In the
Supreme Court of Ohio

STATE OF OHIO EX REL. CITY OF CLEVELAND,	:	Case No.
Relator,	:	**APPLICATION FOR A PEREMPTORY WRIT OF PROHIBITION**
vs.	:	
JUDGE SHANNON M. GALLAGHER,	:	
Respondent.	:	

Pursuant to Ohio Const. Art. IV, § 2(B)(1)(d), Relator respectfully submits this application for a peremptory writ of prohibition against Respondent, ordering her to exercise no further jurisdiction over the matters raised in Plaintiff Paul Baeppler's Emergency Motion for Preliminary Injunction (Hearing Requested) (the "Emergency P.I. Motion") filed on March 23, 2021 in Case No. CV 18 902671, pending in the Cuyahoga County Court of Common Pleas.

As set forth fully in Relator's Memorandum of Support, the subject matter of the Emergency P.I. Motion in the case identified above falls within the exclusive remedial scheme of Chapter 4117 of the Ohio Revised Code. As a result, Respondent patently and unambiguously lacks jurisdiction to exercise judicial power over the matter. Moreover, Respondent has engaged in the unauthorized exercise of judicial power over the claims and issues raised in the Emergency P.I. Motion and has evinced intent to continue to exercise such unauthorized jurisdiction in the future. As a result, this honorable Court is empowered to issue the requested peremptory writ of prohibition.

In support of this Application, Relator relies upon the following, which have been filed simultaneously herewith:

(a) The Verified Complaint and accompanying Affidavit and Exhibits in support, the only prior pleading herein;

(b) The Memorandum in Support of Application for a Peremptory Writ of Prohibition; and

(c) A *praecipe* requesting that the Clerk of the Cuyahoga County Common Pleas Court effect personal service of the filings on Respondent through the Cuyahoga County Sheriff's Office.

Respectfully submitted,

ZASHIN & RICH CO., LPA

/s/ *George S. Crisci*
George S. Crisci (0006325)
David A. Posner (0042174)
Tiffany S. Henderson (0096613)
Jzinae N. Jackson (0098411)
950 Main Avenue, 4th Floor
Cleveland, OH 44113
Tel: 216.696.4441
Fax: 216.696.1618
jmd@zrlaw.com | gsc@zrlaw.com
tsh@zrlaw.com | jnj@zrlaw.com

Scott H. DeHart (0095463)
17 S. High Street, Suite 900
Columbus, OH 43215
Tel: 614.224.4411
Fax: 614.224.4433
shd@zrlaw.com

Attorneys for Relator
The City of Cleveland

CERTIFICATE OF SERVICE

Relator requested that the Clerk of Cuyahoga County Common Pleas Court serve a copy of the foregoing via personal service and certified U.S. Mail upon Judge Shannon M. Gallagher, Respondent, at the Cuyahoga County Court of Common Pleas, Courtroom 17A, 1200 Ontario Street, Cleveland, Ohio, 44113-1678, on this 20th day of April, 2021.

ZASHIN & RICH CO., LPA

/s/ *George S. Crisci*
George S. Crisci (0006325)

Attorneys for Relator
The City of Cleveland

In the
Supreme Court of Ohio

STATE OF OHIO EX REL. CITY OF CLEVELAND,	:	Case No.
Relator,	:	
vs.	:	
JUDGE SHANNON M. GALLAGHER,	:	
Respondent.	:	

MERIT BRIEF OF RELATOR CITY OF CLEVELAND
IN SUPPORT OF APPLICATION FOR PEREMPTORY WRIT OF PROHIBITION

JUDGE SHANNON M. GALLAGHER,
Cuyahoga County Court of Common Pleas
1200 Ontario Street
Cleveland, Ohio 44113-1678

Respondent

ZASHIN & RICH CO., L.P.A.

George S. Crisci (0006325)
David A. Posner (0042174)
Tiffany S. Henderson (0096613)
Jzinae N. Jackson (0098411)
950 Main Avenue, 4th Floor
Cleveland, OH 44113
Tel: 216.696.4441
Fax: 216.696.1618
jmd@zrlaw.com | gsc@zrlaw.com
tsh@zrlaw.com | jnj@zrlaw.com

Scott H. DeHart (0095463)
17 S. High Street, Suite 900
Columbus, OH 43215
Tel: 614.224.4411
Fax: 614.224.4433
shd@zrlaw.com

Attorneys for Relator
The City of Cleveland

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

In the
Supreme Court of Ohio

STATE OF OHIO EX REL. CITY OF CLEVELAND, Relator, vs. JUDGE SHANNON M. GALLAGHER, Respondent.	:	Case No. **APPLICATION FOR A PEREMPTORY WRIT OF PROHIBITION**

I. INTRODUCTION AND SUMMARY OF ARGUMENT

More than thirty-five years of decisive and precedential case law have firmly established that in Chapter 4117 of the Ohio Revised Code – the Public Employee Collective Bargaining Act ("Chapter 4117" or the "Act") – the General Assembly created a mandatory and comprehensive statutory framework for the resolution of all public sector labor disputes. The fundamental purpose of the Act is to establish a coherent and focused procedural framework through the statute, the Ohio Administrative Code, and the corresponding body of labor law decisions to govern uniformly Ohio public employee labor issues.

Chapter 4117 creates an exclusive series of rights for public employees and employers, as well as specific procedures and remedies for the vindication of those rights. The Act creates a specialized body – the State Employment Relations Board ("SERB") – to which the General Assembly granted exclusive, primary jurisdiction to resolve disputes arising under Chapter 4117. Further, the Act provides that when disputes arise concerning the "wages, hours, and terms and conditions of public employment covered by" a collective bargaining agreement ("CBA") that "provides for a final and binding arbitration of grievances," the parties to that CBA "are subject ***solely to that grievance procedure***" to the exclusion of the jurisdiction of civil service boards

and Ohio's courts of common pleas. *See* R.C. § 4117.10(A) (emphasis added). When a party with rights under the Act alleges that its rights under a CBA were violated, the statute requires the party to pursue the remedies set forth in Chapter 4117.

