In the

Supreme Court of Ohio

JOHN M. CASEY, *et al.*

Relators-Appellants

v.

JAMAEL TITO BROWN, *et al.*

Respondents-Appellees

Case No. 2022-1178

Original Action in Mandamus

On Appeal of Right From the Ohio Court of Appeals
Seventh Appellate Judicial District
Case No. 2022-MA-0003

REPLY BRIEF OF RELATORS-APPELLANTS

ORAL ARGUMENT REQUESTED

S. DAVID WORHATCH 0031174
Law Offices of S. David Worhatch
4920 Darrow Road
Stow, Ohio 44224-1406

330-650-6000 (Akron/Kent)
330-656-2300 (Cleveland)
330-650-2390 (Facsimile)
sdworhatch@worhatchlaw.com

Counsel for Relators-Appellants

DANIEL P. DASCENZO 0070280
Deputy Director of Law
City of Youngstown
26 South Phelps Street, Fourth Floor
Youngstown, Ohio 44503

330-742-8874 (Phone)
330-742-8867 (Facsimile)
ddascenzo@youngstownohio.gov

Counsel for Respondents-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Page(s)

Cases (Continued)

Relators-Appellants John M. Casey ("Casey") and City of Youngstown ("the City") (collectively "Relators"), through their undersigned counsel of record, hereby offer their **REPLY BRIEF** in support of the above-captioned direct appeal of right.

As stated in their merit brief and restated in the first paragraph of Part VII of this reply brief, the proposition of law that Relators urge this Court to adopt is:

> In an action seeking relief in mandamus, a public sector employee's complaint states a claim upon which relief can be granted where the clear legal duty the public official allegedly has failed to discharge is imposed by state law or rules or by local government ordinances or rules, successful prosecution of such action does not require proof of a violation of Chapter 4117 of the Revised Code or any applicable provision of a collective bargaining agreement, and the employee otherwise lacks a plain and adequate remedy at law.

PRELIMINARY MATTERS

As of the deadline for filing this reply brief, this Court still has under advisement Relators' motion to strike non-compliant elements of the merit brief filed on December 12, 2022, on behalf of Respondents-Appellees Jamael Tito Brown, Mayor of the City ("the Mayor"), Barry F. Finley, Fire Chief of the City ("the Fire Chief"), and Kyle Miasek, Finance Director of the City ("the Finance Director") (collectively "Respondents"). Since the elements forming the subject matter of such motion to strike clearly are prohibited by operation of Rules 4.01(A)(1), 16.02(B)-(5), and 16.03(B)(1) of the Rules of Practice of the Supreme Court of Ohio, this Court should not obligate Relators to devote any more than this paragraph to address the non-compliant parts of Respondents' merit brief. For example, all of the "facts" asserted at Pages 4 and 5 of Respondents' merit brief and all but four of Respondents' appendices relate to events that took place *after* Casey commenced this original action, not one of those "facts" is attested by a sworn statement appearing in the record of this direct appeal, and the court below in the end did not rely on any of those

"facts" in rendering its decision to dismiss Relators' original action. The intent of learned counsel opposite in attempting to introduced these "facts" for the first time at the Supreme Court level is clear … it is to invite this Court to make a ruling based on "evidence" **not** considered by the court below when it dismissed Relators' original action in mandamus. But this Court's decision must be based on the record before the Seventh Appellate Judicial District and **not** on any documents or other forms of evidence introduced for the first time in the Respondents' merit brief. If this Court nevertheless were to deny Relators' motion to strike, it should, in equity, consider grant leave to allow Relators to supplement the record with additional evidence and supplement their reply brief.

REPLY BRIEF

I. THE OBJECT OF THIS ORIGINAL ACTION DOES NOT INCLUDE SEEKING CASEY'S PROMOTION TO THE VACANT POSITION SPECIFICALLY ADDRESSED BY SERB'S FINAL ORDER OF JUNE 11, 2020, BUT RATHER TO A VACANT POSITION CREATED ON OR ABOUT JUNE 3, 2021.

In the first three paragraphs of the sixth page of Respondents' merit brief, Respondents falsely contend that the object of Casey's mandamus action is to seek promotion to a position for which he did not qualify by examination, namely, a position that was open at the time SERB ordered the City to fill such vacancy by operation its final order of June 11, 2020.

Casey has **never** claimed he has a vested right to promotion to the vacancy referenced in SERB's final order.

