

[Cite as *State ex rel. Kingsley v. State Emp. Relations Bd.*, 2011-Ohio-428.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Kay A. Kingsley, :
Relator, : No. 09AP-1085
v. : (REGULAR CALENDAR)
State Employment Relations Board, :
Respondent. :

D E C I S I O N

Rendered on February 1, 2011

Kingsley Law Office, and James R. Kingsley, for relator.

*Michael DeWine, Attorney General, Michael C. McPhillips,
and Reid T. Caryer, for respondent.*

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Kay A. Kingsley ("relator"), commenced this original action in mandamus seeking a declaration that Am.Sub.H.B. 1, 128th General Assembly ("H.B. 1"), is unconstitutional and an order that respondent, the State Employment Relations Board ("SERB"), recognize relator as a classified employee and reinstate her to her

former position as an administrative law judge. SERB has filed a motion to dismiss relator's action, pursuant to Civ.R. 12(B)(1), (B)(6), and App.R. 6.

{¶2} SERB employed relator as an administrative law judge from January 1999 to October 2009. Effective July 17, 2009, the General Assembly enacted H.B. 1, Ohio's biennial budget bill, which, in part, revised portions of R.C. Chapter 4117, including a revision to R.C. 4117.02(H) that changed relator's position from the classified service to the unclassified service. On October 26, 2009, SERB notified relator that her employment as an unclassified administrative law judge was being terminated, effective October 30, 2009. On November 20, 2009, relator filed this mandamus action, asserting that H.B. 1 is unconstitutional, both on its face and as applied to her, and requested an order that SERB recognize her as a classified employee and reinstate her to her former position.¹ Relator claims that H.B. 1 is facially unconstitutional because it violated Ohio's one-subject rule, Section 15(D), Article II, Ohio Constitution, and that SERB unconstitutionally applied amended R.C. 4117.02(H) to her retroactively.

{¶3} The Ohio Constitution confers upon the Supreme Court of Ohio and the Ohio courts of appeals concurrent, original jurisdiction over writs of mandamus--written orders, in the name of the state, that command a public officer or agency to perform an official act. Sections 2 and 3, Article IV, Ohio Constitution; R.C. 2731.01. To be entitled to a writ of mandamus, a relator must demonstrate the following: (1) the relator has a clear legal right to the requested relief; (2) the respondent is under a clear legal duty to

¹ Relator also filed an appeal from her removal with the State Personnel Board of Review ("SPBR"), but SPBR dismissed relator's appeal for lack of jurisdiction because relator was removed from an unclassified position.

perform the requested act; and (3) the relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Natl. City Bank v. Bd. of Edn.* (1977), 52 Ohio St.2d 81, 84. In its motion to dismiss, SERB focuses on the third requirement and argues that relator could find adequate relief in the court of common pleas by filing an action for a declaratory judgment that H.B. 1 is unconstitutional and/or through the administrative appeal process, by appealing her removal to SPBR and, if necessary, from SPBR to the court of common pleas.

{¶4} Pursuant to Civ.R. 53(D) and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate agreed with SERB's arguments and concluded that the true objective of relator's action is a declaratory judgment, over which this court lacks jurisdiction, and that relator could obtain adequate relief in the court of common pleas through an action for a declaratory judgment. Therefore, the magistrate recommended that the court grant SERB's motion to dismiss.

{¶5} Relator has filed timely objections to the magistrate's conclusions of law. First, relator asserts that the magistrate erroneously concluded that the objective of her action is a declaratory judgment and that she could obtain adequate relief in the court of common pleas. In her second objection, relator contends that the magistrate failed to consider binding precedent that a facial constitutional challenge may be initially raised in the court of appeals.