This case arises out of the employment relationship of Lieutenant Paul Baeppler ("Plaintiff") and The City of Cleveland (the "City" or "Relator"). Lt. Baeppler's employment is subject to the terms and conditions of a CBA negotiated between the Fraternal Order of Police, Lodge #8 ("FOP") and the City. Lt. Baeppler filed a civil lawsuit against the City in 2018, which is pending in the Cuyahoga County Court of Common Pleas and assigned to Respondent. On March 19, 2021, the City notified Lt. Baeppler to appear for a pre-disciplinary hearing on March 26, 2021, pursuant to the CBA, in a discipline matter unrelated to Lt. Baeppler's ongoing lawsuit. Lt. Baeppler responded by filing an *Emergency Motion for Preliminary Injunction (Hearing Requested)* on March 23, 2021 (the "Emergency P.I. Motion"). Respondent initially granted Lt. Baeppler's Emergency P.I. Motion, then vacated her Order *sua sponte* to issue a modified Order granting the broad relief sought by Lt. Baeppler on an interim basis.

The City filed a Motion to Dismiss and Memorandum in Support on April 16, 2021, placing Respondent on notice that she patently and unambiguously lacked jurisdiction over the Emergency P.I. Motion because this is a matter wholly preempted by the CBA and subject ***exclusively*** to the CBA's grievance procedure. Notwithstanding, Respondent has directed the City to appear at a Preliminary Injunction evidentiary hearing on April 19, 2021, and continues to exercise jurisdiction over the Emergency P.I. Motion.

For the reasons set forth in the Verified Complaint, Application, and this Memorandum, the City respectfully asks this Court to issue a peremptory writ of prohibition to prevent Respondent from further unauthorized exercise of jurisdiction over the Emergency P.I. Motion.

II. FACTS

Lieutenant Paul Baeppler ("Lt. Baeppler") is a Lieutenant in the City's Division of Police. Lt. Baeppler was previously assigned to the City's Fourth District. On August 23, 2018, he filed a civil Complaint against the City and Fourth District Commander Brandon Kutz and Lieutenant Jason DeFranco. *See generally,* Complaint. The Cuyahoga County Court of Common Pleas Clerk's Office assigned the case to Respondent.

The City's Division of Police had brought a series of internal charges against Plaintiff for his workplace violence, unprofessional conduct, and failure to follow proper protocol and procedures. *See* Complaint ¶¶31, 37, 41-42, 53. Additionally, Commander Kutz and Lieutenant DeFranco issued several reports and memoranda regarding Lt. Baeppler's workplace violence and misconduct. *See* Complaint ¶¶23-26, 33-34, 37, 41-43, 49, 53. Lt. Baeppler alleges that these charges, reports, and memoranda are premised on false information. *Id*. He contends that Commander Kutz and Lieutenant DeFranco have engaged in "unlawful and discretionary activities," and by doing so the City has "emboldened and ratified the practices and conduct of Kutz, and later on, DeFranco." *See* Complaint ¶38.

Without recounting unnecessarily his entire laundry list of allegations, Lt. Baeppler's Complaint describes various interactions with Commander Kutz and Lieutenant DeFranco, the alleged denial of Lt. Baeppler's application for an officer-in-charge position (Complaint, ¶¶13-16), his transfer to the C Platoon (Complaint, ¶¶17-19), the City's investigation of Lt. Baeppler's involvement in a domestic violence call on June 24, 2016 (Complaint, ¶¶20-29), administrative charges brought against Lt. Baeppler in connection with the June 24, 2016 call (Complaint, ¶¶30-32), Lt. Baeppler's transfer to a new administrative position (Complaint, ¶32), the City's investigation of Lt. Baeppler's conduct in a Senior Staff Meeting on December 15, 2016 (Complaint, ¶¶33-36), Lt. Baeppler's involvement in an incident of unprofessionalism and

misconduct on May 31, 2017 (Complaint, ¶¶37), Lt. Baeppler's complaints regarding alleged discrimination (Complaint, ¶¶38), Lt. Baeppler's involvement in further incidents in April 2017, May 2017, November 2017 (Complaint, ¶¶39-48), Lt. DeFranco allegedly 'tripping' Lt. Baeppler in May 2018 (Complaint, ¶49), and Lt. Baeppler's relocation to a different office and an assignment in the "Impound Lot" (Complaint, ¶¶50-52). The underlying factual allegations on which Lt. Baeppler bases his claims are a series of alleged occurrences between June 29, 2015 (when Lt. Baeppler alleges that he was promoted to the position of Lieutenant) and the filing of Lt. Baeppler's lawsuit in August 2018. *See* Complaint, ¶¶8 through 60.

Lt. Baeppler's Complaint asserts a litany of claims against the above-referenced defendants, all of which arise out of the factual allegations summarized in the preceding paragraph. The nine counts in the Complaint include civil claims for alleged violations of criminal statutes (Count I), intimidation (Count II), discrimination on the basis of age (Count III), retaliation for Lt. Baeppler's complaints about alleged age discrimination (Count IV), intentional infliction of emotional distress (Count V), assault and battery (Count VI), defamation (Count VII), "False Evidence" (Count VIII), and "Complicity" (Count IX).

On March 19, 2021, the City notified Lt. Baeppler that a pre-disciplinary hearing was scheduled for March 26, 2021 regarding his conduct in Office of Professional Standards Case No. OPS2016-00331,[1] in accordance with the requirements under the City's and Fraternal Order of Police, Lodge No. 8's ("FOP") collective bargaining agreement ("CBA").[2] The factual basis

[1]Regarding OPS2016-0033, a citizen filed a complaint against Lt. Baeppler with the City's Office of Professional Standards ("OPS"), asserting that Baeppler unlawfully forced himself into her home and thereafter conducted an improper search. (Baeppler Motion, Exhibit F - Findings Letter). After conducting its investigation, OPS determined that Lt. Baeppler's conduct was improper and forwarded the matter to the Civilian Police Review Board ("CPRB"). The CPRB found that the evidence supported a finding that "[Baeppler's] actions were inconsistent with law or Cleveland Division of Police (CDP) policy, or procedure, or training." Accordingly, the CPRB forwarded the matter to the City with a recommendation for disciplinary action.

