In the Supreme Court of Ohio

The State of Ohio, *ex rel.*

CHRISTOPHER R. STAPLE

Relator-Appellee

v.

STATE EMPLOYMENT RELATIONS BOARD, *et al.*

Respondents-Appellants

Case No. 2024-0279

On Appeal from the Ohio Court of Appeals, Tenth Appellate Judicial District
Case No. 22AP-78

APPELLEE'S MOTION FOR AWARD OF ATTORNEY FEES AND EXPENSES AND BRIEF IN SUPPORT

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Administrative Agency Actions

PLEASE TAKE NOTICE that Relator Christopher R. Staple ("Staple"), through his undersigned counsel of record and pursuant to Rule 4.01(A)(1) of the Rules of Practice of the Supreme Court of Ohio and O.R.C. § 2335.39, hereby moves for an order obligating Respondent State Employment Relations Board ("SERB") to remit to Staple an amount sufficient to reimburse him and compensate his counsel for all attorney fees and expenses incurred and/or advanced by or on behalf of Staple in successfully advocating affirmance in the above-captioned appeal from the judgment entered in Staple's favor in his original action in mandamus. The grounds for this motion are that Staple is a qualifying "eligible party" within the meaning of O.R.C. § 2335.39(A)(2)(b) who has prevailed in a civil action entitling him by operation of O.R.C. § 2335.39(B)(1) to a recovery from SERB as compensation for fees incurred by him in connection with such appeal as well as reimbursement of all costs and expenses that may be awarded pursuant to law or rule of court.

PLEASE TAKE FURTHER NOTICE that Staple, through his undersigned counsel, further applies pursuant to Rule 4.01(A)(1) of the Rules of Practice of the Supreme Court of Ohio and O.R.C. § 2323.51(A)(2)(a) for an order obligating SERB and Respondent City of Ravenna ("the City") to remit to Staple an amount sufficient to reimburse him and compensate his counsel for all attorney fees and expenses incurred and/or advanced by or on behalf of Staple in successfully advocating affirmance in the above-captioned appeal from the judgment entered in Staple's favor in his original action in mandamus. The grounds for this motion are that Staple is a party to an appeal in a civil action in accordance with O.R.C. § 2323.51(B)(1) who has been adversely affected by "frivolous conduct" within the meaning of O.R.C. § 2323.51(A)(2)(a) in that SERB and the City each acted in such fashion in this appeal that was not warranted under existing law, could not be supported by a good faith argument for an extension, modification, or

reversal of existing law, and/or could not be supported by a good faith argument for the establishment of new law, and/or proceeded to advance their respective positions in this appeal without requisite evidentiary support in the record of the proceedings before SERB or this Court.

PREREQUISITES QUALIFYING STAPLE FOR MOTION MADE UNDER O.R.C. § 2335.39

In making his motion under O.R.C. § 2335.39, Staple hereby asserts that (1) he does not have a net worth in excess of $1 million, (2) he seeks relief under such statute from SERB, (3) he is the prevailing party in this original action and is entitled to receive an award of compensation under that statute, (4) SERB's position taken in initiating this controversy by dismissing his unfair labor practice charges against the City and Respondent Fraternal Order of Police, Ohio Labor Council, Inc. ("the Union") and then mounting its defense to the claims asserted by Staple in his verified complaint in mandamus in the course of prosecuting this appeal was not substantially justified, (5) the amount sought in an award against SERB is set forth in the brief supporting this motion and in affidavits submitted to this court both by Staple himself and his counsel contemporaneously therewith (which affidavits are hereby incorporated by reference as if fully rewritten herein), (6) the amount of the fees sought in the award requested hereby is itemized such affidavit of counsel, and (7) the attorney who represented him has included in his affidavit sworn statements attesting to the fees charged, the actual time expended, and the rate at which his fees were calculated. *See* **Affidavit of Christopher R. Staple** ("Staple Affid."), ¶ 3 *and* **Affidavit of S. David Worhatch, Esq.** ("Counsel's Affidavit"), ¶ 15 and Ex. A (each filed contemporaneously with this motion).

Further grounds for this motion is set forth or referenced in the following brief in support.

FORWARD

This court's opinion acknowledges that Staple's motion for a post-judgment attorney fee award is still pending before the Tenth Appellate Judicial District. *See* Case No. 2024-0279, 2025-Ohio-4698, 2025 WL 2919065, ¶¶ 27, 29, and 31. Contemporaneously herewith, Staple will have supplemented that motion before the court below to include the time spent in successfully defending his position under the appellate court's judgment. However, Staple's undersigned counsel is of the view that *this* Court should be the forum to review claims relating to work done on the above-captioned appeal just as the court below should be the forum for hearing Staple's post-judgment motion for attorney fees and expenses (and the taxation of costs) associated with the services performed in prosecuting this original action in that court. Supplementation in the court below to include the attorney fees claimed for work performed in respondents' appeal to this Court shall be undertaken out of an abundance of caution in case this Court unexpectedly would determine that the Tenth Appellate Judicial District is the appropriate forum for *all* issues pertaining to *all* claims for reimbursement of attorney fees and expenses and the taxation of costs.

STANDARD OF REVIEW

In a case in which attorney fees are to be awarded, the amount fixed is a matter within the sound discretion of the court. *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 146, 569 N.E.2d 464, 467 (1991).

And while an application for attorney fees must be judged by the standards of the statute or rule offering the basis for the award, there are commonly applied principles followed by courts in arriving at attorney fee awards.

The first is that the court generally should determine the number of hours reasonably expended and then multiply that number by an hourly rate of compensation. *Hess v. City of*

Toledo, 139 Ohio App.3d 581, 587, 744 N.E.2d 1236, 1240 (2000), *citing Bittner v. Tri-County Toyota, Inc.*, *supra* (syllabus).

A court then is permitted to modify that figure – upward or downward – upon taking the following factors into account:

> (1) The time, labor, and skill required to perform the legal services properly, with due consideration for the "novelty and difficulty" of the questions involved;
>
> (2) The likelihood, "if apparent to the client, that the acceptance of the particular employment will preclude other employment" by the attorney;
>
> (3) The fee customarily charged in the locality for similar legal services;
>
> (4) The amount involved and the results obtained;
>
> (5) The time limitations imposed by the client or by the circumstances;
>
> (6) The nature and length of the professional relationship with the client;
>
> (7) The "experience, reputation, and ability of the lawyer" performing the services; and
>
> (8) Whether the fee is fixed or contingent.

Bittner v. Tri-County Toyota, Inc., *supra*, 58 Ohio St.3d at 146, 569 N.E.2d at 467 (Supreme Court relied on the Code of Professional Responsibility, in its then-current form, in announcing these factors). While all of these factors "may not be applicable in all cases," *Bittner v. Tri-County Toyota, Inc.*, *supra*, a trial court retains "the discretion to determine which factors to apply, and in what manner that application will affect the initial calculation." *Hess v. City of Toledo*, *supra*, 139 Ohio App.3d at 587, 744 N.E.2d at 1240. Indeed, it has been held that a significant attorney fee can be justified, in part, by the recognition that "only a handful of attorneys" in the area "would

have even thought of getting involved" in a particular case or because the case involved "complicated issues" that "took counsel a lot of time to go through." *Id*.

