [her] grievance on her own."[32]

In-house counsel reasoned further that the OEPA should take this stance absent "clear indication from OCSEA that [Snyder's undersigned counsel is] authorized to stand in its

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[31] The opinions in *Johnson* and *Waiters* do not actually use the word "waive," but the effect of the *dicta* in *Johnson* and the unreported decision in *Waiters* is the same.

[32] **Verified Complaint**, Ex. D, p. 1, ¶ 2.

place as its representative" and "[a]s such," the OEPA "will solely recognize OCSEA as [Snyder's] representative for the scheduling, processing, administration, and resolution of [Snyder's] grievances" because "[t]o do otherwise would put the agency at risk of [inadvertently] and unintentionally committing an unfair labor practice."[33]

And, so, there it is! In a nutshell, the case for reconciling the *Bair* decision of the Fifth Appellate Judicial District and *Johnson* and *Waiters* decisions of the Eighth Appellate Judicial Districts is now squarely laid at the bar of this Court.

In *Bair*, the Fifth Appellate Judicial District held that a public sector bargaining unit member electing to "go it alone" within his or her rights under O.R.C. § 4117.03(A)(5) has standing to challenge the results of an arbitrator's decision in court even if the union not only refuses to join in the challenge, but also actively opposes the relief sought by the employee.

Both the employer and the union in *Bair* had challenged the bargaining unit member's standing to mount such a challenge and relied on the Eighth Appellate Judicial District's unreported decision in *Johnson* for that proposition. But the Fifth Appellate Judicial District noted that *Johnson* applies only "where the employee's union and the employer are the *sole* parties" at the arbitration stage of the grievance process,[34] correctly observing that in *Johnson,* the Eighth Appellate Judicial District concluded merely that the employee in that case could not mount a Chapter 2711 challenge *after* she relied on the union as her *sole* representative throughout the *entire* process of adjusting her grievance and then waited only until *after* she was disappointed by the final result of the arbitration proceeding to assert her right to "go it alone."

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[33] *Id.*, p. 2, ¶ 1.

[34] *Bair v. Ohio Department of Mental Health*, *supra*, ¶ 20 (emphasis supplied).

The Fifth Appellate Judicial District noted that the source of the employee's dissatisfaction in *Johnson* was rooted in the fact that an arbitrator had ordered her to be reinstated to her position, but did not order back pay.[35] The *Bair* court distinguished *Johnson* by noting that, unlike *Johnson*, the employee in *Bair* **never** asked for or "accepted" the assistance of his union in the prosecution or arbitration of his grievance, relying instead exclusively on the counsel afforded him in the arbitration proceedings by his private attorney[36] … who just happens to be Snyder's undersigned counsel. With that analysis offered in the announced opinion distinguishing *Johnson*, the *Bair* court reversed the trial court's dismissal of the employee's Chapter 2711 challenge to the arbitration award and held that the employee had standing to mount that challenge.[37]

As noted above, Snyder's undersigned counsel also represented the employee in the *Waiters* case on which the OEPA's in-house counsel relies in urging the Director not to recognize Snyder's undersigned counsel as her representative in the pending grievance process respecting the promotional examination and selection processes. Upon due reflection, it is the undersigned counsel's considered judgment that the *Waiters* panel merely followed the lead of a panel handing down the unreported opinion in the *Johnson* case ten years earlier without giving much reflection on the fact that the passages of the *Johnson* opinion on which the *Waiters* panel relied either were mere *dicta* or amounted to acts of judicial activism by reading into O.R.C. § 4117.03-

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[35] *Id.*, ¶ 19. The employee wanted to challenge the failure to award back pay, but her union would not go along … just like in *Waiters*, where the employee's interests were undermined during an arbitration hearing at the remedy phase by incomplete or misleading testimony of her union's president on management's mitigation defense an, the employee thereupon decided to "go it alone" because she did not trust that the union was looking after her interests. *See* note 30, *supra*.

[36] *Bair v. Ohio Department of Mental Health*, *supra,* ¶ 20.

[37] *Id.*, ¶ 26.