[2] Plaintiff attached a copy of the CBA at Exhibit K of his Motion.

for the notice was Lt. Baeppler's involvement in an arrest on February 10, 2016. No details of this incident are recorded in Plaintiff's Complaint; none of Plaintiff's existing claims is predicated on the facts of this occurrence or the City's investigation thereof.

On March 23, 2021, Lt. Baeppler filed an Emergency Motion for Preliminary Injunction (Hearing Requested) (the "Emergency P.I. Motion") Lt. Baeppler's Emergency P.I. Motion sought extraordinary and overly broad relief in the form of Respondent's entry of a preliminary injunction "prohibiting Defendants, and all persons in active concert and participation with them, from interfering with the continuation of Plaintiffs employment as a Cleveland Police Lieutenant throughout the pendency of this litigation." Emergency P.I. Motion, p.60. The sole entitlement that Lt. Baeppler might possess to any of the relief he requests in the Emergency P.I. Motion depends on the interpretation and application of Chapter the CBA. The Cuyahoga County Court of Common Pleas patently and unambiguously lacks subject-matter jurisdiction over this matter.

Approximately 1-1/2 hours after the filing of the Emergency P.I. Motion, Respondent's Staff Attorney, Kimberly Davenport ("Ms. Davenport") conducted a telephone conference with counsel for Lt. Baeppler and the City (Verified Complaint, ¶31). Ms. Davenport asked if the City would agree to accept the relief sought in the Emergency P.I. Motion, which the City declined. (*Id*, ¶¶32-33). The City's counsel did not have authority to agree to delay the March 26, 2021 pre-disciplinary hearing during the parties' briefing of the Emergency PI Motion, but the City's counsel expressed willingness to inquire with the City. (*Id*, ¶34).However, Ms. Davenport expressed the court's intention to grant the Emergency PI Motion. (*Id*, ¶35). In a second telephone conference on the following day, the City declined to agree to the requested delay for the March 26, 2021 pre-disciplinary hearing. In response, Ms. Davenport indicated that the Court would grant the Emergency PI Motion. (*Id*, ¶39). Ms. Davenport requested, and Lt. Baeppler's counsel submitted, a proposed injunctive order; the Court entered an "electronic

notice" granting the motion at 3:35 p.m. on March 25, 2021. (*Id*, ¶¶40-45). This was followed by an Entry of Preliminary Injunction at 5:24 p.m. on the same day (hereinafter the "March 25th Order"). (*Id*, ¶36). Respondent's March 25th Order stated broadly and indefinitely that the City was "restrained until further notice from undertaking any adverse employment action against Baeppler or otherwise interfering with his continued employment as a Cleveland Police Lieutenant, including any pre-disciplinary or termination hearings or other proceedings."

The City moved to stay execution of the March 25th Order, and simultaneously filed an appeal in the Eighth District Court of Appeals. (*Id*, , ¶50). On April 2, 2021 (and presumably in response to Lt. Baeppler's Brief in Opposition to the City's Motion to Stay), Respondent vacated its March 25, 2021 Order. Respondent re-issued its injunctive order, construing, *sua sponte* (because Lt. Baeppler never has moved for a temporary restraining order), Lt. Baeppler's Emergency P.I. Motion for a preliminary injunction as a motion for a temporary restraining order. (the "April 2nd Order"). Respondent directed the parties to appear for an evidentiary hearing on April 19, 2021. Respondent ordered that the City and its agents were restrained until after the April 19 hearing "from undertaking any adverse employment action against [Baeppler] or otherwise interfering with his continued employment as a Cleveland Police Lieutenant, including any pre- disciplinary or termination hearings or other proceedings." (*Id,* ¶ 55) The Court denied without explanation the City's Motion to Stay. The Eighth District dismissed *sua sponte* the City's appeal on April 13, 2021. The City has not yet filed a motion to reconsider.

The City moved on April 16, 2021, for Respondent to dismiss the Emergency P.I. Motion under Ohio R. Civ. P. 12 (B)(1) and to cancel the scheduled hearing on the Emergency P.I. Motion. (*Id*, ¶59). The same day, April 16th, the Court issued a Journal Entry marked as "taken by" Judge Brendan J. Sheehan and bearing Judge Sheehan's signature) stating that no substantive action was to be taken in the matter until April 26, 2021." On April 17, 2021, Lt.

Baeppler's counsel contacted Ms. Davenport by e-mail to request clarification regarding whether the scheduled PI hearing would be conducted on Monday, April 19, 2021 or would be postponed. (*Id,* ¶62). On April 18, 2021 at 4:13 p.m., Ms. Davenport responded that "[Respondent] plans to go forward with the hearing on Monday 4/19." (*Id*, ¶63).

Respondent continues to exercise unauthorized and illegitimate jurisdiction over the matter. Respondent has allowed Lt. Baeppler to bypass the General Assembly's special statutory scheme for enforcing rights created by Chapter 4117 and memorialized in a CBA. In the face of Respondent's actions, the City was left with no choice but to apply for a writ of prohibition, ordering Respondent to cease her unauthorized exercise of jurisdiction over a matter pre-empted by the labor contract. On April 19, 2021, the City filed its Verified Complaint with the Ohio Supreme Courtand an Application for a Peremptory Writ of Prohibition. The City now files its Merit Brief pursuant to Supreme Court Rule of Practice 16.02(A)(2).