Casey's position on this issue was made abundantly clear in the court below and he has never strayed from the position. His vested right in immediate promotion attaches to the Respondents' duty to fill the *second* vacancy occurring at the rank of Battalion Chief when an incumbent officer retired as of June 3, 2021. The vacancy thus created was to be filled by Casey as the

candidate certified atop the list of candidates for promotion following the August 21, 2021, promotional examination administered by the City's civil service commission.[1]

The fact that SERB denied a motion made by Casey's union on April 26, 2022, in SERB Case No. 2019-ULP-09-0178 to "enforce" the June 11, 2020, order by directing management to fill the position created upon the retirement of a *second* Battalion Chief on June 3, 2021, is **immaterial** to the outcome of this direct appeal. The union's motion was filed with SERB more than a year *after* Relators commenced this original action, SERB's decision on that motion[2] was handed down thereafter, and the court below did **not** rely on either SERB's decision or the union's lack of success in seeking relief in its April 26, 2022, motion in deciding this case. Moreover, since Casey did **not** participate in his union's attempt to leverage the June 11, 2020, SERB final order in an effort to compel the City to fill the vacancy created upon the retirement taking place on June 3, 2021, and was not a party to that case, no collateral estoppel effect can be ascribed.

II. REFERENCES MADE IN RELATORS' MERIT BRIEF TO A SHORT LIST OF PROMOTION-SPECIFIC TERMS IN THE COLLECTIVE BARGAINING AGREEMENT ONLY HELPS RELATORS' CAUSE AND ARE NOT INCONSISTENT WITH THEIR CLAIM THAT THEIR ACTION IN MANDAMUS DOES NOT DEPEND ON PROOF OF A BREACH OF THAT AGREEMENT.

In the last paragraph of the sixth page and the first paragraph of the seventh page of Respondents' merit brief, Relators are criticized for citing elements of the collective bargaining

---

[1] *See* **Amended Verified Complaint**, ¶¶ 8-9 and 13; *see also* **Relators' Brief in Opposition to Respondents' Motion to Dismiss Amended Verified Complaint and Objections to Petition for Writ of Mandamus** at 7, 18 (n. 42), 20, and 25.

[2] Without waiving Relators' position taken in their motion to strike, Appendix 6 of the Respondents' merit brief plainly reflects that the union's motion was denied because the vacancy created upon the retirement of an incumbent Battalion Chief on June 3, 2021, was **not** one in existence as of June 11, 2020, *i.e.*, the date of SERB's final order in SERB Case No. 2019-ULP-09-0178 and therefore filling such vacancy had **not** been specifically ordered by SERB.

agreement even as they argue that no part of the relief they seek stems from or requires for its success proof of any breach of that agreement. *There is no inconsistency*. Section 1 of Article 13 of the collective bargaining agreement expressly confirms that the promotion process for the rank of Battalion Chief is governed by Sections 124.45 through 124.48 of the Ohio Revised Code and provisions of the civil service rules of the City to *except* to the *limited* extent any provision of such statutes was superseded by an express provision of Article 13 that "conflicts" with such statutes and local regulations.[3] Relators' references to the certain promotion-specific provisions of Article 13 are *limited* to pointing out how Article 13 "conflicts" with Sections 124.45 through 124.48 and the City's civil service rules in only three ways … and *none* of those "conflicts" involves a term governing the promotion process that is in disputed in this original action. Accordingly, references to those provisions in Relators' merit brief have the effect of *ruling out* any grounds for the Respondents to claim that Relators' original action is about anything other than interpretation and enforcement of the provisions of Sections 124.45 through 124.48 of the Ohio Revised Code and/or the City's civil service rules that do not "conflict" with any of those three promotion-specific provisions of the collective bargaining agreement.

III. GIVEN THE CIRCUMSTANCES UNDER WHICH THE AUGUST 21, 2021, PROMOTIONAL EXAMINATION CAME TO BE ADMINISTERED, THE COLLECTIVE BARGAINING AGREEMENT DID NOT REQUIRE THE CITY TO ENGAGE IN THE PERFUNCTORY STEP OF "DETERMIN[ING]" THAT A VACANCY IN THE RANK OF BATTALION CHIEF EXISTS.

In reality, the only parties playing loosely with the language of Article 13 in this case are the *Respondents*. Although learned counsel opposite contends that Article 13 specifically

[3] **Verified Complaint**, Ex. B at 1-2, Art. 13, § 1, incorporated by reference in **Amended Verified Complaint**, ¶ 14 (also reproduced in **Appendix 5** of Relators' merit brief).

requires the Fire Chief to take an affirmative step to "determine" a vacancy at the rank of Battalion Chief exists before the Respondents would have a clear legal duty to fill that position with the highest qualifying candidate for promotion, this is **not** a fair or reasonable interpretation of the collective bargaining agreement.

The collective bargaining agreement makes only two provisions respecting the conditions under which the City's civil service commission will be asked to administer a promotional examination.

In the end, for purposed of this direct appeal, it does **not** matter which of those two means of scheduling an examination led to the administration of the August 21, 2021, examination.