(A)(5) a temporal restriction that the General Assembly plainly did **not** include when enacting the statute in 1983 or amending it in 2004 or 2011, especially the following passage:

> … [The employee] correctly argues that public employees have a statutory right under R.C. 4117.03(A)(5) to "present grievance and have them adjusted, without intervention of the bargaining representative. * * *." *However, we interpret this right to exist only before the employee invokes union representation. Once the employee chooses union representation, that employee lacks standing on all matters including an appeal.*
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> … *By choosing to pursue this matter with the benefit of union representation under the collective bargaining agreement [the employee] sacrificed her right as a party in interest*, and the union obtained the right to pursue this matter for the benefit of all employees under the collective bargaining agreement. [The] union, not [the employee], was the sole party in interest adverse to [the employer].
>
> This conclusion further recognizes a distinction between a party in interest and an interested party. Clearly [the employee] remained interested in the arbitration decision; however, when she asked for her union's help, she called upon the collective power of her fellow members, and ceased to stand alone. *The necessary and just price paid by [the employee] was subordination of her individual rights to those of her fellow union members.*

Johnson v. Metro Health Medical Center, *supra*, *2 , ¶¶ 3-5 (emphasis supplied).

Where in the statute can there be **any** hint or suggestion that the legislature intended that a public sector employee must make an irreversible, immutable decision *at the earliest stages of a grievance process* that would "sacrifice" the right to "go it alone" and be compelled to pay the "necessary and just price" of tying his or her fate in respect of the defense of a constitutionally protected property right in continued employment in the public sector to a union that ultimately may not prove to have the employee's interests at heart or may prove to lack the resources, incentive, or will to serve as a zealous advocate of the employee's interest?

In short, *no such language exists!*

And, yet, the OEPA's in-house counsel now relies on the *dicta* in *Johnson* as if to establish a "bright line" test that obligates Snyder to accept that her challenge to the propriety of the OEPA's promotion examination and selection processes resulting in someone else getting the promotion ultimately will be left to the tender mercies of union leadership *already unwilling to commit to taking her case to arbitration after expressing concerns for the inherent conflict that the Union now faces* because one of its members (Snyder) claims another member has the job that the first member earned by promotional examination and seniority rules to break ties.

C. The Eighth Appellate Judicial District's fact-specific unreported opinions are not supported by any principles of statutory interpretation, the built-in policy objectives of the General Assembly, or principles of law defining "wavier" or are inapposite.

The public employee in *Johnson* exhausted the grievance process outlined in her union contract all the way through the *end* of the grievance process, *relying entirely on her union in doing so*. As a matter of law, therefore, by the time a final award was handed down in disposition of the employee's grievance, there were *no further steps to take* respecting adjustment of that grievance. So, when the union then decided *against* filing an application under O.R.C. § 2711.10 for judicial review of the arbitrator's decision, the employee in *Johnson* truly was too late in invoking her O.R.C. § 4117.03(A)(5) right since the statute contemplates the pendency of a grievance yet to be finally adjusted. Relying on well-settled case law, the trial court in *Johnson* dismissed the public employee's personal application to vacate on the grounds that she had no standing to challenge the arbitrator's award because she waited until the arbitration process had concluded and therefore could mount an independent or collateral attack on the final adjustment of her grievance only under limited circumstances, holding specifically, as follows:

> . . . Johnson's application to vacate the arbitration award focuses solely on the propriety of the arbitrator's decision; Johnson failed to allege that her

> union breached its duty of proper representation or committed fraud or deceit in representing her. Consequently, Johnson's assigned error is without merit.

Id., * 2, ¶ 6. While it is true that the appellate court in *Johnson* included *dicta* on which the OEPA's in-house counsel now relies in claiming that Snyder "waived" her right to proceed on her own when she "elected the representation of the union," *Johnson* is inapposite or at least distinguishable from the facts in the record in this original action principally because Snyder has **not** yet reached the point of final adjustment of her promotion challenge grievance through completion of the arbitration process.