This Court has clearly and unequivocally decided that matters arising under Chapter 4117– including alleged CBA violations – fall within the primary, exclusive remedial scheme created in Chapter 4117. Respondent's lack of jurisdiction over the Emergency P.I. Motion is patent and unambiguous. By granting the Emergency P.I. motion, converting it to a TRO, and refusing to cancel the P.I. hearing until such time as Respondent could rule on the City's motion to dismiss, and by continuing to exercise jurisdiction in this matter, Respondent has disregarded more than three decades of Ohio labor law – including the clear decisions of this Court as recent as 2019 – which confirm the exclusivity of Chapter 4117 in disputes of precisely this type.

III. ARGUMENT

Chapter 4117 of the Ohio Revised Code is the playbook for collective bargaining between Ohio's public employers and their employees. The Act includes several provisions ranging from the establishment of the State Employment Relations Board ("SERB"), to the

organization of unions, to impasse resolution, to the enforcement of the parties' bargaining obligations, to the determination of any violations of those obligations, and to the remedying of any such violations.

The Act's coverage of collective bargaining in the public sector is comprehensive. R.C. 4117.11(A) enumerates various types of unlawful activity, identified as public employer unfair labor practices, making it unlawful for a public employer to, *inter alia*, "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117" and/or to "refuse to bargain collectively" (§ 4117.11 (A)(1) and (5)). R.C. 4117.11 and 4117.12 bestow upon SERB the exclusive authority to investigate and render determinations regarding ULPs (§§ 4117.11 and 4117.12).

Where an employer and an employee's exclusive representative have entered into a CBA defining the terms and conditions of public employment, R.C. § 4117.10(A) provides that:

> An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement. ***If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure.*** Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees.

With limited, narrow exceptions, Chapter 4117 does not vest courts of common pleas with jurisdiction beyond appeals from, or enforcement of, orders rendered by SERB (*see* R.C. § 4117.13 (A) and (F)) or the hearing of motions to vacate, modify, or confirm labor arbitration awards (*see* R.C. Chapter 2711). As this Court noted in *Lorain City School Dist. Board of Education v. SERB* (1988), 40 Ohio St. 3d 257, 266 "[I]t was clearly the intention of the General

Assembly to vest SERB with broad authority to administer and enforce R.C. Chapter 4117."

Lt. Baeppler is a public employee; the terms and conditions of his employment are governed by a CBA negotiated by Lt. Baeppler's Union and the City under R.C. Chapter 4117. In his Emergency P.I. Motion, Lt. Baeppler claims that the City is violating the investigatory and pre-disciplinary rules of the CBA, and that the City is pursuing a disciplinary process that will not be consistent with the "due process" standards of the CBA and arbitral precedents for "just cause." Because the rights that Lt. Baeppler asserts in his Emergency P.I. Motion arise under the CBA and the alleged violations depend on application and interpretation of the CBA, Chapter 4117 prescribes the ***exclusive*** avenues by which Lt. Baeppler may seek relief. He must pursue alleged CBA violations according to the CBA's procedures (for grievances and arbitration) and he must pursue any alleged unfair labor practices ("ULP") at SERB. Chapter 4117 does not create any private right of action for public employees to obtain an injunction to *preemptively* stop an alleged violation of the CBA or Chapter 4117 in a Common Pleas Court.

It is black letter law that, when a public employee such as Lt. Baeppler asserts that a public sector employer has violated a CBA negotiated under R.C. Chapter 4117, the matter falls exclusively within the ***exclusive*** remedial scheme of Chapter 4117 and not the jurisdiction of the State's courts of common pleas. Respondent is exercising jurisdiction improperly over the Emergency P.I. Motion.

When, as here, a court patently and unambiguously lacks jurisdiction to proceed in a cause, prohibition will issue to prevent any future unauthorized exercise of jurisdiction and to correct the results of prior jurisdictionally unauthorized actions. *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 12 (*citing, State ex rel. Dannaher v. Crawford,* 78 Ohio St.3d 391, 393, 1997 Ohio 72, 678 N.E.2d 549 (1997)). A suit for a writ of prohibition is properly directed to the Ohio Supreme Court, which has original jurisdiction

pursuant to the Ohio Constitution, Article IV, § 2(B)(1)(d).

For a writ of prohibition to issue, the relator must establish that: (1) the respondent is about to exercise judicial power; (2) the exercise of judicial power is legally unauthorized; and if the writ is denied, relator will incur injury for which no adequate legal remedy exists. *State ex rel. Richland Cty. v. Richland Cty. Court of Common Pleas*, 152 Ohio St.3d 421, 2017-Ohio-9160, 97 N.E.3d 429, ¶8 (*citing State ex rel. Elder v. Camplese*, 144 Ohio St. 3d 89, 2015-Ohio-3628, 40 N.E.3d 1138, ¶13). Regarding the third element, this Court has held that where the respondent's lack of subject-matter jurisdiction is "patent and unambiguous," the relator is not required to establish that it lacks an adequate remedy at law, because the availability of alternate remedies like appeal is immaterial to the relator's entitlement to the writ. S*tate ex rel. State of Ohio*, 99 Ohio St.3d at 101, *citing*, *State ex rel. Goldberg v. Mahoning Cty Bd. of Electors*, 93 Ohio St. 3d 160, 101, 2001 Ohio 1297. *See also*, *State ex rel. Sapp v. Franklin Cty Court of Appeals*, 118 Ohio St. 3d 368, 370, 2008 Ohio 2637, *citing*, *State ex rel. Columbus S. Power Co. v. Fais*, 117 Ohio St. 3d 340, 2008 Ohio 849. This Court has explained that:

> If a lower court patently and unambiguously lacks jurisdiction to proceed in a cause, prohibition and mandamus will issue to prevent any further unauthorized exercise of jurisdiction and to correct the results of prior jurisdictionally unauthorized actions.

State ex rel. Sapp, 118 Ohio St.3d at 370, *citing*, *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002 Ohio 6323 and *State ex rel. Powell v. Markus*, 115 Ohio St.3d 219, 2007 Ohio 4793.