Finally, the fees and expenses incurred in preparing and then advocating approval of the application for the award of attorney fees itself are to be included in fashioning relief. *Village of West Unity v. Merillat*, *supra*, 169 Ohio App.3d at 78-79, 861 N.E.2d at 907-908, ¶¶ 37-38 (principle followed in awarding attorney fees for successful prosecution of claim under Ohio's prevailing wage laws). "[T]Ime reasonably devoted to obtaining attorneys' fees in the context of litigation where the court must be petitioned for such an award is itself subject to an award of fees." *See Environmental Defense Fund v. Environmental Protection Agency,* 672 F.2d 42, 62 (D.C.Cir.1982) (referring to applications for sanctions made under the federal rules); *see also Cobell v. Norton*, 231 F.Supp.2d 295, 306-307 (D.D.C.2002); *Sierra Club v. Environmental Protection Agency*, 769 F.2d 796, 811 (D.C.Cir.1985); *Laffey v. Northwest Airlines*, 746 F.2d 4, 29 (D.C.Cir.1985). In the most extreme application of this principle that the undersigned counsel ever has seen, the Fifth Appellate Judicial District, sitting in Canton, ruled that it was reasonable to award $16,305.44 in attorney fees and expenses to the party prevailing on the merits of an Ohio Consumer Sales Protection Act case and some $103,109.43 in pursuing post-judgment proceedings upon an application for attorney fees and expenses upon a determination that the trial court had not failed to apply the appropriate standards in making its award. *Ferron v. Video Professor, Inc.*, Case No. 10-CAE-01-0008, 2010-Ohio-3585, 2010 WL 3030520, ¶¶ 37-38 (5th App.Jud. Dist., Aug. 4, 2010).

Accordingly, in making an award in favor of Staple on this motion, this Court is to *include* all attorney fees and expenses reasonably incurred in successfully seeking relief under O.R.C. §§ 2335.39 and/or 2323.51, as a failure to account for the fees and expenses incurred in

applying for reimbursement of the fees and expenses under Ohio's version of the Equal Access to Justice Act or for "frivolous" conduct would be to compromise the purpose of the law where the costs of pursuing relief might equal or exceed the fees and expenses incurred on account of the culpable conduct. *Sweeney v. Hunter*, 76 Ohio App.3d 159, 161-162, 601 N.E.2d 166, 167-168 (1991) (rejecting contrary authority from the First Appellate Judicial District); *see also Ron Scheiderer & Associates v. City of London*, Case Nos. CA95-08-022 and CA95-08-024, 1996 WL 435312, *slip op.* at 7-8 (12th App.Jud.Dist., August 5, 1996) (unreported); *Pracker v. Dolan*, Case No. 94-G-1867, 1995 WL 301455, *slip op.* at 4-5 (11th App.Jud.Dist., April 21, 1995) (unreported); *accord Environmental Defense Fund v. Environmental Protection Agency, supra*, 672 F.2d at 62 ("time reasonably devoted to obtaining attorneys' fees in the context of litigation where the court must be petitioned for such an award is itself subject to an award of fees") *and Cobell v. Norton*, *supra*, 231 F.Supp.2d at 306-307 (both cases referring to applications for sanctions made respecting discovery disputes under the federal rules and the policy of the discovery rules to discourage unreasonable conduct in the court of prosecuting or defending a civil action).

Accompanying this brief is a schedule of attorney fees and expenses detailing the nature and amount of attorney fees and expenses Staple seeks in this matter, appended as an exhibit to the affidavit of counsel lodged contemporaneously with this motion (the contents of which are hereby incorporated by reference as if fully rewritten herein). Such schedule is offered for notice purposes. Further evidentiary support for the amounts claimed shall be presented at any hearing conducted by this Court or by the submission of further evidence in the manner to be specified by further order of this Court once it determines Staple's motion is well-taken.

The evidence presented in Staple's counsel's affidavit in support of this motion reveals, in substantial detail, that the claimed attorney fees and expenses were ordinarily and

reasonably incurred, are reasonable as to amount, and were minimized due to the efficiency, skill, and vast experience of the undersigned counsel amassed over 46-plus years in prosecuting and defending matters relating to employment-related disputes subjected to civil litigation in courts in the State of Ohio. Moreover, given the daunting task undertaken in prosecuting a civil action seeking extraordinary relief in the form of a writ of mandamus under an "abuse of discretion" standard of review, it is respectfully submitted that scarcely a handful of Ohio attorneys are qualified to pursue a claim for such relief and that Staple's success in this case therefore was the product of efficiencies and a base of litigation knowledge and skills required of any advocate seeking to undo SERB action taken on an unfair labor practice charge. *See* **Counsel's Affid.**, ¶¶ 14.

For all of these reasons and those recited in the following brief in support, Staple requests that this Court award all fees and expenses, as claimed in **Exhibit A** attached to its counsel's affidavit in support of such award and in the balance of the exhibits to be introduced at any hearing on such award, updated to include all fees and expenses incurred through the end of such hearing and all post-hearing proceedings conducted by the Court in connection with applying for and causing such an award to be fashioned in this matter.

BRIEF IN SUPPORT OF MOTION FOR FEES AND EXPENSES

This Court affirmed the judgment of the court below against SERB on the unfair labor practice lodged against the City and the part of the judgment of the court below against SERB for its failure to investigate and determined the charge filed by Staple against the Union under O.R.C. § 4117.11(B)(2). In doing so, this Court affirmed the judgment of the Tenth Appellate Judicial District that SERB had dismissed the charge against the City and had failed to determine Staples's Section 4117.11(B)(2) charge in abuse of its discretion, thereupon ordering SERB to find probable cause that the City violated O.R.C. § 4117.11(A)(1) and to conduct the

statutorily-mandated investigation into Staple's charge that the Union violated O.R.C. § 4117.11(B)(2).

I. STAPLE IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND EXPENSES AGAINST SERB UNDER OHIO'S VERSION OF THE EQUAL ACCESS TO JUSTICE ACT, O.R.C. § 2335.39.

Since its enactment of Ohio's version of the Equal Access to Justice Act in 1984, the General Assembly has allowed a qualifying "prevailing party" in a civil action against the state to recover an award compensating for the reasonable attorney fees and expenses in taking on the State of Ohio. Our state's remedial statute became law four years after Congress enacted the Federal Equal Access to Justice Act, 5 U.S.C. § 504. "Like the federal [a]ct, the Ohio [a]ct was passed to censure frivolous government action which coerces a party to resort to the courts to protect his or her rights." *Collyer v. Broadview Development Center*, 81 Ohio App.3d 445, 448, 611 N.E.2d 390, 392 (1992), *citing Malik v. Ohio State Medical Board*, Case No. 88AP-741, 1989 WL 112346 (10th App.Jud.Dist., Oct. 2, 1989) (unreported). "This serves to ' … encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expense.'" *Id.*, *citing Spencer v. National Labor Relations Board*, 712 F.2d 539, 549 (D.C.Cir.1983).

There can be no disputing that Staple is a party eligible for an award under O.R.C. § 2335.39, as he has prevailed in this original action in mandamus and does not have a net worth in excess of $1 million. **Staple Affid.**, ¶ 3. Ohio's version of the Equal Access to Justice Act benefits Staple in this case because this mandamus action is **not** a Chapter 163 appropriations proceeding, features a verified complaint that alleged **no** tort claim(s), and did **not** constitute a form of any O.R.C. § 119.12 administrative appeal excluded from the reach of an award under the statute within the meaning of O.R.C. § 2335.39(F).

In relevant part, the enabling statute provides:

> [I]n a civil action … to which the state is a party, … the prevailing party is entitled … to compensation for fees incurred … in connection with the action … in addition to any other costs and expenses that may be awarded to that party by the court pursuant to law or rule.

O.R.C. § 2335.39(B)(1). Exempt from the scope of this rule are *only* cases in which a court finds that the state's position was "substantially justified" and those where "special circumstances [would] make an award unjust," and any attorney fees and expenses occasioned by the prevailing party's having "engaged in conduct during the course of the action … that unduly and unreasonably protracted the final resolution of the matter in controversy." O.R.C. § 2335.39(B)(2). The statute specifically assigns to the *state* the burden of proving that its position "in initiating the matter in controversy was substantially justified, that special circumstances make an award unjust, or that the prevailing eligible party engaged in conduct … that unduly and unreasonably protracted the final result." *Id*.