The first of these provisions, found in the *first* sentence of Section 1 of Article 13, obligates the City to request a promotional examination within 14 days of management's "determin[ation] that a vacancy in the promotional ranks exists." The fact that the City's civil service commission conducted an examination for promotion to the rank of Battalion Chief on August 21, 2021, justifies an inference at this early stage of Relators' original action that the City in fact "determine[d]" that a vacancy either existed or would soon exist on account of the announced retirement of a Battalion Chief to take effect on or about June 3, 2021, and therefore requested that the civil service commission conduct an examination. Respondents' current unverified claim[4] that it never "determine[d]" that a vacancy exists therefore is undercut by the fact that the civil service commission ultimately conducted its examination on August 21, 2021.

[4] The Respondents' reaction to Relators' allegations respecting this issue is **not** supported by any sworn statement(s) or any effort to authenticate documents purportedly supporting such reaction.

The second of these provisions, and the one on which Respondents now rely, is found in the *fourth* sentence of Section 1 of Article 13.[5] That provision regulates the timing of an examination needed to replace an eligibility list due to expire within 120 days irrespective of whether a vacancy in any given rank then exists. Although the City now contends that the August 21, 2021, promotional examination was scheduled only because the union had lodged a grievance because the Fire Chief had not requested an examination to be scheduled to create a new promotion eligibility list at least 120 days prior to expiration of the then-existing list, the record includes no sworn statements or documents presented to the court below respecting the impetus for this examination. But even if the August 21, 2021, examination actually was conducted because the then-existing promotional eligibility list created in February 2020 had expired, the City's position in this regard would be **immaterial** to the outcome of this original action. After all, even if the Respondents are correct, a "determin[ation]" that a vacancy exists is *only* required if the examination is to be scheduled under the authority of the *first* sentence of Section 1 of Article 13 at a time when no current eligibility list exists (or will exist) by the time a promotion will have to be made. If the August 21, 2021, promotional examination indeed was the by-product of a request made by the Fire Chief under the authority of the *fourth* sentence of Section 1 of Article 13 in response to

---

[5] *Id.*, Ex. B. at 2, Art. 13, § 1 (fourth sentence) (also reproduced in **Appendix 5** of Relators' merit brief). The Respondents' merit brief includes copies of unverified documents associated with a grievance purportedly filed by the union on behalf of another Captain in the Spring of 2021 asking the Fire Chief to schedule an examination as a prerequisite to establishing an eligibility list to replace the one that expired in February 2020. *See* **Respondents' Merit Brief**, App. 7 and 8. These two pages are reproduced in Employer's Exhibit No. 1 attached to Respondents' motion to dismiss Relators' amended verified complaint, but their authenticity is **not** established by any sworn statement and no other evidence in the record, by affidavit or otherwise, verifies the accuracy of the contents of those pages. Hence, these appendices have been included within the scope of Relators' motion to strike, as neither the contents of these alleged grievance records nor any of the details needed to authenticate them or validate Respondents' claims regarding the impetus for the August 21, 2021, examination can be regarded a part of the record in this direct appeal.

a union grievance directed at the issue, the collective bargaining agreement does **not** provide for any management discretion or concurrent duty to "determine" that a vacancy exits, as the provisions for both conducting the examination and certifying a new eligibility list under sentence are self-executing.

What does matter, in the end, is that Casey took the August 21, 2021, examination, finished first among all eligible candidates, and ultimately was certified atop the resulting promotion eligibility list for the rank of Battalion Chief. No one disputes any of those facts.

IV. WHERE A PUBLIC SECTOR BARGAINING UNIT MEMBER SEEKS RELIEF IN MANDAMUS TO ENFORCE A VESTED RIGHT EARNED IN THE EMPLOYMENT SETTING, HE OR SHE HAS STANDING TO PRESENT SUCH A CLAIM AS LONG AS SUCCESSFUL PROSECUTION DOES NOT REQUIRE EITHER PROOF OF A BREACH OF A SPECIFICALLY APPLICABLE TERM OF A COLLECTIVE BARGAINING AGREEMENT OR A VIOLATION OF CHAPTER 4117 OF THE OHIO REVISED CODE.

The success of Respondents' motion to dismiss hinged on a finding by the court below that Relators' claim could be resolved *only* through proceedings administered by SERB because the subject matter of Relators' original action necessarily required Casey to rely on adjudication of a dispute arising under the collective bargaining agreement and therefore subject to such agreement's grievance procedure. For the reasons detailed in their merit brief and below, the Seventh Appellate Judicial District made the wrong call in this case because Relators' claim that the Respondents have failed to discharge their clear legal duty to promote Casey instead hinges *entirely* on how *state statutes* and *civil service rules* **not** in "conflict" with Article 13 of the collective bargaining agreement are to be interpreted and applied. And while Casey's union was privileged to try to secure a remedy for him through the grievance process, Casey was **not** bound by that process as the exclusive way to protect his constitutionally guaranteed property interest in the terms and conditions of his employment in the public sector as long as the relief he would seek

in his action in mandamus would **not** depend on proving a violation of Chapter 4117 of the Ohio Revised Code or any interpretation or enforcement of a promotion-specific term of the collective bargaining agreement essential to his success.