The first element is satisfied because Respondent has exercised – and continues to exercise – judicial power in the underlying case. Respondent issued a conditional Preliminary Injunction, converted it *sua sponte* into a TRO, calendared dates for an evidentiary hearing, and ultimately refused to delay the hearing pending a ruling on the City's Rule 12(B)(1) Motion.

The second element is therefore the "dispositive issue." *See State ex rel. Duke*

Energy Ohio, Inc. v. Hamilton Cty. Court, 126 Ohio St.3d 41, 2010-Ohio-2450, 930 N.E.2d 299, ¶ 17. As set forth herein, Respondent has no jurisdiction over the Emergency P.I. Motion because collective bargaining matters are subject to exhaustion of the exclusive remedies in Chapter 4117. State courts have no jurisdiction to entertain actions alleging violations of a CBA, which are subject solely to the grievance and arbitration provisions of the CBA pursuant to R.C. § 4117.10(A). Indeed, when the courts of common pleas have decided to retain jurisdiction – including the Cuyahoga County Court of Common Pleas – is this Court has issued a writ of prohibition extinguishing the court's attempted exercise of jurisdiction. The same outcome should result in the instant case.

A. Proposition of Law No. 1:

Disputes over the Interpretation and Application of CBA Terms between a Public Employer and an Employee Covered by that CBA Fall Squarely andExclusively within the Remedial Scheme of Chapter 4117

In *Franklin County Law Enforcement Assoc. v. Fraternal Order of Police Capital City Lodge No. 9*, 59 Ohio St. 3d 167 (1991) ("*Franklin County*"), the plaintiff union sought injunctive and declaratory judgment relief against the defendants, including the Fraternal Orderof Police ("the FOP") and the Franklin County Board of Commissioners, for an alleged improperagreement reached between the FOP and the County Commissioners. The trial court dismissed the lawsuit based on a lack of subject-matter jurisdiction. The appellate court reversed, holding that the declaratory judgment remedy was an alternative to other remedies. This Court reversed.

In affirming the trial court's dismissal of the complaint for lack of subject-matter jurisdiction, this Court first noted that Chapter 4117 established a comprehensive framework for resolving public sector labor disputes, and specifically noted the numerous procedures identified under R.C. §§ 4117.11, 4117.12 and 4117.13 – the elaborate rights and procedures pertaining to

unfair labor practices. This Court then concluded that Chapter 4117 does not prescribe the right of a party to initiate claims in the courts of common pleas: "[A]ccordingly, we hold that SERB has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117." 59 Ohio St.3d at 170.

Subsequent decisions have further delineated the contours of this Court's holding in *Franklin County.* It has become well-settled that "Chapter 4117 of the Ohio Revised Code governs disputes between an employer and an employee where a CBA is in place." *Chenevey v. Greater Cleveland Regional Transit Auth*., 2013-Ohio-1902, 992 N.E.2d 461, ¶14-18 (8th Dist.) Chapter 4117 sets forth a "comprehensive statutory scheme for collective bargaining for public employees." *Id.*, quoting *Bailey v. Ohio Dept. of Trans*p., 8th Dist. No. 80818, 2002 Ohio 6221, ¶21, *citing Rocky River v. State Emp. Relations Bd*., 43 Ohio St.3d 1, 539 N.E.2d 103 (1989). This statutory scheme outlines "very specific rights and duties for public employers, public employees and their unions in making such agreements. It also sets out the remedies available for enforcing those rights and duties." *Id.*, citing *Johnson v. Ohio Council Eight*, 146 Ohio App.3d 348, 352, 766 N.E.2d 189 (8th Dist. 2001).

Chapter 4117 offers two remedial avenues for employment disputes of the type that Lt. Baeppler asserts:[3] (1) seeking relief from SERB, primarily by filing ULP charges; or (2) filing a grievance under the parties' CBA, which the union may advance to binding arbitration (or to a civil suit by the Union under R.C. § 4117.09(B), in the absence of a CBA arbitration clause).

With regard to the first option, "SERB has exclusive jurisdiction over matters within R.C. Chapter 4117 in its entirety, not simply over unfair labor practices." *Assn. of Cleveland Firefighters, Local 93 v. Cleveland*, 156 Ohio App.3d 368, 2004-Ohio-994 (8th Dist. 2004); *see*

[3] R.C. § 4117.14 also provides for "fact-finding" and "conciliation" proceedings that help to resolve bargaining impasse disputes. Those statutory provisions are not relevant to this case.

also Franklin Cty. Law Enforcement Assoc, 59 Ohio St.3d at 170 ("SERB has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117."); *Consolo v. City of Cleveland*, 103 Ohio St.3d 362, 367 (2004) ("[C]ollective bargaining on behalf of employees is the province of SERB.").

Moreover, "[a]ny claim which is independent of R.C. Chapter 4117, such as a breach of contract enforcement, **still falls solely within the jurisdiction of SERB if the asserted claim arises from or is dependent on the collective bargaining rights created by R.C. Chapter 4117**." *State ex rel. FOP, OLC v. Court of Common Pleas*, 76 Ohio St.3d 287, 290 (1996), citing *State ex rel. Clev. City Sch. Dist. Bd. of Edn. V. Pokorny*, 105 Ohio App.3d 108, 110 (1995) (emphasis added); *see also Johnson v. Ohio Council Eight*, 146 Ohio App.3d 348, 351 (8th Dist.) 2001 (same) ("When a party asserts a claim sounding in contract, a court must always ask: Which contract? The answer in this case is that we are dealing with a public employees collective bargaining contract. These contracts are exclusively within the jurisdiction of SERB").