"State" is defined in O.R.C. § 2335.39(A)(6) as any board or other agency of the State of Ohio falling within the scope of the definition of "state" found in O.R.C. § 2743.01. SERB falls within this definition.

Relief under the statute requires the prevailing party first to file a motion seeking compensation for attorney fees and expenses not later than the 30th day immediately succeeding entry of judgment. O.R.C. § 2335.39(B)(1). As this Court's judgment was entered on October 15, 2025, Staple has met this deadline in this case.

The statute goes on to require Staple's motion to identify the party against which relief is sought (in this case, SERB) (O.R.C. § 2335.39(B)(1)(a)), allege that he is "the prevailing eligible party and is entitled to receive an award of compensation for fees (O.R.C. § 2335.39(B)(1)(b)), "include a statement that the state's position in initiating the matter in

controversy was not substantially justified" (O.R.C. § 2335.39(B)(1)(c)), "indicate the amount sought as an award" (O.R.C. § 2335.39(B)(1)(d)), and "itemize the fees sought in the requested award," including "a statement from any attorney who represented the prevailing eligible party [indicating] the fees charged, the actual time expended, and the rate at which the fees were calculated" (O.R.C. § 2335.39(B)(1)(e)). Each of these requirements has been met either in the express terms of Staple's motion and supporting brief and/or the sworn statements included in the affidavits he and his counsel have submitted contemporaneously with the filing of this motion, each of which is expressly incorporated by reference as if fully rewritten herein. Thus, all procedural prerequisites to seeking relief under O.R.C. § 2335.39 have been satisfied.

In making an award in favor of Staple, this court's decision shall be expressed in writing that outlines the findings and conclusions that support the award and the "reasons or bases for [such] findings and conclusions" and the Clerk then is to be directed to send a copy of its judgment entry on Staple's motion to all parties by certified mail. O.R.C. § 2335.39(B)(2).

Denial of Staple's motion would depend on this Court's finding that the state sustained its burden of proving that its position was substantially justified or that special circumstances make an award unjust. O.R.C. § 2335.39(B)(2)(a). A reduction of the amount otherwise awardable on Staple's motion similarly would depend on this Court's specifically finding that Staple himself engaged in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy. O.R.C. § 2335.39(B)(2)(b).

A. SERB initiated the adverse action suffered by Staple by dismissing Staple's unfair labor practice charge against the City without substantial justification and did not have substantial justification to ignore Staple's Section 4117.11(B)(2) charge against the Union.

A threshold question is presented by the text of the statute. A qualifying prevailing party is entitled to recover an award under O.R.C. § 2335.39 upon a determination of whether or

not "the position of the state *in initiating the matter in controversy* was substantially justified." O.R.C. § 2335.39(B)(2) (emphasis supplied). This language has spurred controversy in the past about whether the "matter in controversy" language used in the statute is broad enough to include an original action in mandamus commenced by an individual, such as Staple, so that SERB might avoid liability because such an original action itself would not have been initiated by SERB at all, but merely was made necessary in order to seek redress from agency action that was not substantially justified.

To be sure, some courts construed this language in the past to mean that relief under O.R.C. § 2335.39 is confined to cases where the *litigation* was "initiated" by the state. *See, e.g.*, the Court of Claims decision in *Highway Valets, Inc. v. Ohio Department of Transportation*, 38 Ohio App.3d 45, 526 N.E.2d 112 (1987) (syllabus), and the First Appellate Judicial District's decision in *Estate of Kirby v. Hamilton County Court of Common Pleas*, 78 Ohio App.3d 397, 402, 604 N.E.2d 1367, 1371 (1992).

However, in 2002, this Court erased all doubt when it decided *State ex rel. R.T.G., Inc. v. State of Ohio*, 98 Ohio St.3d 1, 14, 780 N.E.2d 998, 1010-1011, 2002-Ohio-6716, ¶¶ 67-68 (emphasis in original):

> We construe this language [in O.R.C. § 2335.39(B)(2)] to permit fees where the state initiates either the *conduct* that gave rise to the litigation *or* initiates the *litigation* caused by the controversy. Had the General Assembly intended to permit fees only where the state initiates the litigation, then it could have indicated that fees would be awarded only where the state initiated "litigation," as opposed to the more general language "matter in controversy" that was actually used.
>
> Furthermore, to construe this language otherwise would lead to an absurd result in this case. Clearly the purpose of R.C. 2335.39 is to protect citizens from unjustified state action. If fees under R.C. 2335.39 were permitted only where the state initiated the legal action, the protection that R.C. 2335.39 provides would not be available where [qualified prevailing parties] were compelled to initiate legal action to get relief from the state.

The statute cannot be read only one way, as the Court of Claims asserted in *Highway Valets*, but also can be read the way this Court and Staple read it. Accordingly, Staple qualifies for consideration of his motion under O.R.C. § 2335.39 because (1) "the *conduct* that gave rise to the litigation" in this case was initiated by SERB when it dismissed Staple's unfair labor practice charge against the City and totally ignored Staple's Section 4117.11(B)(2) charge against the Union and (2) relief for Staple from the unreasonable conduct of SERB could proceed only by commencing an original action in mandamus. *See Ohio Association of Public School Employees, Chapter 643, AFSCME, AFL-CIO v. Dayton City School District Board of Education*, 59 Ohio St.3d 159, 572 N.E.2d 80 (1991) (syllabus); *State ex rel. Leigh v. State Employment Relations Board*, 76 Ohio St.3d 143, 144, 666 N.E.2d 1128, 1130 (1996); *see also State ex rel. Ohio Association of Public School Employees/AFSCME, AFL-CIO v. State Employment Relations Board*, 64 Ohio St.3d 149, 151-152, 593 N.E.2d 288, 290-291 (1992) (a writ of mandamus will issue to correct an abuse of discretion by SERB in dismissing unfair labor practice charges).

B. Staple is the "eligible prevailing party" in this appeal.

For purposes of this motion made under O.R.C. § 2335.39, Staple's "prevailing party" status in this original action against SERB is scarcely up for debate. This Court will note that Staple realized in this case 100 percent (100%) of the relief he sought on his unfair labor practice charge against the City and prevailed upon this Court to affirm the judgment of the court below respecting his Section 4117.11(B)(2) charge against the Union. Not only did this Court affirm the decision of the court below in issuing a writ of mandamus directing SERB to vacate its order dismissing Staple's unfair labor practice charge against the City and find probable cause, but it also affirmed the issuance of a limited writ directing SERB to decide the charge prosecuted by

Staple against the Union under O.R.C. § 4117.11(B)(2) on its merits. This Court's judgment of October 15, 2025, affirms the mandate of the court below obligating SERB to proceed with action to be taken in furtherance of pursuing relief on Staple's charge against the City and to complete its investigation and pursue enforcement actions to hold the City and the Union accountable to the extent the evidence warrants granting relief on Staple's charges. If that does not make Staple a "prevailing party" within the meaning of Ohio's version of the Equal Access to Justice Act, Staple's undersigned counsel is afraid he does not know how any party would qualify.

C. The positions SERB took in urging reversal to reinstate its order dismissing Staple's unfair labor practice charge against the City and avoid having to investigate Staple's separate Section 4117.11(B)(2) charge against the Union, were not substantially justified.

What SERB did in this case was not justified by any reasonable interpretation of Chapter 4117 of the Ohio Revised Code, the dispute resolution terms of the collective bargaining agreement, or any normative evaluation of the evidence before it on Staple's charges.