Respondents' unwavering reliance on O.R.C. § 4117.10(A) expands the meaning of that statute beyond its plain intent. In relevant part, that statute provides that a collective bargaining agreement may provide "for a final and binding arbitration of grievances," that will subject the parties to such agreement and the bargaining unit members covered by it "solely to that grievance procedure … relating to matters that were the subject of a final and binding grievance procedure." The key, therefore, is that if a term of a collective bargaining agreement is **not** at the heart of a dispute between or among management, a union, and a member of a bargaining unit, Section 4117.10(A) does **not** bar a civil action to redress such dispute. In other words, if Casey's right to seek redress for management's failure to promote him does **not** depend on enforcement of a promotion-specific term of the collective bargaining agreement subject to the exclusive remedy provisions of Section 4117.10(A) and Article 10 of the collective bargaining agreement (outlined a dispute resolution process), prosecuting a grievance is **not** his only pathway to success.

In this case, Casey seeks to require the Respondents to promote him **not** because they have a duty to do so under any promotion-specific term of the collective bargaining agreement, but because the City's own civil service rules, construed in the context of O.R.C. §§ 124.45 through 124.48 and *without* regard for any essential applicable promotion-specific provision of such agreement, compel the appointing authority to promote Casey now that there is no more litigation pending whereby the City had sought to avoid the obligation SERB imposed on its legislative authority to rescind all steps taken to abolish the very position for which Casey qualified for promotion upon being certified atop the City's promotion eligibility list.

Indeed, Section 1 of Article 10 of the collective bargaining agreement defines a "grievance" s "any dispute between an employee and the City or its representative involving an allegation that there has been a breach, misinterpretation, or improper application of [the collective bargaining agreement]."[6] Relators' claim stems from duties imposed on the Respondents **not** by the collective bargaining agreement, but rather by specific state statutes and civil service rules that do not "conflict" with any of the promotion-specific terms of Article 13 and require the Respondents to promote Casey once he was certified in the top position on the promotional eligibility list and the City abandoned its collateral attack on SERB's final order of June 11, 2020. Hence, while the union was privileged to attempt to enforce the promotion-specific term requiring Casey to be promoted under the promotion-specific term requiring action within 14 days of the date of certification of the promotion eligibility list (instead of the ten-day deadline allowed by O.R.C. § 124.46), Casey's remedies were **not** limited to lodging a grievance as long as any relief sought in court could be prosecuted without requiring interpretation or application of any of the promotion-specific terms of the collective bargaining agreement in "conflict" with state statutes or civil service rules or proof of a violation of Chapter 4117 of the Ohio Revised Code.

In the end, it does **not** matter that Casey's union submitted a grievance that invoked a promotion-specific provision of the collective bargaining agreement (failure to promotion within 14 days) because Relators did **not** cite that issue as grounds for seeking relief in mandamus. What does matter is (1) the union unilaterally abandoned the grievance process without Casey's consent or approval, (2) Casey's constitutionally guaranteed property interest in public sector employment cannot be compromised by the unilateral action of either a public employer or a union representing

---

[6] **Verified Complaint**, Ex. C at 1, Art. 10, § 1, incorporated by reference in **Amended Verified Complaint**, ¶ 19 (also reproduced in **Appendix 5** of Relators' merit brief).

public employees, and (3) the claim for relief in mandamus, as specifically alleged and asserted by Relators in the amended verified complaint filed in this original action, can be successfully litigated without any court having to interpret or enforce any promotion-specific provision of the collective bargaining agreement or to determine if the conduct of either management or the bargaining representative constituted an unfair labor practice within the meaning of O.R.C. § 4117.11.

In this case, even if his union had never presented a grievance seeking his immediate promotion, Casey was privileged to seek relief in mandamus because the duty to promote him became *unconditional* and *obligatory* the moment the City abandoned the judicial process of trying to avoid the obligations imposed by SERB's June 11, 2020, final order on the union's unfair labor practice charge challenging the right to abolish the rank of Battalion Chief. It was that act – and **not** any breach of any promotion-specific term of the collective bargaining agreement – that vested in Casey a right to immediate promotion. Accordingly, as long as the foundation of Relators' claim for relief in mandamus rests on alleged violations of state statutes and/or civil service rules and **not** on any breach of any promotion-specific term of the collective bargaining agreement at odds with those statutes or rules, jurisdiction in the court below over the subject matter of Relators' mandamus action is *concurrent* with any exclusive jurisdiction SERB would have over the subject matter of a dispute arising out of promotion-specific terms of such agreement that "conflict" with such statutes or rules or supporting any claimed violation of Chapter 4117 of the Ohio Revised Code.