A second avenue for a remedy under Chapter 4117 is the submission of disputes with respect to contractual wages, hours, and terms and conditions of employment to the grievance and binding arbitration procedures in the CBA. *Toledo Police Command Officers' Assn. v. City of Toledo*, 2014-Ohio-4119, 20 N.E.3d 308, ¶29 (6th Dist.) When such provisions are included in a CBA, R.C. § 4117.10(A) makes the grievance and arbitration procedures *exclusive* and prohibits the exercise of jurisdiction by other bodies (e.g., civil service commissions). Jurisdiction is vested in a duly-appointed labor arbitrator upon the ripening of such controversies, to the exclusion of the courts of common pleas. "Where the grievance procedure is the exclusive remedy available to the employee under the CBA, the common pleas court acts properly when it

dismisses a complaint pursuant to Civ.R. 12(B)(1) and Civ.R.12(B)(6)." *Pulizzi v. City of Sandusky*, 6th Dist. Erie No. E-03-002, 2003-Ohio-5853, ¶11.

Illustrative of this principle is the Tenth District Court of Appeals' decision in *Albright v. Jackson*, 10th Dist. Franklin No. 89AP-1215, 1990 Ohio App. LEXIS 2073, at *7 (May 15, 1990). In that case, the trial court properly found that it lacked jurisdiction over the allegation of a violation of the CBA. The employer, a university, chose to close its laundry facilities and use an outside contractor for its laundry needs. The union members filed an action for an injunction, claiming that the action violated the CBA. The trial court dismissed the action, and on appeal, the Tenth District affirmed. The court held that if the labor agreement provided for final and binding arbitration, then employers, employees, and labor unions were subject ***solely*** to the grievance procedures as set forth in the CBA, which culminated in binding arbitration. Accordingly, the trial court properly found that it lacked jurisdiction.

Lt. Baeppler's Emergency P.I. Motion, over which Respondent continues to exercise jurisdiction, represents an attempt by Lt. Baeppler to have the Respondent intervene in a CBA dispute that Chapter 4117 clearly and unequivocally commits to the grievance and arbitration processes in the CBA. Under the clear precedents of this Court set forth above, and because these claims seek vindication of collective bargaining rights created by the Act, the remedies in Chapter 4117 are exclusive. Respondent has no jurisdiction to hear them, and the City is entitled to the requested writ of prohibition.

This Court has made clear that the "dispositive test" in determining whether the common pleas court has jurisdiction over a claim by a party to a CBA is whether the party's claims "arise from or depend on the collective bargaining rights" outlined by Chapter 4117. *State ex rel. Cleveland v. Sutula*, 127 Ohio St.3d 131, 2010 Ohio 5039, 937 N.E.2d 88, ¶20, quoting *Franklin Cty. Law Enforcement Assn.* at paragraph 2 of the syllabus; *Gudin v. W. Reserve Psychiatric*

Hosp., 10th Dist. No. 00AP-912, 2001 Ohio App. LEXIS 2634 (June 14, 2001) (finding state law claims preempted where the claim is based on rights created by the CBAs or the rights are created by state law, but the application of the law is dependent on an interpretation of a CBA).

In his Emergency P.I. Motion, Lt. Baeppler alleges that the City issued a notice of pre-disciplinary hearing on March 19, 2021 in an "attempt to terminate Plaintiff Baeppler" in retaliation for some unspecified protected activity. Baeppler's nine-count complaint does include a retaliation claim, but it is premised on his earlier complaints about age discrimination and harassment in the Division of Police.[4] As the Eighth District has explained, allegations of retaliation under R.C. Chapter 4112 are "distinct from any right conferred by the [CBA]" and they are, therefore, "independent of the arbitration process." *Chenevey,* 2013-Ohio-1902 at ¶20 (citing cases). However, when a retaliation claim "arises from or is dependent on the collective bargaining rights" created by R.C. Chapter 4117, the claim falls within the exclusive remedial scheme of Chapter 4117. *Id.*, ¶21 citing *State ex rel. Cleveland*, 127 Ohio St.3d 131, 2010 Ohio 5039, 937 N.E.2d 88, ¶ 23. Thus, in *Chenevey*, the Court found that all of the plaintiff's claims "hinge[d] on the terms of the CBA in place during Chenevey's employment[,]" namely an eligibility list, that list's expiration, and whether the employer had followed the applicable CBA. *Id.* at ¶28. Because Chenevey's claims of discrimination "arise from, or are dependent upon, the interpretation of the [CBA] at issue and, consequently, the rights created by R.C. Chapter 4117, the remedies provided in that chapter are exclusive. Chapter 4117, therefore, preempts Chenevey's claims [and] . . . the trial court properly granted RTA's motion to dismiss for lack of subject matter jurisdiction."

[4] Baeppler never sought leave to amend his Complaint to address any additional alleged retaliation based on this lawsuit. And as noted in footnote 12, *infra*, the enactment of the ELUA requires Baeppler's allegations of new, discrete acts of discrimination or retaliation to be administratively exhausted at the OCRC, thus depriving the common pleas courts of any subject-matter jurisdiction until those proceedings have concluded.

Lt. Baeppler's motion for injunction will require the Respondent to interpret and determine CBA rights; thus, the CBA remedies are exclusive, and the Court's jurisdiction is preempted. *See Crawford v. Kirtland Local School Dist. Bd. of Edn.,* 2018-Ohio-4569, 124 N.E.3d 269, ¶31 (11th Dist.) (approving of the analysis in *Chenevey* and explaining that "[e]ven when the rights asserted by a plaintiff are created by state law, ***if the application of the law is dependent on an analysis or interpretation of a collective bargaining agreement, the trial court lacks subject matter jurisdiction over the matter.***") (emphasis added) (*citing, Guden v. Western Reserve Psychiatric Hosp*., 10th Dist. Franklin No. 00AP-912, 2001 Ohio App. LEXIS 2634, 2001 WL 664389, *3 (June 14, 2001)); and *Hill v. Bd. of Edn. of the City School Dist. of Cincinnati*, S.D.Ohio No. 1:13-cv-628, 2015 U.S. Dist. LEXIS 81256, at *20 (June 23, 2015) ("The Ohio courts have consistently held that Ohio Rev. Code 4117.10 does not permit a private cause of action if the claim arises under a CBA. The genesis of Hill's claims is the fact that she was referred to the Peer Review Panel and placed in Intervention; both of these acts arose under the CBA, and ***Hill should have timely pursued a grievance in order to challenge them***.") (emphasis added)