This Court should not lose sight of the fact that what SERB had before it in the record of this original action was indisputable on the key issues that would determine the sufficiency and viability of Staple's unfair labor practice charges.

First, Staple showed that the collective bargaining agreement between the City and the Union included a clause expressly reserving any arbitrability challenge to the exclusive jurisdiction of an arbitrator. Nothing in that agreement allowed the City to determine unilaterally that the Union's notice of arbitration submitted on Staple's behalf was untimely so that it could then blithely refuse to submit to arbitration over at least that issue. And as this Court expressly noted in its opinion affirming the judgment of the court below respecting disposition of Staple's charge against the City, SERB had no business ignoring this unambiguous provision of the collective

bargaining agreement or taking the position it took in this Court or in the court below on this issue. There plainly was no substantial justification for re-writing the grievance dispute resolution terms of the collective bargaining agreement to allow the City to skirt its duty to submit to arbitration of at least the question of arbitrability or to expect SERB to relieve the City of its duty to submit that issue to arbitration by deciding the issue for itself.

Second, Staple filed a timely charge under O.R.C. § 4117.11(B)(2) that SERB simply ignored in spite of a clear legal duty under Chapter 4117 to investigate such charge and arrive at a decision reasonably based on the results of that investigation. This charge deals with questions of whether the conduct of the Union paved the way for Staple's arbitration rights under the collective bargaining agreement to be compromised. A determination on that issue is *independent* of any determination of whether the Union committed an unfair labor practice against Staple when it did not submit its notice of arbitration until November 23, 2020, a duty the agreement imposed *exclusively* on the Union and not at all on Staple on terms that expressly *forbade* Staple from submitting his own notice of arbitration even if he had wanted to do so.

Third, Staple showed that when given a chance to join him in his Chapter 2711 action seeking to compel the City to submit to arbitration, the Union did not do so even though it was well aware of the action Staple took because he wound up having to name the Union as an additional party-*defendant* in that matter instead of welcoming the Union as a co-party-*plaintiff* in jointly seeking relief against the City. The Union's conduct thus allowed the City to claim successfully that Staple lacked standing to enforce his right to arbitration because his pathway under Chapter 2711 was barred when the Union declined to join him in an action he was prepared to prosecute on his own dime and without asking the Union for a single penny.

Fourth, Staple showed that SERB had a clear legal duty under O.R.C. § 4117.12(B) to investigate his charge under O.R.C. § 4117.11(B)(2) and render a principled decision on that charge in writing in a manner reasonably based on the results of such investigation, but the agency failed to do live up to that duty.

Given these undeniable elements of the record before it on Staple's charges and on the claims asserted in Staple's original action in mandamus, it is inconceivable that SERB ever could have felt that its position in summarily dismissing Staple's claims was "substantially justified" let alone in repeating that position in the above-captioned appeal. But out of an abundance of caution, and in an effort to peel way the layers of the onion in this case, Staple will engage in a bit of further exposition here.

Of course, Staple need not prove that SERB's position was not "substantially justified," as the statute expressly imposes the burden of proof on that issue on *SERB* if it seeks to avoid liability. Even so, Staple notes that in addressing this issue, case law has helped to establish some common standards to use in making this determination. *See, e.g.*, *In re Williams*, 78 Ohio App.3d 556, 559-560, 605 N.E.2d 475, 477-478 (1992) (state agency fails to satisfy its burden when it offers no evidence and relies only on argument in supporting its position that its conduct was "substantially justified"); *cf. Holden v. Ohio Bureau of Motor Vehicles*, 67 Ohio App.3d 531, 539, 587 N.E.2d 880, 884-885 (1990) (state agency "substantially justified" in taking action to suspend plaintiff's driver's license based on a trial court's inaccurate abstract of the record). It remains, however, that there is little case law in Ohio on what does or does not constitute conduct that is "substantially justified" within the meaning of our state's version of the Equal Access to Justice Act. It would appear therefore that disposition of this issue is a matter of a case-by-case analysis of the law and the facts. However, under the federal statute, courts have adopted a

standard of "simple reasonableness" with determinations made in the context of prevailing law at the time the agency took action. *Frey v. Commodity Futures Trading Commission*, 931 F.2d 1171, 1174 (7th Cir.1991), *citing Pierce v. Underwood*, 487 U.S. 552, 583-586, 108 S.Ct. 2541, 2549-2551, 101 L.Ed.2d 490 (1988). Thus, where a government agency forces an individual to resort to taking court action to attack arbitrary governmental conduct, the agency's position is not "substantially justified" and an award of attorney fees and expenses is warranted where the agency's action is not reasonable. *Glick v. U.S. Civil Service Commission*, 567 F.Supp. 1483, 1486 (N.D.Ill.1983), *aff'd* 799 F.2d 753, *citing Photo Data, Inc. v. Sawyer*, 533 F.Supp.348, 352, n.7 (D.D.C.1982) (drawing an analogy to discovery sanction awardable when a party's position in making or opposition a motion to compel discovery is not "substantially justified" where the underlying policy is to "deter abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists").

Imagine the tremendous burden Staple shouldered in bringing his mandamus action and then undertaking to urge affirmance of the judgment entered in his favor in the court below. He was entitled to relief only if he could prove that SERB *abused its discretion*. He did that … a monumental task given the state of applicable case law stacked against him in this area. Implicit in a finding that SERB's conduct amounted to an abuse of discretion, therefore, must be recognition that SERB was **not** "substantially justified" in taking the positions it did in dismissing Staple's unfair labor practice charge against the City and totally ignoring his Section 4117.11(B)(2) charge against the Union. This Court affirmed the decision of the court below to vacate these parts of SERB's action and remanded Staple's charges with instructions specifically (1) to find that the evidence in the record supports a finding of probable cause respecting the charge lodged against the City under O.R.C. § 4117.11(A)(1) and (2) to complete its investigation into the charge lodged

against the Union under O.R.C. § 4117.11(B)(2) and render a final and appealable order on that charge. Accordingly, no matter how a standard of "simple reasonableness" is applied, this Court hardly can conclude that SERB's actions or defense of such actions in this Court were substantially justified given (1) the state of the law in this area at the time SERB made its decisions and (2) the state of the record demonstrating that the City had a clear duty under the collective bargaining agreement to submit to arbitration at least to allow its challenge to arbitrability to be adjudicated by an arbitrator and that SERB had a clear duty to decide *both* charges that Staple had lodged against the Union. The fact that the record before SERB included **no evidence** proving that the City ever gave Staple or the Union actual written notice of the appointing authority's removal order (as expressly required by the collective bargaining agreement) only made matters worse for SERB, as the deadline for lodging an arbitration request could not have begun to run until such notice was given to *both* Staple *and* the Union and the record before SERB therefore did not establish when the time for serving an arbitration notice would begin and then expire.

In spite of how it acted in disposition of Staple's charges, SERB's discretion was **not** boundless or unlimited. Thus, in the context of a standard of "simple reasonableness," this Court should bear in mind that SERB was duty-bound to exercise its discretion soundly and in a principled fashion, demonstrating loyalty to its commitment to consistency with its own prior interpretations of Chapter 4117 of the Ohio Revised Code … all with due regard for proper and reasonable interpretations of applicable terms of a collective bargaining agreement and with an eye toward applying the provisions of Chapter 4117 logically, fairly, and reasonably to all *uncontroverted* evidence actually before it … and to follow those same guidelines in defending itself in Staple's original action and SERB's appeal taken from the judgment rendered by the court below.