This Court should bear in mind that Casey did **not** join in filing this original action while his union prosecuted a grievance on his behalf. Instead, he waited until (1) the City abandoned its collateral attack on SERB's final order and (2) the union made a unilateral decision and informed Casey that it would not pursue his grievance to binding arbitration. This is significant

because the grievance process offered a remedy available to Casey, but *only* if the union continued the process. It is true that once that process was cut off by the union's unilateral decision to abandon the effort to secure relief under the collective bargaining agreement, it was *possible* that Casey could have charged the union with a failure of its duty of fair representation by lodging an unfair labor practice with SERB. However, (1) such a charge would have shifted the focus away from the merits of Casey's claim that he was entitled, by law, to immediate promotion by operation of O.R.C. §§ 124.45 through 124.48 and the City's civil service rules irrespective of whether the City breached its obligations to promote him under any of the promotion-specific terms of Section 1 of Article 13 of the collective bargaining agreement and (2) SERB's jurisdiction does **not** extend to enforcement of any claimed violation(s) of the provisions of Chapter 124 of the Ohio Revised Code and/or the City's civil service rules on which Relators rely in presenting their claim for relief in mandamus. So, while lodging a charge with SERB was *possible*, the specific claim Casey wanted to bring was one over which SERB had no jurisdiction … and that claim could be brought *only* in a court of record in this state.

V. CASEY LACKS A "PLAIN" AND "ADEQUATE" REMEDY AT LAW AND THEREFORE THE RELIEF SOUGHT IN RELATORS' MANDAMUS ACTION IS NOT FORECLOSED.

In the final analysis, the only "plain" and "adequate" remedy available within the context of the collective bargaining agreement, *viz*., the grievance process, became unavailable to Casey when his union's President declined to pursue arbitration. Until then, such process offered Casey due process. However, once the union abandoned Casey before securing a final adjustment by way of arbitration, such process was no longer available to Casey and the opportunity for securing a remedy otherwise afforded thereby could no longer be regarded as "plain" or "adequate." The Seventh Appellate Judicial District erred when it did not acknowledge this fact.

Once the grievance process came to an end without a final decision, the type and nature of the process to which Casey was entitled changed and a court's review became available to him only as long as he did not plead any claim that would be subject to the exclusive jurisdiction of SERB. *No such impermissible claim has been asserted.* Rather, Casey seeks only that a court in Ohio will review the record and determine whether the parts of the City's civil service rules and Sections 124.45 through 124.48 of the Ohio Revised Code that do not "conflict" with Article 13 of the collective bargaining agreement have been violated by the Respondents so as to entitle Casey to enforcement of his vested right in immediate promotion now that all other impediments and prerequisites to seeking relief in mandamus no longer apply.

Casey does not dispute that the collective bargaining agreement vested in the President of his union the discretion to decide whether to continue pressing the grievance the union had filed on Casey's behalf. Thus, the Respondents' reliance on *State ex rel. Stewart v. State Employment Relations Board*, 108 Ohio St.3d 203, 205, 842 N.E.2d 505, 507, 2006-Ohio-661, ¶ 13, to demonstrate this principle is not contested. While this Court in *Stewart* did not cite authority for the proposition that a public sector employee "lacks any independent right to compel the city and union to arbitrate his grievance," Casey does not dispute this point. But this principle, in any event, is *beside the point* in this case, as prior rulings make it clear that Casey had no good faith argument for why his union committed an unfair labor practice by not exercising its discretion to seek arbitration and therefore Casey lacked any "plain" and "adequate" remedy at law by way of lodging a charge against his union with SERB charging a breach of the union's duty of fair representation. How can a "remedy" be considered "plain" or "adequate" when this Court has said that a bargaining unit member in the public sector has "no independent right" to compel his or her union to proceed to arbitration of a grievance? Surely, then, Casey's recourse once the City

abandoned its collateral attack of the June 11, 2020, SERB final order and the union decided unilaterally not to arbitrate was to seek whatever relief he might have in the form of a civil action that would **not** depend for its success on proof of a breach of the collective bargaining agreement or a violation of some provision of Chapter 4117 of the Ohio Revised Code.[7]

In spite of what Respondents' counsel urges this Court to believe, Casey does **not** seek relief in mandamus merely because his is not satisfied with the result of the grievance process or his union's unilateral decision not to seek arbitration. To the contrary, Casey asks for an order in mandamus precisely because he no longer has any other plain and adequate remedy at law available to him and the process initiated by the union did **not** result in adjudication of his constitutionally protected property interest in public sector employment. If Casey's grievance had been decided by binding arbitration, he would have no business seeking relief in mandamus, as the dispute resolution process, having been pursued to a final adjustment of his grievance, would have resulted in decision in satisfaction of Casey's due process rights and Casey would have been bound by that the result reached on the merits of his claim. What this Court needs to decide, then, is whether the