First, Section 4117.03(A)(5) is *remedial* in nature and such statutes are subject to liberal construction in favor of the party benefited.[38] The purpose of the rule of liberal construction of remedial statutes is to prevent the failure of a remedy attaching to a legal right otherwise granted.[39] Thus, if the OEPA Director or Tackett hope to prevail on any notion that Snyder somehow knowingly, intelligently, and purposely "waived" her right to her own counsel by not asserting her statutory right earlier in the grievance process, the conditions under which such "waiver" would occur should be found in the statute. *No such conditions are stated.*

Second, Section 4117.03(A)(5) does **not** express any deadline or time limit upon a public employee's exercise of his or her right to proceed with the presentation of a grievance without the intervention of the bargaining representative. Apart from the reasoning of the Eighth Appellate Judicial District in *dicta* in *Johnson* and the unreported decision in *Waiters*, OEPA's in-house counsel's letter of March 14, 2018, does **not** even acknowledge the Fifth Appellate Judicial

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[38] *See, e.g.*, 85 O.JUR.3D *Statutes*, § 256 (2004 and cum.supp.) (collecting cases).

[39] *Porter v. Roher*, 95 Ohio St. 90, 115 N.E. 616 (1916); *Columbier v. City of Kenton*, 111 Ohio St. 211, 145 N.E. 12 (1924).

District's decision in *Bair* and does **not** rely on any other case for the proposition that a public employee cannot make a decision *at any time prior to final "adjustment" of his or her grievance* to go it alone – particularly in response to changed circumstances – or cannot even change his or her mind for his or her own convenience or where circumstances warrant re-examination of an earlier decision to proceed with the assistance of the union. Indeed, there are a number of reasons why a public employee might decide to make an election under O.R.C. § 4117.03(A)(5) *after* prosecution of his or her grievance is well underway (and even after the arbitration process has commenced):

- The leadership of the union may have changed after the grievance process has commenced so that the employee no longer feels he has the support or commitment of the new union officers in charge; or

- A union may suffer from dwindling resources and may no longer be capable of funding or justifying the prosecution of any individual grievance through exhaustion of all steps of the grievance process, including arbitration; or

- The relationship between the union and its lawyers, on the one hand, and the public employee, on the other, may have deteriorated through the process of prosecuting the grievance and/or communication channels with the employee may have become so fractious or unreliable as to cause the employee to lose confidence in his or her union's ability or genuine commitment to looking out for his or her interests in the prosecution of the employee's grievance to final adjustment; or

- The union's representation proves to be incompetent, unorganized, and/or incapable of presenting the employee's case in the best possible light; or

- **As in Snyder's case**, the union has an inherent conflict and may be motivated more by *avoiding* the consequences of having to sort out the problems that might arise if the employee prevails at the expense of another member of the union.

In this case, the facts recited in the verified complaint show that Snyder and her private counsel tried cooperating and working with the Union in its efforts to look after Snyder's interests until it

became apparent that the Union was **not** necessarily serving only those interests and instead may have an agenda of its own. What Snyder wants is clarity and a firm resolve to achieving her goal of requiring a neutral arbiter to assess the results of the Northeast District Office's promotional examination and selection processes and determine whether it was Snyder – and not the candidate ultimately selected by OEPA management – who won the right, through competition, to the promotion (with any tie resolved in favor of Snyder as the more senior candidate). *The Union is not presently committed to furnishing such clarity or resolve … and yet it is Snyder's career and future retirement income that is at stake*, **not** the reputation or administrative convenience of the Union. Snyder's undersigned counsel has been brought in to make sure someone in the grievance process has his eyes *exclusively* on the interests of Snyder. Even so, Snyder has **not** failed to recognize the Union's interest in participating in the adjustment of her grievance, and she is satisfied that the General Counsel of the Union does **not** disagree with her stance in choosing to rely on her own counsel through the end of the grievance process. However, the OEPA Director and Tackett appear to be determined to frustrate her rights under O.R.C. § 4117.03(A)(5), thereby prompting Snyder to apply to this Court for help.

Third, no reasonable interpretation of O.R.C. § 4117.03(A)(5) would lock a public employee inalterably into a "decision" made *at the earliest stages* of a grievance process so as to obligate that employee to stick with his or her bargaining representative even if that representative and/or the lawyer hired by that representative ultimately should prove to be inept, uninterested, distracted, conflicted, or downright hostile toward the employee's interests or rights.

Fourth, while a union in the *private* sector very well may "own" a grievance from the beginning to the end of the process, O.R.C. § 4117.03(A)(5) confirms that the policy in the

State of Ohio is that employees in the *public* sector "own" their grievances and their bargaining representatives *always* are subject to being "fired" if they do not or cannot or will not do their jobs.