Staple contended that SERB abused its discretion when it (1) ignored or flatly misinterpreted uncontroverted facts before it, (2) ignored and failed to apply plain and unambiguous collective bargaining agreement language that conferred on Staple (and the Union) a clear right to take Staple's grievance to arbitration at least to test the City's arbitrability defense, and then (3) decided the arbitrability question on its merits and upon substituting its own judgment for the judgment expressed by the parties to the collective bargaining agreement. Instead of finding that there was "probable cause" to conclude that the City violated O.R.C. § 4117.11(A)(1) by outright refusing to cooperate in allowing at least the arbitrability question to be referred to an *arbitrator* precisely as the parties to the collective bargaining agreement expressly intended, SERB decided that the City was justified in unilaterally deciding that Staple's arbitration notice was untimely and therefore divested any arbitrator of jurisdiction. This Court agreed with Staple and the court below that SERB abused its discretion in this regard and therefore all positions taken in Staple's original action or in SERB's appeal to this Court do not suggest that SERB had any substantial justification to act as it did when dismissing Staple's charges or seeking relief from the judgment of the court below. The "simple reasonableness" standard when applied to each of Staple's unfair labor practice charges therefore cannot support opposition to Staple's motion for reimbursement of attorney fees and expenses under O.R.C. § 2335.39 for agency conduct that was not "substantially justified."

SERB's conduct – make no mistake about it – literally *forced* Staple to take SERB to court to reverse unreasonable agency action on his unfair labor practice charges by means of a mandamus action. The same applies to SERB's conduct in this Court when (1) failing to accord a reasonable and logical interpretation of the specific words used by the parties in their collective bargaining agreement as they crafted arbitration terms and/or (2) either ignoring or blithely

misconstruing *uncontroverted* evidence in the record and undeniable applicable precedent squarely on point that required the City to submit to arbitration and SERB to decide *all* charges lodged by Staple against the Union.

To prevail in his original action, Staple had to convince this court that SERB's judgment in this case was unreasonable, arbitrary, or unconscionable when it came to interpretation and application of unambiguous collective bargaining agreement language and/or uniform application of established principles for making determinations under O.R.C. §§ 4117.11(A) and 4117.11(B). It was an abuse of discretion in this case for SERB to fail to root its decisions in substantial evidence in the record and its own well-established principles of statutory interpretation and precedents in the context of what the collective bargaining agreement expressly says. *See, e.g.*, *State Employment Relations Board v. State Office of Collective Bargaining*, Case No. 91-AP-939, 1992 WL 132463, *5 (10th App.Jud.Dist., June 11, 1992) (unreported) (SERB entitled to *no deference* when it comes to how a collective bargaining agreement is to be properly interpreted); *State ex rel. Municipal Construction Equipment Operators' Labor Council, v. Ohio State Employment Relations Board*, 2017-Ohio-2624, 2017 WL 16535650, ¶ 16 (10th App.Jud.Dist.). SERB had no business reading terms that were not incorporated by the parties to the collective bargaining agreement. After all, such an agreement, at its core, is but a contract … and "the overriding concern … when construing a contract is to ascertain and effectuate the intention of the parties." *Koehring v. Ohio Department of Rehabilitation and Correction*, 2007-Ohio-2652, 2007 WL 156279, ¶ 20, *quoting State ex rel. Kabert v. Shaker Heights City School District Board of Education*, 78 Ohio St.3d 37, 44, 676 N.E.2d 101, 107 (1997), *and TRINOVA Corp. v. Pilkington Bros., P.L.C.*, 70 Ohio St.3d 271, 276, 638 N.E.2d 572, 576 (1994).

SERB interpreted the parties' collective bargaining agreement and the applicable statutes arbitrarily and without adhering to its other decisions serving as precedent for cases falling under the statutes on which Staple relied, failed to take into account uncontroverted evidence presented by Staple or simply misconstrued such evidence to suit its pre-ordained determination that Staple's charges simply had to be dismissed, and inexplicably misconstrued or failed take stock of plain and unambiguous language in the collective bargaining agreement just to serve its own interest in favoring a more expedient result by dismissing Staple's charges over the harder course required to effect substantial justice that would come with having to investigate the charges fully, prosecute an administrative enforcement action, and then take the parties to court to enforce its decision should voluntary compliance by the parties prove to be elusive.

SERB continued such substantially unjustified conduct in prosecuting its appeal in this Court. After all, when the terms of a collective bargaining agreement are not ambiguous, they are to be construed and applied as the *parties* intended and **not** as SERB may have wished they would have been written or by reading into (or out of) those terms any sort of language the parties did not themselves include. And noted by the court below in 2011 in its decision in *Beasley v. Monoko, Inc.*, 195 Ohio App.3d 93, 104, 958 N.E.2d 1003, 1012, 2011-Ohio-3995, ¶ 30, when the terms of an agreement are unambiguous and clear on their face, a court need not look beyond the plain language of the contract to determine the rights and obligations of the parties. SERB's arbitrary conduct in this respect is underscored by the fact that the Union agreed with Staple's position, as its General Counsel called Staple's private counsel's attention to the City's obligation to submit any arbitrability issue to arbitration. **Record** at C25, p. 223 of 1020, ¶ 40, and at H5, p. 697 of 1020, ¶ 2.

When the uncontroverted evidence established that the City simply refused to go to arbitration over *any* issue merely because it unilaterally decided the Union's arbitration such notice was untimely, SERB plainly was not "substantially justified" in ignoring Sections 16.1 and 16.4 of Article 16 of the collective bargaining agreement requiring the City to allow an arbitrator to decide whether the Union acted in a timely fashion. SERB was bound by each of those principles of law. This Court rightly agreed with the court below that SERB abused its discretion when it failed to interpret and apply the unambiguous language found in the collective bargaining agreement at issue in this case when it came to deciding Staple's charge against the City. Such abuse of SERB's discretion thus was repeated in prosecuting SERB's appeal this Court. The standard of "simple reasonableness" cannot be met by SERB given these realities in this case.

Consequently, Staple respectfully submits that SERB will be hard-pressed to claim that it had "substantial justification" for arbitrarily ignoring the plain language of the arbitration provisions of Section 16.4 of Article 16 of the collective bargaining agreement that made it abundantly clear that the City *must* submit to binding arbitration when a notice of arbitration is presented by the Union … and that it is up to an *arbitrator* (and **not** SERB and certainly **not** just the City) to determine any preliminary issues of arbitrability on which the City might wish to rely respecting the timeliness of invoking the arbitration process. The express terms of the collective bargaining agreement irrefutably conferred rights on Staple in ways SERB could not reasonably or responsibly ignore without abusing its discretion in the course of effectively rewriting the collective bargaining agreement and allowing the City to get away without having to defend some form of action (before SERB or in court) to compel arbitration. Dismissing Staple's charges against the City and the Union therefore was **not** "substantially justified."

SERB's conduct fares even worse when it comes to review of its decision to dismiss the second of Staple's two charges against the Union. It was up to SERB to determine whether the Union paved the way for the City to trample on Staple's right to pursue arbitration by not joining in Staple's attempt to compel arbitration under Chapter 2711 of the Ohio Revised Code. Instead, SERB completely ignored Staple's O.R.C. § 4117.11(B)(2) charge. Then SERB offered **nothing** in advocating its position in support of its own motion for summary judgment in the court below to justify its failure to live up to its clear legal duties under O.R.C. § 4117.12(B) to investigate the grounds for bringing that charge under O.R.C. § 4117.11(B)(2) and render a principled decision on that charge in writing. Accordingly, the way SERB disregarded the part of Staple's charge relating to a claimed violation of O.R.C. § 4117.11(B)(2) was **not** "substantially justified."