---

[7] Absent a showing of discrimination or bad faith in making either such decision, SERB defers to the judgment of the union hierarchy in such cases. *See In re Romine v. Ohio Council 8, AFSCME, Local 2544, AFL-CIO*, SERB Case No. 07-ULP-04-0203 (Oct. 19, 2007) (SERB will defer to a union's "legitimate justification" or "viable excuse" for failure to pursue a grievance to arbitration and therefore there was no probable cause to hold the union to account for an unfair labor practice); *In re AFSCME, Ohio Council 8 and Local 1768*, SERB Case No. 99-013 (June 24, 1999) (SERB will take into account a union's justification or "viable excuse" for not taking a grievance to arbitration). This Court, in turn, defers to SERB's expertise in this area. *State ex rel. Hall v. State Employment Relations Board*, 122 Ohio St.3d 528, 533, 912 N.E.2d 1120, 1125, ¶¶ 22-25 (2009) (success in prosecuting a charge against a union for breach of duty of fair representation for failing to take a matter to arbitration requires proof of an improper motive, bad faith, discriminatory intent based on irrelevant or invidious considerations, hostile action, or malicious dishonesty proceeding from a lack of a rational basis for the union's action that is "so egregious as to be beyond the bounds of honest mistake or misjudgment" or arbitrariness characterized by a failure to take a "basic and required step" to protect a bargaining unit member's right to prosecution of his or her grievance).

union's voluntary abandonment of Casey's grievance bound Casey in such a fashion as to foreclose all other remedies available to him even if no grievance had been initiated on his behalf and a claim could be asserted by Casey in protection of his constitutionally guaranteed property interest in public sector employment *without* needing to rely on any promotion-specific term of the collective bargaining agreement or to prove any Chapter 4117 violation in asserting that the Respondents violated state statutes and/or civil service rules not in "conflict" with any of those promotion-specific terms.

Relators' amended verified complaint and merit brief in this direct appeal make it plain that Casey's claim for relief in mandamus has absolutely **nothing** to do with the union's decision to decline to arbitrate. This is because the union is **not** the party responsible for refusing to promote Casey. *The Respondents alone are responsible.* All allegations in Relators' mandamus action are directed and the acts and omissions of *management*, **not** the union notwithstanding the effort by learned counsel opposite to claim otherwise. Additional grounds supporting a holding that Casey does **not** have a "plain" and "adequate" remedy at law are digested comprehensively in Relators' merit brief and in the foregoing passages of this reply and therefore will not be restated here. For all of the reasons referenced above, Casey's remedy under Ohio law is **not** limited to seeking relief upon filing an unfair labor practice charge with SERB once his recourse under the grievance process was foreclosed by conduct not of his own doing.

VI. THE PROVISIONS OF ARTICLE 56 OF THE COLLECTIVE BARGAINING AGREEMENT, WHILE SUBJECT TO RELATORS' MOTION TO STRIKE, ACTUALLY SUPPORT RELATORS' POSITION.

While the Respondents' reference to Article 56 of the collective bargaining agreement should be subject to an order granting relief on Relators' motion to strike, the reference to that article actually *helps* Relators' cause in this direct appeal if this Court were to decline to strike

all references to this article. This is because (1) Section 1 of that article merely provides that "bargaining unit members shall retain all rights reserved to them under Civil Service Law and state statutes" except as otherwise provided in the agreement where a *state* civil service law has been superseded by virtue of the parties having "bargained over and reached agreement over a subject addressed in [state] law" and (2) Section 2 of that article goes on to provide that "the conduct and grading of civil service examinations (as related to the Youngstown Civil Service Commission), the establishment of eligible lists from examinations, and the original appointments from eligible lists are not appropriate subjects for bargaining pursuant to Section 4117.08 [of the Ohio Revised Code], except as provided by Article 13."

The terms of Article 56 accordingly can be construed *only* in the context of *precise* language of Article 13 that expressly *limits* the superseding effect of the promotion terms of the collective bargaining agreement to only three areas … not one of which is at issue in Relators' original action in mandamus. Since no promotion-specific term of Article 13 is implicated by Relators' claims asserted under Sections 124.45 through 124.48 of the Ohio Revised Code and the City's civil service rules, it follows that the availability of an action in mandamus to seek relief to compel Respondents to discharge their clear legal duties under *state* law and the city's civil service rules is **not** foreclosed by the exclusive jurisdiction of SERB over issues implicating collective bargaining rights and duties because not one of Casey's claims depends for its success on proof of a violation of Chapter 4117 of the Ohio Revised Code or any interpretation or application of any promotion-specific term of the collecting bargaining agreement at odds with the state statutes and civil service rules on which Relators rely. Accordingly, the language found in Sections 1 and 2 of Article 56 of the collective bargaining agreement actually *helps* Relators' cause.