Snyder made her election to "go it alone" *before* the grievance process at issue in this original action reached even the mediation stage. The Union Contract makes it clear that the grievance process in Snyder's case does **not** end until the opportunity for adjustment by arbitration either is invoked or waived.[40]

The OEPA Director and Tackett are duty-bound to accept Snyder's election and to acknowledge that the Union's involvement in Snyder's grievance process thereupon was restricted to being "present" at the "adjustment" of her grievance through arbitration. *Snyder's employer should have had nothing to say about any of this*.

Lamentably, acting on the advice of his agency's Chief Legal Counsel, the OEPA Director has compromised Snyder's ability to act on her own behalf for the protection of her constitutionally guaranteed property interest in continued or resumed employment in the public sector and Tackett appears to be willing to go along.

The object of Snyder's O.R.C. § 4117.03(A)(5) election is to proceed *on her own* in securing final adjustment of her grievance through the balance of the grievance process outlined in the Union Contract. She wishes to be in control of her destiny and does not wish to cede that control to the Union when it is not apparent to her that the Union ultimately supports what she is trying to accomplish by prosecuting her grievance.

If she were to go along and let the Union remain in charge of her grievance and lose, Snyder's only recourse would be to file an "unfair labor practice" charge with the State

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[40] **Verified Complaint**, Ex. A, pp. 98-102, Art. 25, § 25.02 and 25.03.

Employment Relations Board ("SERB"),[41] but the cases[42] plainly establish that a union cannot be held to account for an "unfair labor practice" merely because it refuses to adopt a member's own

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[41] Snyder does **not** contend that the OEPA Director is retaliating against her because of her union status or unionizing activities, or that the Union is restraining or coercing her in the exercise of rights guaranteed in Chapter 4117, or that the Union has acted in a discriminatory or arbitrary fashion or has exhibited bad faith in the choices it has made in the course of prosecuting her grievance to date. Thus, she has no "unfair labor practice" claim within the meaning of O.R.C. § 4117.11. Instead, Snyder simply disagrees with the approach the Union is taking in her case and wants to avail herself of a right expressly conferred by *another* statute (O.R.C. § 4117.03(A)(5)) to "go it alone" from this point forward.

[42] More than a simple "internal" struggle or disagreement with a union or its officials must be involved before the struggle or disagreement can be characterized as an "unfair labor practice." A union can breach its duty of fair representation *only* in regard to matters in which it *must* represent **all** employees; matters affecting an *individual* employee's relationship with the union generally is perceived as an "internal" union matter falling **outside** of the scope of fair representation. *See In re SERB v. Worthington Classified Association*, SERB 96-009 (June 27, 1996). Thus, sheer ineptitude demonstrated in the course of representing a union member in a grievance proceeding does **not** rise to the level of an "unfair labor practice" to the effect that the union has failed to represent "all" of its members fairly. To the contrary, O.R.C. § 4117.11(B)(6) is designed to redress *discrimination* when it comes to choosing to represent some, but not all, union members fairly or to overcome *arbitrariness* or *bad faith* in the union's conduct toward an individual union member. *See, e.g.*, *District 11, the Health Care & Social Services Union v. SERB*, 2002 SERB 4-10 (Franklin Co., March 13, 2002) (union culpable under O.R.C. § 4117.11(B)(6) for failure to include one employee in its settlement discussions with management even though she clearly fell within the class of employees included within a grievance prosecuted by the union); *Wheeland v. SERB*, *supra* (union liable under O.R.C. § 4117.11(B)(6) for concealing its failure to make proper and timely steps to advance employee's grievance to the next step and then abandoning the grievance without notice to the employee); *In re OCSEA/AFSCME Local 11*, SERB 98-010 (July 22, 1998) (union commits an "unfair labor practice" in violation of O.R.C. § 4117.11(B)(6) where the record reflects arbitrariness, discrimination, or bad faith in the way in which the union discharged its duties to one of its members); *In re Ohio Nurses Association and University of Cincinnati Hospital*, SERB 96-012 (Oct. 30, 1996) (arbitrary or discriminatory intent or bad faith are necessary elements in a claim for breach of duty of fair representation); *In re OAPSE*, SERB 93-021 (Dec. 21, 1993) (preference of one member over another would constitute a "clear" act of discrimination or bad faith in violation of a union's duty of fair representation); *In re AFSCME, Local 2312*, SERB 89-129 (Oct. 16, 1989). Such wrongdoing is **not** implicated by the allegations of Snyder's verified complaint in this original action. Snyder alleges **none** of the elements of a duty-of-fair-representation claim. She does **not** assert that the union is discriminating against her … and while she is disappointed with the way in which the Union has failed to date to make a firm commitment to taking her case to arbitration, Snyder does **not** contend in this case the Union has acted arbitrarily or in bad faith in their dealings with her so that filing a SERB charge should be considered.