Nor was SERB's position taken at Page 14 of its merit brief in this Court that its action was capable of being regarded as "substantially justified." SERB claimed, without referencing any authority, that the O.R.C. § 4117.11(B)(2) charge was dependent on Staples other charges and that SERB was "not yet required to complete its investigation on the (B)(2) charge." Although in this Court, SERB claimed that the court below had "in fact … granted [SERB] a stay" of its duty to determine this charge, the court below actually said in its January 16, 2024, decision that "we grant a limited writ of mandamus ordering SERB to vacate its order dismissing the [unfair labor practice charge against the Union], directing SERB to consider all facts and circumstances relevant to the alleged violation of R.C. 4117.11(B)(2), and to issue a new order explaining the reasoning for its decision on that charge." No "stay" ever was entered, *sub silentio* or otherwise.

Since SERB bears the burden on this issue, Staple will reserve further comment until he sees how the agency will attempt – if at all – to support a defense brought on this issue under O.R.C. § 2335.39(B)(2)(a).

D. No special circumstances exist that would render it unjust to award Staple compensation for the attorney fees and expenses he incurred in successfully upholding the judgment of the court below to reverse the wrongful actions of SERB in disposition of his unfair labor practice charges.

Staple and his undersigned counsel cannot fathom what "special circumstances" might be present to head off an award of compensation for attorney fees and expenses in this case.

Accordingly, further comment on this issue will be deferred pending any possible election on SERB's part to proceed along these lines. If necessary, Staple will address this issue in a reply brief in support of this motion or in merit briefing that this Court may order in advance or following a hearing on this motion.

E. Staple did nothing in this appeal to protract the final resolution of the matter in controversy in this Court or the court below in any undue or unreasonable manner.

Every argument advanced by Staple on the merits in this Court was presented to SERB as it considered Staple's charges. Nothing new or novel was presented. All arguments were rooted in both the uncontroverted evidence in the record of the proceedings before SERB and well-established principles of law applicable to such evidence. Yet, SERB ignored the evidence called to its attention, ignored its own well-established precedents, made assumptions about facts **not** included in the evidence in its record, and blithely misinterpreted and/or misapplied unambiguous collective bargaining agreement language in choosing to dismiss Staple's charges instead of finding there was probable cause to believe that unfair labor practices had occurred.

It was within the province of SERB to make the right call on each of Staple's charges. It not only failed to do so, but acted in a way that caused the court below correctly to regard SERB's disposition of Staple's charges as an abuse of the sort of discretion entrusted to SERB's members by the General Assembly. Those board members took an oath to "faithfully and

impartially discharge and perform all the duties incumbent on [each such member] according to the best of [his or her] ability and understanding." O.R.C. § 3.23. SERB's members most assuredly violated that oath here when they acted as if the record before them did not exist and just played right into the City's hands by exonerating city officials from an unambiguously expressed obligation set forth in the collective bargaining agreement to submit to arbitration over at least the question of whether Staple's grievance was timely and therefore arbitrable, and continued taking these positions in prosecuting their appeal in this Court.

If anyone protracted the final resolution of the matters brought by Staple to SERB in an undue and/or unreasonable fashion, *it was SERB*.

F. All other prerequisites to an award under O.R.C. § 2335.39 have been satisfied.

Staple's motion meets all other prerequisites for an award under O.R.C. § 2335.39(B) in that he has identified the party against which relief is sought (in this case, SERB) (O.R.C. § 2335.39(B)(1)(a)), has alleged that he is "the prevailing eligible party and is entitled to receive an award of compensation for fees" (O.R.C. § 2335.39(B)(1)(b)), has "include[d] a statement that the state's position in initiating the matter in controversy was not substantially justified" (O.R.C. § 2335.39(B)(1)(c)), has "indicate[d] the amount sought as an award" (O.R.C. § 2335.39(B)(1)(d)), and has "itemize[d] the fees sought in the requested award," including "a statement from [the] attorney who represented [him indicating] the fees charged, the actual time expended, and the rate at which the fees were calculated" (O.R.C. § 2335.39(B)(1)(e)).

II. STAPLE IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND EXPENSES AGAINST SERB AND THE CITY UNDER O.R.C. § 2323.51.

State agencies are just as liable as private litigants for awards under Ohio's Frivolous Conduct Statute. *Ohio Civil Rights Commission v. Harlett*, 132 Ohio App.3d 341, 347, 724 N.E.2d 1242, 1247, n. 2 (1999).

In this case, Staple respectfully submits that SERB and the City each engaged in "frivolous conduct" within the meaning of that statute and therefore should be held liable for the roles they respectfully played in asserting absurd positions and/or bumping up the costs of this litigation to Staple.

The Frivolous Conduct Statute, in relevant part, brands as "frivolous" any "[c]onduct of . . . [a] party to a civil action . . . or [such] party's counsel of record that … (i) …. obviously serves merely to harass … another party to the civil action … or is for another improper purpose, including … causing … needless increase in the cost of litigation [or] … (ii) … is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law [or] (iii) … consists of allegations or other factual contentions that have no evidentiary support …. [or] (iv) … consists of … factual contentions that are not warranted by the evidence…." O.R.C. § 2323.51-(A)(2)(a).

Staple respectfully submits that SERB and the City in this appeal have engaged in "frivolous conduct" satisfying one or more of the foregoing four criteria.

SERB must be held to account under O.R.C. § 2323.51(A)(2)(a) for all of the attorney fees and expenses it forced Staple to incur in defending his interests against Staple without substantial justification on SERB's part and resisting frivolous positions in this appeal.

And while this case was prosecuted to seek relief against SERB in mandamus for its abuse of discretion, it remains that the City, as a party named by Staple in accordance with Civil Rule 19(A), either joined in or supported frivolous positions taken by SERB in this action or engaged in its own frivolous conduct in presenting the City's arguments in its brief. After all, the City could have allowed SERB to defend itself without attempting to participate in any way or to advance its own arguments in support of SERB or to shore up positions it thought SERB overlooked or did not comprehensively address. When it elected instead to participate actively in this appeal, the City assumed the risk that its conduct later might be branded as "frivolous" and thus susceptible to relief being granted in Staple's favor under O.R.C. § 2323.51(A)(2)(a) irrespective of the extent SERB might be liable under the same statute or under O.R.C. § 2335.39.

A. SERB's liability is rooted in all four cited subparts of O.R.C. § 2323.51(A)-(2)(a).

Staple respectfully submits that the frivolousness of the positions taken by SERB in this original action are amply demonstrated in the foregoing elements of this brief in support of this motion. Those details therefore are hereby incorporated by reference as if fully rewritten in this section of this brief.

Out of an abundance of caution, however, Staple calls the following details to this Court's attention in the specific context of his claim under the Frivolous Conduct Statute.

SERB aligned itself with the City's position that since Staple could not himself invoke the "right" to demand arbitration, he had no "standing" to invoke SERB's jurisdiction to redress unfair labor practices to which he was subjected when the City unilaterally refused to submit at least the question of arbitrability to an arbitrator. SERB thus is liable for reimbursement of Staple's litigation costs under O.R.C. § 2323.51(A)(2)(a)(i) (needless increase in the cost of

litigation) and O.R.C. § 2323.51(A)(2)(a)(ii) (advancing a position not warranted under existing law, not supported by a good faith argument for an extension, modification, or reversal of existing law, and not supported by a good faith argument for the establishment of new law). After all, Staple's status as a third party beneficiary of the collective bargaining agreement between the City and the Union is well-established under Ohio law. *See Hill v. Sonitrol of Southwestern Ohio, Inc.*, 36 Ohio St.3d 36, 41, 521 N.E.2d 780, 784 (1988), *and Cullen v. Ohio Department of Rehabilitation and Correction*, 125 Ohio App.3d 758, 766, 709 N.E.2d 583, 589 (1998); *see also Norfolk & Western Co. v. United States*, 641 F.2d 1201, 1208 (6th Cir.1980) (applying Ohio law) (if a party to a contract "intends that a third party should benefit from the contract, then that third party is an intended beneficiary who has enforceable rights under the contract"). And that agreement includes an express provision guaranteeing that disputes affecting the rights of a bargaining unit member under that agreement shall be submitted to arbitration upon the Union's submission of an arbitration notice and that such arbitration proceedings are conducted in accordance with the Labor Arbitration Rules of the American Arbitration Association. **Record** B22, p. 120 of 1020, Art. 16, § 16.1, and B23, p. 121, Art. 16, § 16.4 (filed in the court below on April 21, 2022). Since Rule 3a those arbitration rules expressly provides that the arbitrator will decide any questions of arbitrability that arise in the context of any dispute referred to him or her,[1] neither SERB nor the City had any business effectively urging upon this Court or the court below that the City could unilaterally refuse to go to arbitration merely because it deemed the Union's arbitration notice to have been untimely or because the evidence suggested to SERB that the City correctly determined that the