VII. INASMUCH AS A COMMON NUCLEUS OF OPERATVE FACTS MAY SUPPORT CONCURRENT CLAIMS IN DIFFERENT FORUMS, NO PUBLIC EMPLOYEE'S ACCESS TO COURT TO ENFORCE A VESTED EMPLOYMENT RIGHT SHOULD BE UNJUSTLY COMPROMISED BY FRAMING THE PARAMETERS OF SERB'S EXCLUSIVE JURISDICTION OVER PUBLIC SECTOR LABOR RELATIONS DISPUTES IN TOO BROAD A FASHION.

For their proposition of law in this direct appeal, Relators urge this Court to confirm that notwithstanding the exclusive jurisdiction of SERB over certain types of disputes arising in the context of a collective bargaining process and agreement involving a public sector employer and a union, an individual bargaining unit member nevertheless states a claim upon which relief can be granted by a court in mandamus when a common nucleus of operative facts over which SERB supports *concurrent* jurisdiction over a dispute arising in the context of public sector employment as long as the employee limits his or her claim to redress respecting a public official's failure to discharge a clear legal duty imposed by state law or local regulations and no proof of a violation of Chapter 4117 of the Ohio Revised Code or a breach of such agreement is necessary to prove such claim and the employee otherwise lacks or no longer had available to him a plain and adequate remedy at law.

To Casey's mind, this result should be self-evident given the due process right he enjoys in not being deprived of his property interest derived from his rights under O.R.C. §§ 124.45 through 124.48 and the City's civil service rules and the guarantee extended to him under the Open Courts Clause (Section 16 of Article I of the Ohio Constitution) assuring that Casey gets access to a court of record in this state now that (1) an option of seeking redress through the grievance process was cut off by action taken unilaterally by his union without first securing a decision on the merits respecting his vested right in immediate promotion and (2) no part of his action to enforce his right to promotion requires adjudication of any issue falling within the limited scope of SERB's exclusive jurisdiction over disputes arising in the public sector labor relations setting.

The court below justified its dismissal of this original action by erroneously concluding that Casey's only recourse was to rely on his union for prosecution of his grievance through the arbitration step of the grievance process under the collective bargaining agreement and therefore the only remedy available to him would depend on lodging an unfair labor practice charge in SERB against his union once its President abandoned Casey's grievance. However, SERB's jurisdiction over the common nucleus of operative facts, as presented by the record of this direct appeal and alleged in Relators' amended verified complaint, would be merely *concurrent* with the jurisdiction of the court below over other claims to the extent such claims would depend on state statutes and local rules that do **not** require proof of a violation of Chapter 4117 or a breach of the collective bargaining agreement in order to prevail.

Since there never was an adjudication on the merits of Casey's grievance, Relators' claims are **not** foreclosed by any *res judicata* or collateral estoppel effect of the grievance process. Without a final arbitrator's award on the merits of Casey's grievance that would need to be protected or honored, Casey is free to seek relief in mandamus as long as his claim does not require interpretation or enforcement of any promotion-specific term(s) of the collective bargaining agreement or proof of any violation of Chapter 4117 of the Ohio Revised Code that would fall within the scope of the exclusive jurisdiction of SERB. The relief that Relators seek stems from the Respondents' failure to honor their clear legal duties to promote Casey to the rank of Battalion Chief under applicable state statutes and the City's civil service rules that became unconditionally applicable after SERB's final order of June 11, 2020, attained *res judicata* status. Neither a promotion-specific term of the collective bargaining agreement at odds with those statutes or rules nor any alleged violation of Chapter 4117 of the Ohio Revised Code has anything to do with the claim Relators have asserted now that SERB's order is final and unappealable and certainly such

claim, as pleaded in the amended verified complaint, does **not** require for their success the prosecution of any claims for any such breach or violation.

The question of subject matter jurisdiction in this case comes down to determining whether a bargaining unit member in public sector employment is barred from accessing a court of record in this state to compel his or her employer to take favorable action on his or her employment (in this case, in the form of an earned promotion) (1) once all possible exceptions, barriers, and impediments to discharging the duty to do so have been adjudicated against the interests of the employer or have been waived or accepted by that employer *and* (2) proof of a violation of Chapter 4117 of the Ohio Revise Code or breach of any specifically applicable provision of a collective bargaining agreement is **not** essential to secure such relief. This Court has articulated the test for SERB's "exclusive" jurisdiction to make it plain that the test is **not** one of whether the claims of a plaintiff or relator in civil litigation could "arguably" constitute an unfair labor practice under O.R.C. § 4117.11. Instead, the test is whether the complaint of the civil litigant "alleges conduct that constitutes an unfair labor practice *specifically enumerated* in [O.]R.C. [§] 4117.11." *City of East Cleveland v. East Cleveland Firefighters Local 500, I.A.F.F.*, 70 Ohio St.3d 125, 127-28, 637 N.E.2d 878, 880, 1994-Ohio-174 (emphasis supplied). Accordingly, as long as a Casey's claim in this mandamus action can be prosecuted without needing to prove a breach of any promotion-specific term of the collective bargaining agreement or a violation of Chapter 4117, his access to judicial review in the court below is **not** barred out of considerations of SERB's exclusive jurisdiction over unfair labor practice charges.