interpretation of a term of the bargaining agreement or position in respect of the application or enforcement of such a term in the course of handling the employee's grievance.[43] Yet, that is *precisely* Snyder's position in this case … she disagrees with the way in which the Union is comporting itself presently in the prosecution of her grievance to arbitration and has invoked O.R.C. § 4117.03(A)(5) to take over responsibility for her own grievance "without the intervention of the collective bargaining representative." The General Assembly has guaranteed that Snyder, as a public employee in a bargaining unit entitled to benefits under a collective bargaining agreement, was free to make this election to "go it alone" under O.R.C. § 4117.03(A)(5). So, in construing and applying that statute in this original action in mandamus, this Court should make it plain that the *dicta* in *Johnson* do **not** correctly summarize the law in this area.

In the end, this original action presents an issue of first impression for this Court. Such a prominent issue deserves more than blind adherence by the OEPA's in-house counsel to *dicta* in an unreported intermediate appellate division opinion handed down 17 years ago … or rudderless navigation by lower courts without the aid of this Court's guidance in specifying whether the *dicta* in *Johnson* really represents the law of this state.

If Snyder's right to make an election under O.R.C. § 4117.03(A)(5) is to be eviscerated based on some "temporal restriction" read into that statute by an act of judicial activism, then let it be *this* Court that reads such a condition into the statute. As it is, the General Assembly has **not** seen fit in the 35 years since enacting this law to require any bargaining unit member to

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[43] *See, e.g.*, *In re Williams*, SERB 85-059 (Nov. 7, 1985). A union also can make decisions regarding which claims to assert on behalf of a grievant and which to abandon without committing an "unfair labor practice." *Wheeland v. SERB*, 1994 SERB 4-86 (Franklin Co., Sept. 2, 1994) (union ultimately held liable under O.R.C. § 4117.11(B)(6) for concealing its failure to make proper and timely steps to advance employee's grievance to the next step and then abandoning the grievance without notice to the employee).

ask his or her union to step aside right at the very outset of the grievance process or be "tied to the hip" with his or her union forevermore, regardless of changing circumstances and regardless of the discovery of facts or any later developments that would have prompted the bargaining unit member to tell the union that its representation of his or her interests in the adjustment of a grievance is not desired. Whether for dissatisfaction with the job the Union has been doing or her lack of confidence in the ability or motivation of the Union and its attorneys to overcome the inherent conflict it now admits it has in continuing to represent Snyder or in endeavoring to prosecute her grievance through the end of the grievance process with dedication to her objectives, skill, and thoroughness, there are more than enough reasons to find that Snyder has every right under O.R.C. § 4117.03(A)-(5) at this point to "go it alone" even though she and the Union prosecuted OEPA Grievance No. EPA-2017-02279-13 through the initial Step 2 phase of the grievance process.

To be sure, the signatories to the collective bargaining agreement at issue in this case are the OEPA and the Union. The terms and conditions of that contract, however, exist expressly for the purpose of benefiting a class of individuals that includes Snyder, as a member in good standing of the Union, and therefore must be construed in harmony with the right enjoyed by Snyder under O.R.C. § 4117.03(A)(5).

One of those rights – reserved exclusively for employees in the *public* sector in Ohio – is to say "thank you, but no thank you" to his or her union and "go it alone" by mounting an effort to adjust his or her grievance "without the intervention of the bargaining representative" if she or he so elects.

And since the statute that creates this right does **not** incorporate any temporal restrictions or deadlines for making such an election, this Court should refrain from reading any into that statute.