[1] The Labor Arbitration Rules of the American Arbitration Association are accessible online at *https://www.adr.org/sites/default/files/Labor_Arbitration_Rules_3.pdf*. Rule 3c goes on to provide that the arbitrator "may rule on [procedural or jurisdictional] objections as a preliminary matter or as part of the final award."

Union's notice was untimely. *That is a decision for an arbitrator to make and not one for the City or, for that matter, for SERB to make.* **Nothing** in the collective bargaining agreement reserved to the unfettered discretion of the City any right or privilege of exercising its judgment on the timeliness of the Union's arbitration notice unilaterally in a way that would foreclose either (1) any party's access to an arbitrator to subject the City's decision regarding arbitrability or (2) the ability of SERB to consider whether the City committed an unfair labor practice by refusing to let an arbitrator hear Staple's grievance if only to decide the arbitrability defense the City has raised. This position taken by SERB and the City on this issue therefore was frivolous with the meaning of O.R.C. § 2323.51(A)(2)(i) (needless increase in the cost of litigation) and O.R.C. § 2323.51(A)(2)(a)(ii) (advancing a position not warranted under existing law, not supported by a good faith argument for an extension, modification, or reversal of existing law, and not supported by a good faith argument for the establishment of new law).

SERB also is liable to Staple under O.R.C. § 2323.51(A)(2)(a)(iii) and O.R.C. § 2323.51(A)(2)(a)(iv) for having taken positions in this case both at odds with uncontroverted evidence in the record or based on evidence presumed to exist, but not actually appearing in the record of the proceedings conducted by the agency. That record contains **no evidence** establishing that the City ever gave the required actual written notice of the decision of its appointing authority to remove Staple to the Union or Staple, or, for that matter, the date such notice supposedly was given. Those two requirements, once satisfied by the City, would have started the 30-day clock for serving an arbitration notice. Without any evidence of the City's compliance, then, SERB had no business urging the court below or this Court to conclude that the record in this case establishes the deadline by which the Union had to act … a position at the heart of how SERB decided Staple's charge and how both SERB and the City attempted to persuade this Court to reverse the court

below. This would be precisely the sort of evidence that an arbitrator – and **not** SERB – would be called upon to evaluate in determining whether a timely arbitration notice was served on December 23, 2020, under arbitration rules specifically reserving that decision for an *arbitrator* to make in disposing of any arbitrability challenge. Case law is in accord and neither SERB nor the City offered any support for the proposition that the rule reaffirmed in applicable precedents should be reconsidered, modified, or abandoned in favor of a new standard or that any of those cases was distinguishable from the case at bar. *See, e.g.*, *Youngstown Professional Firefighters, IAFF Local 312 v. City of Youngstown*, Case No. 2022-CV-02228 (Mahoning Co. Comm.Pl., June 30, 2023) (unreported) (supplemental authority filed in the court below on June 30, 2023), and the cases cited by the magistrate in the court below at Page 13 of his decision. Instead, SERB took a position that amounted to advocating that it could usurp a power reserved by the City and the Union for an arbitrator's exclusive review even though SERB was presented with undeniable – and *uncontroverted* – facts that the City bound itself to a contract term requiring decisions regarding arbitrability to be decided by an arbitrator, **not** by SERB, **not** by a court, and certainly **not** unilaterally by the City.

In addition, all of the speculation of SERB and the City about whether Staple's private counsel or the Union erred in determining the deadline for serving an arbitration notice just constitutes more frivolous conduct, as such details, even if established, were *irrelevant* to the question presented to SERB by Staple's unfair labor practice charge against the City. The City was **not** a party to an agreement by which Staple's private counsel *eventually* would assume responsibility for his client's grievance. And such agreement offered no cover for SERB or the City whatsoever since the record clearly demonstrates that the condition for causing that agreement to take effect – namely, *timely* service of an arbitration notice – has yet to be determined. SERB had no

business deciding that issue for itself in the proceedings it conducted on Staple's unfair labor practice charges any more than the City did in unilaterally refusing to submit to arbitration concerning the timeliness of the Union's notice. SERB surely had no business replicating that argument in the position it took in this original action and subsequent appeal to this Court. Neither SERB nor the City could claim simultaneously that this Court should ignore the rules to which the City had bound itself that reserve arbitrability questions to an arbitrator and then argue that the court below erred when it concluded that SERB abused its discretion by failing to find that there is probable cause that the City violated its obligation to the Union (and, by extension, to Staple as a third party beneficiary) to refer Staple's grievance to arbitration at least for the purpose of letting a neutral arbiter decide whether the City's reading of the collective bargaining agreement is correct respecting the timeliness of the Union's notice and the evidence to be adduced on that issue. Liability for SERB and the City thus is established under O.R.C. § 2323.51(A)(2)(a)(iii) (asserting allegations or other factual contentions having no evidentiary support) and O.R.C. § 2323.51(A)(2)(a)(iv) (making factual contentions not warranted by the evidence).

One other issue raised by SERB and the City in the court below and in this Court demonstrates that there was no limit to the frivolousness of their arguments in this original action. SERB and the City joined in calling the attention of the court below to the fact that Staple is not a "party" to the collective bargaining agreement and therefore had no "right" to expect or demand arbitration of his grievance or any "standing" to urge SERB to compel the City to submit to arbitration as the final step of the grievance adjustment process. But the evidence in the record establishes in unmistakable and uncontroverted terms that it was *the Union* (and **not** Staple or his private counsel) that filed the arbitration notice … precisely because the collective bargaining agreement mandated that *the Union* undertake to invoke the arbitration process, rendering Staple *incapable*

of filing an arbitration notice himself and leaving him *wholly dependent* on the Union's filing such notice in a timely fashion. **Record** at G19, p. 611 of 1020, ¶ 4; G55-G56, pp. 655-656 of 1020, ¶¶ 18-19; C23, p. 221 of 1020, ¶¶ 18-19. SERB and the City frivolously advanced this "standing" question in this original action even though the *Union* – not Staple – submitted the arbitration notice. Consequently, the issue here is whether Chapter 4117 allowed Staple the right to lodge an unfair labor practice charge even if he would be precluded from seeking to compel arbitration in an action under Chapter 2711 of the Ohio Revised Code because he lacked "standing" to do so unless the Union joined him in that action.

SERB and the City needlessly increased Staple's litigation cost by forcing him to address this frivolous argument. Liability for SERB and the City thus is established once again under O.R.C. § 2323.51(A)(2)(a)(iii) (asserting allegations or other factual contentions having no evidentiary support) and O.R.C. § 2323.51(A)(2)(a)(iv) (making factual contentions not warranted by the evidence).