SERB does **not** have "exclusive" jurisdiction over anything but unfair labor practice charges. Chapter 2731 of the Ohio Revised Code offers Relators an *independent* basis for seeking relief in the court below *without* having to rely on successful prosecution of a violation of

Chapter 4117 of the Ohio Revised Code or proving a breach of a promotion-specific term of the collective bargaining agreement as an essential element of their claims. The rights asserted by Casey "are *independent* of R.C. Chapter 4117" and Relators have not alleged in their amended verified complaint any violation of Chapter 4117 that would fall within the "exclusive" jurisdiction of SERB. Hence, Relators' amended verified complaint is eligible to be adjudicated on its merits in the court below and it was error therefore to dismiss Relators' original action.

CONCLUSION AND RELIEF REQUESTED

What Relators seek in this original action is relief stemming from the *aftermath* of the promotional examination process once the June 11, 2020, SERB final order became *res judicata*. None of this has anything to do with any alleged breach of any promotion-specific term of the collective bargaining agreement or any alleged unfair labor practice committed by management or Casey's union in a process that ultimately denied Casey benefits in which he is entitled in respect of his vested right in immediate promotion. Relators instead want the court below to compel the Respondents to promote Casey in accordance with applicable state statutes and local regulations that are **not** in "conflict" with any promotion-specific term of Article 13 of the collective bargaining agreement and therefore govern the actions the City's officials are required to take without reference to that agreement.

For all of the foregoing reasons and those digested in their merit brief, Relators respectfully submit that the "exclusive" jurisdiction of SERB extends *only* to claims that a party to a collective bargaining agreement violated Chapter 4117 of the Ohio Revised Code, including those that implicate a breach of a collective bargaining agreement or require interpretation or application of specifically applicable terms of such agreement. SERB's jurisdiction over alleged unfair labor practices is **not** always "exclusive," but rather, in appropriate circumstances such as

those presented by Relators' original action, may be "concurrent" with claims that a public sector collective bargaining unit member would have under Chapter 2731 for failure of his or her employer to discharge a clear legal duty **not** rooted in the breach of a specifically applicable term of a collective bargaining agreement or a Chapter 4117 violation. Each forum may draw upon a common nucleus of operative facts and no court would usurp SERB's "exclusive" power over disputes implicating unfair labor practices or requiring for their adjudication proof of a breach of a specifically applicable collective bargaining agreement in order to succeed. Relators have **not** alleged any such violation or breach.

Accordingly, this Court should **REVERSE** the judgment of the court below and **REMAND** this matter for further proceedings on the merits of the claims asserted by Relators in their amended verified complaint in a manner not inconsistent with the mandate to be issued by this Court in disposition of this appeal of right.

/s/ S. David Worhatch
S. DAVID WORHATCH 0031174
Law Offices of S. David Worhatch
4920 Darrow Road
Stow, Ohio 44224-1406

330-650-6000 (Akron)
330-656-2300 (Cleveland)
216-650-2390 (Facsimile)
sdworhatch@worhatchlaw.com

Counsel for Relators-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2023, and in accordance with Rule 3.11(C)(1) of the Rules of Practice of the Supreme Court of Ohio, a copy of the foregoing was served on counsel for respondents [*method(s) of service checked*] □ by ordinary U. S. Mail, first-class postage pre-paid, addressed to counsel for Respondents-Appellees, Daniel P. Dascenzo, Esq., Deputy Director of Law, City of Youngstown, 26 South Phelps Street, Fourth Floor, Youngstown, Ohio 44503 (**Facsimile Telephone No. 330-742-8874**), □ by facsimile transmission to the facsimile telephone number(s) referenced above, □ by delivery in hand to the offices of counsel at the addresses referenced above, ■ by electronic transmission(s) addressed to *ddascenzo@youngstownohio.gov*, □ by delivery in hand to the offices of counsel at the addresses referenced above, and/or □ by the following alternate means of service: _____

_____.

/s/ S. David Worhatch

S. DAVID WORHATCH 0031174
Law Offices of S. David Worhatch
4920 Darrow Road
Stow, Ohio 44224-1406

330-650-6000 (Akron/Kent)
330-656-2300 (Cleveland)
330-650-2390 (Facsimile)
sdworhatch@worhatchlaw.com

Counsel for Relators-Appellants