This Court has **not** weighed in[44] on whether the *dicta* in *Johnson* (that served as the basis for the decision in *Waiters* and the OEPA Director's position on the undersigned counsel's status as Snyder's designated representative) accurately serve to interpret O.R.C. § 4117.03(A)(5) in that temporal restrictions fairly can be read into the words chosen by the General Assembly when enacting this law. Snyder urges this Court to find that the Fifth Appellate Judicial District's exposition of this statute in *Bair* is closer to the correct interpretation that those administering collective bargaining agreement in the public sector in Ohio should follow … namely, that the right to make an election to "go it alone" under O.R.C. § 4117.03(A)(5) can be exercised *at any time* until *completion* of a grievance process outlined in such an agreement. It is this conclusion reached by the *Bair* court that is most closely aligned to the true intent and plain meaning of the statute than anything the Eighth Appellate Judicial District said in its *Johnson* and *Waiters* decisions … and it is that same conclusion that offers this Court the best possible chance of harmonizing those two decisions with *Bair* and the plain meaning of the words employed by the General Assembly when enacting that statute.

Even so, before deciding to cast its lot with the Eighth Appellate Judicial District's decisions in *Johnson* and *Waiters*, this Court would be well-advised to take care to determine whether the *Waiters* and *Johnson* cases are inapposite and/or limited to their respective facts. Snyder asserts that they are inasmuch as the record before this Court makes it plain that the decision to "go it alone" was made and was communicated by Snyder *before* reaching the final (arbitration) step in the grievance process. Thus, the Union has **not** rendered *any* assistance to Snyder

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[44] This Court declined to address this issue when first called to its attention when it turned down the employee's discretionary appeal in *Waiters* in 2011. *Waiters v. Lavelle*, 128 Ohio St.3d 1500, 947 N.E.2d 683 (Table), 2011-Ohio-2420.

at this last step of the grievance process and no argument therefore can be made, *à la Johnson* and *Waiters*, that Snyder has "accepted" the Union's representation through the *end* of the grievance process. At their core, both the *Johnson* and *Waiters* cases stand for the proposition that once a public employee "accepts" his or her union's representation *at the arbitration phase* of a grievance process, *i.e.*, the *end* of the grievance process, the right or privilege of invoking O.R.C. § 4117.03(A)(5) can be considered as having been effectively "waived." Snyder has **not** yet begun the arbitration phase of the adjustment of her promotion challenge grievance, so the fact-specific findings of *Johnson* and *Waiters* make those cases inapposite.

While Snyder and her undersigned counsel do **not** believe O.R.C. § 4117.03(A)(5) can be fairly read to impose even this sort of "temporal restriction," they respectfully submit that the *only* way this Court could attempt to reconcile or harmonize these unreported decisions of the Eighth Appellate Judicial District and the Fifth Appellate Judicial District in *Bair* would be to *limit* the Eighth Appellate Judicial District's holdings in the fashion suggested in the immediately preceding paragraph and declare that a public sector bargaining unit worker may make an election under O.R.C. § 4117.03(A)(5) at any time *before* commencing the last step of the grievance process.

Nevertheless, Snyder urges a *bolder* interpretation of the statute upon this Court and believes that an announcement is warranted to the effect that the *dicta* in *Johnson* and the unreported decision in *Waiters* are inconsistent with the plain meaning and intent of the legislature discerned upon proper and reasonable interpretation and application of O.R.C. § 4117.03(A)(5). Such a pronouncement would be consistent with the plain meaning of the words used by the General Assembly in crafting this section of Chapter 4117 and guaranteeing important statutory rights designed to help public sector bargaining unit workers protect a constitutionally protected interest.