Lt. Baeppler seeks extraordinarily over-broad relief, which Respondent has already granted – i.e., that "the City of Cleveland . . . be enjoined from interfering with the continuation of Plaintiff's employment based upon the hearing process that has been undertaken." (Motion, p.57). Lt. Baeppler has attempted, with Respondent's cooperation, to convert a Preliminary Injunction hearing into a judicial review of the merits of a *possible* disciplinary action (before it has even been issued), bypassing both the pre-deprivation processes (i.e., a pre-disciplinary hearing) and the post-deprivation processes in the applicable CBA (i.e., grievance and arbitration). Lt. Baeppler contends that an injunction is necessary because the City allegedly failed to follow its own rules, the rules of the CBA, or constitutional due process. (Motion,

p.56). These are classic procedural arbitrability arguments that are properly raised in an arbitration -- ***not*** to Respondent on a motion for preliminary injunction. Lt. Baeppler is not just putting the proverbial cart before the horse – but worse, the horse is nowhere near the cart and has not even left the stable! Baeppler is asking to substitute Respondent's judgment for that of the City and a labor arbitrator, to decide in the first instance that he *should not* be subject to *any* discipline under the CBA for an indefinite period of time. Respondent has no jurisdiction to insert itself directly into the CBA discipline process.

The instant case has similarities to *Jones v. Walton*, 12th Dist. Butler No. CA87-09-117, 1987 Ohio App. LEXIS 9690, at *1 (Nov. 23, 1987). Jones was a classified civil servant of the Butler County Sheriff. Jones was notified that a hearing would be held to consider allegations that he made disparaging remarks about the chief deputy. Jones appeared at the appointed time and place accompanied by his union representative. The hearing began without objection, and the employer presented the charges and a summary of the supporting evidence. Jones then requested that the hearing be continued in order to obtain the advice of counsel, review the evidence, and prepare his response. The hearing was continued.

Before the pre-disciplinary hearing was reconvened, Jones filed a civil action seeking injunctive relief. He sought to permanently enjoin the hearing officer from hearing the charges; to have a new and impartial hearing officer selected; and to have a full evidentiary hearing. The trial court dismissed the action, and the Twelfth District Court of Appeals affirmed. The Court explained that the employer had initiated a pre-disciplinary process that complied with *Loudermill* by affording "notice of the pendency of disciplinary charges against him, an opportunity to be informed of the substance of those charges, and an opportunity to respond thereto." *Id.* at *5. The Court found "no due process violation in the procedural format employed by [the employer] in the proceedings below," and the Court explained that it was "not

inclined to engraft further 'rights' onto such proceedings when a full post-disciplinary process, including a full evidentiary hearing, is available to an affected employee."

The same result should obtain in the instant case; there is no legal basis to bar the City from conducting a pre-disciplinary hearing. The only person seeking to deprive Baeppler of "due process" is Baeppler himself (and, arguably, Respondent). Respondent's improper exercise of jurisdiction should be barred by this Court through issuance of a writ of prohibition.

B. Proposition of Law No. 2:

A Public Employee May Not Avoid Chapter 4117 and its Exclusive Remedies by Pre-emptively Filing an Injunction Action.

In *State ex rel. Cleveland v. Sutula*, 127 Ohio St.3d 131, 2010-Ohio-5039 (2010 ("*Sutula*"), the Ohio Supreme Court held a common pleas court patently and unambiguously lacked jurisdiction over claims that arose from or were dependent on R.C. Chapter 4117. A union had filed a complaint for a declaratory judgment that the parties reached final contract terms and for an injunction compelling the City to comply with those terms. The Supreme Court issued a writ of prohibition after the trial court denied the City's motion to dismiss for lack of subject-matter jurisdiction, holding:

> In essence, the union claimed that the city committed unfair labor practices by interfering with the employees' exercise of their rights under R.C. Chapter 4117 and by refusing to bargain collectively with the union by ignoring a valid collective-bargaining agreement. See R.C. 4117.11(A)(1) and (5).

Sutula, at ¶8. Reiterating its holding in *Franklin Cty.*, the *Sutula* Court held that SERB "has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117," and that, "if a party asserts claims that arise from or depend on the collective bargaining rights created by R.C. Chapter 4117, the remedies provided in that chapter are exclusive." *Sutula*, at ¶16. The Court explained:

> Exclusive jurisdiction to resolve unfair labor practice charges is vested in SERB

> in two general areas: (1) where one of the parties filed charges with SERB alleging an unfair labor practice under R.C. 4117.11 and (2) where a complaint brought before the common pleas court alleges conduct that constitutes an unfair labor practice specifically enumerated in R.C. 4117.11.

Id. (emphasis added), quoting *State ex rel. Ohio Dept. of Mental Health v. Nadel*, 98 Ohio St.3d 405, 2003-Ohio-1632, ¶23. The principle of SERB's exclusive jurisdiction, which the Ohio Supreme Court recognized in *Sutula,* has been regularly enforced. *See, State ex rel. Cleveland v. Russo*, 156 Ohio St.3d 449, 2019-Ohio-1595.

In the instant case, Lt. Baeppler is a member of a bargaining unit, and the terms and conditions of his employment are set forth in a negotiated CBA – these terms include the procedures for pre-disciplinary hearings and disciplinary actions. Lt. Baeppler asserts that his filing is an action for injunctive relief under Ohio Revised Code Chapter 2727, which vests the Courts of Common Pleas with general jurisdiction over claims for injunctive relief. R.C Chapter 2727 does not confer any collective bargaining rights – it provides only for injunctions to protect litigants' rights under other statutes. Accordingly, the sole basis for the relief that Lt. Baeppler seeks arises under Chapter 4117.