B. The City's liability likewise is rooted in all four cited subparts of O.R.C. § 2323.51(A)(2)(a).

Staple respectfully submits that the frivolousness of the positions taken by the City in this original action is amply demonstrated in the foregoing elements of this brief in support of this motion. Those details therefore are hereby incorporated by reference as if fully rewritten in this section of this brief and, in particular, the details in the immediately preceding section demonstrating how the conduct of both SERB and the City in this case was frivolous.

Out of an abundance of caution, however, Staple calls the following additional details to this Court's attention.

Without any legal authority on point or any reasonable argument for the advancement of a theory showing that its position was rooted in sound principles of Ohio law by analogy or otherwise, the City frivolously urged this Court to conclude that SERB could not be held to have abused its abuse its discretion unless Staple could show that the City's misconduct was part of a *broader* array of Chapter 4117 violations and not but a "single" instance of wrongdoing. The authority on which the City relied involved a statute in which *multiple* violations of Chapter 4117 was a required element of the specific type of charge asserted in that case under O.R.C. § 4117.11(A)(6) (where a public employee alleges "a pattern or practice of repeated failures to timely process grievances and requests for arbitration of grievances by failing to follow the contractual procedure"). However, Staple proceeded under a different statute, O.R.C. § 4117.11(A)(1), that clearly provides that even *one* such violation involving but a *single* bargaining unit member and a *single* unfair labor practice could be enough to trigger SERB action to afford redress to the aggrieved bargaining unit member. The City made no attempt to distinguish or explain away the fact that SERB's prior decision does **not** stand for the proposition that relief of the sort sought by Staple in this case can be pursued only if the employer engages in a "pattern or practice of repeated failures" in processing requests for arbitration "by failing to follow the contractual procedure." No case holds for the proposition that relief under O.R.C. § 4117.11(A)(1) never can be granted unless the charging party can point to some case in the past where relief was ordered against the same employer under precisely the same conditions. In about as stark an admission that could be ascribed to an administrative agency regarding the interpretation of a statute it is charged with enforcing, not even SERB made the argument the City advanced in this regard and did not join the City in urging this Court to sustain the City's first proposition of law.

Also frivolously misplaced was the City's challenge in this Court to the interpretation of the court below of the holding in *Franklin County Sheriff's Department v. Fraternal Order of Police*, 78 Ohio App.3d 153, 604 N.E.2d 181 (1992). The court below correctly relied on this case for the proposition that even SERB itself has concluded that it is not proper for a public sector employer to refuse to process a grievance upon determining for itself that the grievance is not arbitrable. **Magistrate's Decision**, p. 12. The City never explained how the number of times an employer refuses to go to arbitration matters except in cases where a "pattern or practice" charge made under O.R.C. § 4117.11(A)(6) or why the court below erred in concluding that "'[a] party may always raise the issue of arbitrability before the arbitrator as well as [a] challenge to the arbitrator's jurisdiction to rule on substantive arbitrability'" and that "'it would be bad public policy to permit parties to frustrate established and accepted dispute resolution procedures by simply raising the defense of arbitrability'" because such a practice would not be "'[i]n the interest of processing grievances in quick and orderly fashion and in promoting harmonious relations.'" **Magistrate's Decision**, p. 12, *quoting In re SERB v. Franklin County Sheriff*, SERB Opinion No. 91-001, p. 3, note 2, and p. 4.[2] Thus, there was no reasonably conceivable basis for agreeing to the City's first proposition of law on the grounds that a "single" occurrence of a violation of the sort alleged by Staple cannot support an unfair labor practice charge leveled under O.R.C. § 4117.11(A)(1) and liability to Staple under the first four subparts of O.R.C. § 2323.51(A)(2)(a) is established.

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[2] This opinion is accessible online via *https://serb.ohio.gov/wps/wcm/connect/gov/6b2f5466-aa12-4018-94 1f-94efe95d1b6c/1991-OPN-00-0001.pdf?MOD=AJPER-ES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1H GGIK0N0JO00QO9DDDDM3000-6b2f5466-aa12-4018-941f-94efe95d- 1b6c-EdCQSi*.

All four subparts of O.R.C. § 2323.51(A)(2)(a) expose the City to liability to Staple for reimbursement of his attorney fees and expenses for this bit of frivolousness. After all, even to this day, the SERB record does **not** yet include *all* of the evidence about the date on which the City supposedly gave the Union and Staple actual written notice of its appointing authority's final decision on Staple's grievance and the collective bargaining agreement in any event leaves it up to an *arbitrator* to interpret the provisions of that agreement bearing on the timeliness of the Union's arbitration notice and then to apply those terms to the facts presented to him or her on that issue. The parties' agreement does **not** leave that decision up to SERB – or even this Court – to make in the first instance and the City never explained why well-established Ohio law or the collective bargaining agreement would require or permit any other result. Besides, and notwithstanding the frivolous "reasonable arbitrator" standard advocated by learned counsel for the City in the court below,[3] this Court could not have reasonably endorsed the City's proposition of law because there was no way this Court could have found that SERB had the authority under Chapter 4117 to usurp power exclusively reserved to an arbitrator under the dispute resolution provisions of a collective bargaining agreement between the City and the Union. The City thus engaged in sheer "frivolous conduct" in advancing its position.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Staple respectfully requests that this Court **GRANT** his motion against SERB and award him reimbursement of all attorney fees and expenses incurred and/or advanced on his behalf in the successful defense of his interests in the judgment of the court

[3] This position was taken by the City in offering support for the its third objection to the magistrate's decision in the court below (at Pages 16 through 18 of the objections lodged on June 24, 2023).

below and his successful prosecution of this motion under O.R.C. § 2335.39 and/or for having engaged in "frivolous conduct" in its prosecution of this appeal within the meaning of Ohio's Frivolous Conduct Statute.

For the foregoing reasons, Staple furthermore respectfully requests that this Court **GRANT** his motion against the City and award him reimbursement of all attorney fees and expenses incurred and/or advanced on his behalf in the successful defense of his interests in the judgment of the court below and his successful prosecution of this motion seeking redress for the City's "frivolous conduct" in its prosecution of this appeal within the meaning of Ohio's Frivolous Conduct Statute.

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2025, a copy of the foregoing was served on counsel for respondents-appellants in accordance with Rule 3.11(C)(1) of the Rules of Practice of the Supreme Court of Ohio [*method(s) of service checked*] □ by ordinary U. S. Mail, first-class postage prepaid, addressed to Ms. Lori J. Friedman, Principal Assistant Attorney General, Counsel for Respondent-Appellant State Employment Relations Board, Office of the Ohio Attorney General, Executive Agencies Section – Labor Relations Unit, 615 West Superior Avenue, 11th Floor, Cleveland, Ohio 44113-1899 (**Facsimile Telephone No. 866-478-7363**), Scott H. DeHart, Esq., Counsel for Respondent-Appellant City of Ravenna, Zashin & Rich Co., L.P.A., 17 South High Street, Suite 900, Columbus, Ohio 43215 (**Facsimile Telephone No. 614-224-4433**), and Michael W. Piotrowski, Esq., General Counsel for Respondent-Appellant Fraternal Order of Police Ohio Labor Council, Inc., 2721 Manchester Road, Akron, Ohio 44319 (**Facsimile Telephone No. 330-753-8955**), ■ by electronic transmission(s) via one of more *e*-mail messages addressed to counsel for respondents-appellants at *Lori.Friedman@ohioAGO.gov*, *shd@zrlaw.com*, and *mpiotrowski-@fopohio.org*, □ by facsimile transmission to the facsimile telephone number(s) referenced above, and/or □ by delivery in hand to the offices of counsel at the addresses referenced above.

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Appendix 1

Affidavit of Christopher R. Staple
November 11, 2025

Appendix 2

Affidavit of S. David Worhatch, Esq.
November 12, 2025