Moreover, before choosing to align itself with *Johnson* and *Waiters*, this Court *also* should take into account Ohio law on "waiver." In this state,[45] a "waiver" is "a voluntary relinquishment of a known right or such conduct as warrants an inference of relinquishment of such right" under circumstances where the relinquishment of the right does not itself violate public policy. The three essential elements of a "waiver" under Ohio law are: (1) An existing right; (2) knowledge, actual or constructive, that such right exists; and (3) an intention to relinquish such right.[46] Moreover, "[a] person cannot be bound by a waiver of his rights … unless such waiver is distinctly made."[47]

On this record, this Court has **no evidence** before it that the OEPA or the Union notified Snyder that she would have to make an election under O.R.C. § 4117.03(A)(5) when she filed her promotion challenge grievance on June 14, 2017, or her failure to do so would be regarded effectively as a "waiver" of her right ever to make that election at a later date. Likewise, neither the OEPA nor the Union notified Snyder that either or both of them would rely on the unreported decisions of the Eighth Appellate Judicial District in *Johnson* and *Waiters* in support of the claim that Snyder would be "tied at the hip" with the Union through the entirety of the grievance process – straight through arbitration – because she failed to "go it alone" from the earliest day of her grievance. Hence, Snyder's failure to make an election under O.R.C. § 4117.03(A)(5) **cannot** have the effect under Ohio law of having *knowingly* "waived" any such claim(s) with an "intention to relinquish such right" for all time.

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[45] *See generally* 42 O.JUR.3D *Estoppel and Waiver* § 93 (collecting cases).

[46] *Id.*, § 94 (collecting cases).

[47] *Id.*, *citing Karly Kiefer Machine Company v. Henry Hiemes, Inc.*, 82 Ohio App. 310, 80 N.E.2d 183 (1948).

II. SNYDER'S CLAIMS IN THIS CASE SATISFY THE CONDITIONS FOR ISSUING A WRIT OF MANDAMUS DIRECTING THE STATE AGENCY RESPONDENTS TO DISCHARGE THEIR CLEAR LEGAL DUTIES.

A writ of mandamus should be issued where a relator demonstrates by his or her application for such relief that (1) a clear legal right exists respecting the requested relief, (2) the respondent is under a clear legal duty to perform the requested act, and (3) the relator has no plain and adequate remedy in the ordinary course of the law.[48] Each of these elements is satisfied in this original action.

Snyder has a clear legal right to make an election to "go it alone" when it comes to the adjustment of her pending promotional challenge grievance … O.R.C. § 4117.03(A)(5) guarantees that right to her.

In the last analysis, the OEPA Director and Tackett[49] are charged with clear legal duties, imposed by O.R.C. § 4117.03(A)(5), to allow Snyder to proceed with the adjustment of her promotion challenge grievance without the intervention of the Union as long as she and her counsel honor the Union's privilege to be present at each step of the grievance adjustment process. There is **no evidence** that Snyder has attempted to compromise or frustrate the Union's right to be present at each such step. Hence, by refusing to recognize Snyder's election to proceed in the adjustment

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[48] *State ex rel. Cincinnati Enquirer v. Dinkellacker*, 144 Ohio App.3d 725, 729, 761 N.E.2d 656, 659 (2001).

[49] Tackett has been named as a party needed for just adjudication because, as a practical matter, "complete relief" probably cannot be accorded among the other parties named in Snyder's verified complaint absent Tackett's opportunity to participate in these proceedings and disposition of this original action may impair or impede Tackett's ability to protect whatever interest he or the Office of Collective Bargaining may claim in respect of this Court's disposition of Snyder's claim and the failure to name Tackett therefore could leave the remaining parties named in the verified complaint subject to a substantial risk of multiple judgments and/or inconsistent obligations by reason of Tackett's potential interest in the subject matter of this original action. Ohio R.Civ.P. 19(A)(1) and (2).

of her grievance without the intervention of the Union, the OEPA Director and Tackett are compromising a fundamental right guaranteed to Snyder under O.R.C. § 4117.03(A)(5) as a bargaining unit employee in the public sector … something the law does **not** give either the OEPA Director or Tackett the right to do. Snyder's election **cannot** be "vetoed" by either her employer or the agency charged with administering the arbitration process in collective bargaining agreements involving state agencies.