While Respondent possesses basic statutory jurisdiction over actions for injunction (*see* R.C. §2727.03), Respondent patently and unambiguously lacks jurisdiction over a motion for injunctive relief when the underlying rights asserted arise under Chapter 4117. As explained in *Sutula* the court's basic statutory jurisdiction over actions for injunction do not vest it with jurisdiction over Chapter 4117-related claims. *Sutula,* at ¶23. Chapter 2727 does not defeat the exclusivity of the Chapter 4117 remedies.

Ohio courts have long recognized that civil actions for injunction are inappropriate when they allow a party to bypass special statutory proceedings and avoid the exclusive jurisdiction of administrative bodies. *See*, *State ex rel. Albright v. Court of Common Pleas of Delaware*

County, 60 Ohio St. 3d 40, 42 (1991) ("Albright") (upholding a writ of prohibition to prohibit a common pleas court from exercising jurisdiction over a matter committed to the exclusive jurisdiction of a county board of commissioners) and cases cited therein. In *Albright*, this Court explained that:

> **Since it is always inappropriate for courts to grant declaratory judgments and injunctions that attempt to resolve matters committed to special statutory proceedings, their decisions should always be reversed on appeal**, except when they dismiss the actions. We find this tantamount to holding that courts have no jurisdiction to hear the actions in the first place and now so hold.

Id. at 42 (emphasis added). *See, also, State ex rel. Taft v. Court of Common Pleas of Franklin County*, 63 Ohio St. 3d 190, 193 (1992) *citing*, *Arbor Health Care Co. v. Jackson*, 39 Ohio App. 3d 183 (10th Dist. 1987) ("Where, however, a specialized statutory remedy is available in the form of an adjudicatory hearing, a suit seeking declaration of rights which would bypass, rather than supplement, the legislative scheme ordinarily should not be allowed."); *Eastbrook Farms Inc. v. City of Springboro*, 2004 Ohio 1377, 2004 Ohio App. LEXIS 1228 (12th Dist.) (a party must exhaust all administrative remedies before instituting a declaratory judgment action). Here the General Assembly has limited Lt. Baeppler to the filing of ULP charges and the filing of grievances under his CBA; there is no basis in Chapter 4117 for Lt. Baeppler to seek the relief that he has requested in the Emergency P.I. Motion, and no jurisdiction for Respondent to consider or grant such relief.

For the foregoing additional reasons, the City respectfully requests that this Honorable Court issue the requested peremptory writ of prohibition.

IV. REQUEST FOR PEREMPTORY WRIT.

In an original action before this Honorable Court, its rules provide for four possible judgments: the Court may (1) dismiss the complaint, (2) issue an alternative writ, thereby requiring the parties to submit evidence and additional briefing, (3) issue a peremptory writ of

mandamus or prohibition, or (4) deny the writ outright." *State ex rel. Richland Cty. v. Richland Cty. Court of Common Pleas*, 152 Ohio St.3d 421, 2017-Ohio-9160, 97 N.E.3d 429, ¶20 (*citing* S.Ct.Prac.R. 12.04(C)).

This Court has previously explained that, in a prohibition action, when the pertinent facts are uncontroverted and it appears beyond doubt that relator is entitled to the requested relief, a peremptory writ will be granted. *State ex rel. Duke Energy Ohio, Inc. v. Hamilton Cty. Court*, 126 Ohio St.3d 41, 2010-Ohio-2450, 930 N.E.2d 299, ¶15 (*citing State ex rel. Sapp v. Franklin Cty. Court of Appeals,* 118 Ohio St.3d 368, 2008 Ohio 2637, 889 N.E.2d 500, ¶14). Because the pertinent facts in this case are uncontroverted, the City requests that this Court grant a peremptory writ of prohibition.

This Court has granted peremptory writs in other cases where the court lacked subject matter jurisdiction because of SERB's exclusive jurisdiction over collective bargaining matters. *See State ex rel. FOP, Ohio Labor Council v. Court of Common Pleas*, 76 Ohio St.3d 287, 290, 1996-Ohio-424, 667 N.E.2d 929 ("Since the … complaint is well taken, a peremptory writ of prohibition is granted and the Franklin County Common Pleas Court is hereby ordered to dismiss the underlying action").

V. CONCLUSION

There is no question that the Emergency P.I. Motion filed in the trial court is based entirely on the CBA governing Lt. Baeppler's position. In turn, the law, as established by this Court, unquestionably requires that such claims be exhausted under the CBA grievance and arbitration procedures pursuant to R.C. § 4117.10(A). Chapter 4117 does not authorize public employees to perform an end-run around the CBA and seek relief in the first instance from a Common Pleas Court under R.C. Chapter 2727. Yet, Respondent has refused to divest the lower court of its jurisdiction over the Emergency P.I. Motion, subjecting the City to a Preliminary

Injunction, a TRO, and additional proceedings.

The City respectfully requests that this Honorable Court grant the City's requested writ of prohibition.

Respectfully submitted,

ZASHIN & RICH CO., LPA

/s/ *George S. Crisci*
George S. Crisci (0006325)
David A. Posner (0042174)
Tiffany S. Henderson (0096613)
Jzinae N. Jackson (0098411)
950 Main Avenue, 4th Floor
Cleveland, OH 44113
Tel: 216.696.4441
Fax: 216.696.1618
jmd@zrlaw.com | gsc@zrlaw.com
tsh@zrlaw.com | jnj@zrlaw.com

Scott H. DeHart (0095463)
17 S. High Street, Suite 900
Columbus, OH 43215
Tel: 614.224.4411
Fax: 614.224.4433
shd@zrlaw.com

Attorneys for Relator
The City of Cleveland

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Merit Brief of Relator City of Cleveland* was served this 20th day of April 2021 via hand-delivery and certified U.S. Mail upon the following:

JUDGE SHANNON M. GALLAGHER,
Cuyahoga County Court of Common Pleas
Courtroom 17A
1200 Ontario Street
Cleveland, Ohio 44113-1678
Respondent

ZASHIN & RICH CO., L.P.A.

/s/ *George S. Crisci*
George S. Crisci (0006325)
One of the Attorneys for Relator
The City of Cleveland