Lastly, Snyder lacks any plain and adequate remedy in the ordinary course of the law. As detailed in Notes 41 through 43, *supra*, what the Union is doing in administering the grievance process presently is **not** actionable as an "unfair labor practice" within the meaning of O.R.C. § 4117.11. Moreover, if all decisions are ceded to the Union at this point, there is no assurance that Snyder's grievance ever will be submitted to arbitration, or that the Union will act as a zealous advocate on Snyder's behalf, or that the Union will not simply decline to proceed for its own convenience, *e.g.*, to avoid having to mediate or reconcile the conflict inherent in Snyder's interest in securing the promotion with back pay and the interest of another bargaining unit member to whom the promotion was awarded. Snyder's right to make the decision to take her grievance to arbitration cannot be held hostage by state agency respondents having a motive to do whatever they can to make it more difficult for Snyder to see her grievance through to final adjustment by a neutral arbitrator. There would be no remedy for Snyder in the ordinary course of the law if the time for invoking arbitration were to expire under the Union Contract before a court ultimately were to determine that Snyder had the right to cause the state agency respondents to recognize her private counsel as her representative for the rest of the grievance process. Only relief in mandamus can compel those state agency respondents to honor their clear legal duties by officially recognizing Snyder's right to "go it alone" upon having made her election under O.R.C. § 4117.03(A)(5).

CONCLUSION AND RELIEF REQUESTED

This Court has jurisdiction over this original action under Sections 2(B)(1)(b) and 2(B)(1)(f) of Article IV of the Ohio Constitution and O.R.C. §§ 2731.02 and 2503.37(A). In the absence of relief in mandamus, Snyder lacks a plain and adequate remedy at law since the failure of the OEPA Director and Tackett to recognize her fundamental right under O.R.C. § 4117.03(A)-(5) compromises or frustrates her right to proceed in the adjustment of her grievance without the intervention of the Union, including the right to make her own decision to take such grievance to arbitration irrespective of any final determination of the Union as to whether to invoke such arbitration process.

For all of the foregoing reasons, Snyder asks that this Court grant her application and issue a writ of mandamus and order the OEPA Director and Tackett, under pain of contempt, to comply forthwith in discharging their clear legal duties under O.R.C. § 4117.03(A)(5) by recognizing Snyder's right to proceed with completion of the process of adjusting OEPA Grievance No. EPA-2017-02279-13 through arbitration, if deemed by Snyder to be necessary or advisable, and accepting as her representative either Snyder's undersigned counsel or any other attorney duly licensed to practice law in this state.

Snyder also asks this Court to tax all costs of this original action against the OEPA Director and Tackett, jointly and severally, and to require the OEPA Director and Tackett, jointly and severally, to reimburse Snyder for all reasonable attorney's fees and expenses reasonably incurred by her in the successful prosecution of this original action upon presentation of a post-judgment application for such fees and expenses and establishing a briefing schedule upon such application.

Alternatively, Snyder seeks issuance of an alternative writ or a preemptory writ allowing for the presentation of evidence and the filing and service of briefs or other pleadings on an expedited basis. In fashioning such alternative writ, this Court should order the respondents to file and serve an answer to Snyder's verified complaint and should refer this matter to a master commissioner under S.Ct.Prac.R. 12.10 to receive evidence and conduct a hearing and/or oral argument in disposition of the issues joined by the parties in their respective pleadings filed herein.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2018, a copy of the foregoing was served on the respondents in accordance with S.Ct.Prac.R. 3.11(C) [*method(s) of service checked*] ■ by ordinary U. S. Mail, first-class postage prepaid, addressed to Respondents Craig W. Butler, Director, Ohio Environmental Protection Agency, Lazarus Government Center, 50 West Town Street, Suite 700, P. O. Bo 1049, Columbus, Ohio 43216-1049 (**Facsimile Telephone No. 614-644-3184**), Mark Tackett, Deputy Director, Office of Collective Bargaining, Ohio Department of Administrative Services, 1602 West Broad Street, Columbus, Ohio 43223-1202 (**Facsimile Telephone No. 614-644-0991**), and Ohio Civil Service Employees Association, Local 11, AFSCME (OCSEA), AFL-CIO, c/o Brian J. Eastman, Esq., General Counsel, 390 Worthington Road, Suite A, Westerville, Ohio 43082-8329 (**Facsimile Telephone No. TBD**), □ by facsimile transmission to the facsimile telephone number of the respondents or their respective counsel referenced above, □ by delivery in hand to the offices of the respondents or their respective counsel at the addresses referenced above, □ by electronic transmission via one of more *e*-mail messages addressed to the respondents or their respective counsel, and/or □ by the following alternate means of service: _____

_____

_____.

/s/ S. David Worhatch

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