{¶6} In opposition to SERB's motion to dismiss and in support of her contention that a writ of mandamus is the appropriate form of relief here, relator relies on *State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363 ("OCSEA"). In that case, the OCSEA, the exclusive bargaining representative for certain collective-bargaining units in Ohio, sought to include within those units the employees of the Ohio School Facilities Commission ("OSFC"), and filed petitions with SERB for amendment of certification and clarification of a bargaining unit. While OCSEA's petitions were pending before SERB, the General Assembly enacted Am.Sub.H.B. 405 ("H.B. 405"), a budget corrections bill that amended R.C. 3318.31(B) to exempt OSFC employees from R.C. Chapter 4117, and to exclude OSFC employees from the statutory definition of public employees. SERB dismissed OCSEA's petitions based on the statutory amendment, and OCSEA filed an action for a writ of mandamus in this court. OCSEA argued that the amendment to R.C. 3318.31(B), upon which SERB relied, was unconstitutional because it violated the one-subject rule. Although a magistrate of this court concluded that this court lacked jurisdiction because the real object of OCSEA's action was a declaration that H.B. 405 was unconstitutional, we rejected the magistrate's conclusions of law. Instead, we "determined that an action for declaratory judgment would not provide OCSEA with a plain and adequate remedy at law [and] that OCSEA's petition for a writ of mandamus was the appropriate vehicle by which to challenge SERB's dismissal order." OCSEA at ¶6. The Supreme Court affirmed.

{¶7} "It is well settled that 'if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus.' " Id. at ¶11, quoting *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 634, 1999-Ohio-130. The Supreme Court of Ohio and the Ohio courts of appeals lack original jurisdiction over actions that, although styled in mandamus, actually seek a declaration of rights, status or other legal relations. OCSEA at ¶11. Nevertheless, " 'where declaratory judgment would not be a complete remedy unless coupled with ancillary relief in the nature of mandatory injunction, the availability of declaratory injunction is not an appropriate basis to deny a writ to which the relator is otherwise entitled.' " *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd.* (1986), 22 Ohio St.3d 1, 8, quoting *State ex rel. Fenske v. McGovern* (1984), 11 Ohio St.3d 129, paragraph two of the syllabus. A declaratory judgment that merely announces the existence of a duty has generally not been deemed as adequate as a writ of mandamus that compels performance. OCSEA at ¶16, citing 1 Antieau, *The Practice of Extraordinary Remedies* (1987) 300, Section 2.06.

{¶8} The crux of the parties' initial disagreement in OCSEA was the third requirement for mandamus relief, whether the relators lacked a plain and adequate remedy in the ordinary course of law. SERB argued that OCSEA had a plain and adequate remedy in an action for declaratory judgment.² The Supreme Court, however,

² SERB also argued that OCSEA had an adequate remedy in an administrative appeal from SERB's dismissal of the petitions, but the Supreme Court did not address that argument because it determined that SERB had waived it by not raising it before this court.

determined that a declaration of H.B. 405's unconstitutionality would not provide OCSEA with a complete remedy. Specifically, "[b]ecause SERB had dismissed [OCSEA's] petitions, it would be under no obligation to reinstate the petitions if a trial court held that [H.B. 405] was unconstitutional; only a declaratory judgment coupled with a mandatory injunction ordering the reinstatement of the six petitions would provide complete relief." OCSEA at ¶17. Thus, the Supreme Court rejected SERB's argument that OCSEA had a plain and adequate remedy in the ordinary course of law through an action for a declaratory judgment. The court stated, at ¶20, "we have jurisdiction to entertain this cause because the relators seek an order mandating SERB, a public agency, to comply with the affirmative statutory duties required of it[.]"

{¶9} Since OCSEA, the Supreme Court of Ohio has decided *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327 ("*UAW*"). There, the court affirmed the dismissal of a mandamus action because the relator's true objectives were a declaratory judgment and prohibitory injunction and because the relator had an adequate remedy at law via a declaratory judgment action. *UAW* involved the constitutionality of amendments to R.C. 4123.93 and 4123.931, manifestly intended to comply with the Supreme Court's holding in *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 135, 2001-Ohio-109, that the former version of R.C. 4123.931 was unconstitutional.³ Five days after the amendments took effect, the relator, a labor union (the "union"), filed a

³ R.C. 4123.93 and 4123.931 created statutory subrogation in favor of identified subrogees that pay workers' compensation benefits.

complaint in this court against the Ohio Bureau of Workers' Compensation and its administrator (collectively, "BWC"), alleging that the amended statutes were unconstitutional for the same reasons as former R.C. 4123.931 and requesting a writ of mandamus compelling BWC to follow the law set forth in *Holeton* and *Glaspell v. Ohio Edison Co.* (1987), 29 Ohio St.3d 44. The union did not allege that it or any of its members had been harmed by the enactment or application of the amended statute.

{¶10} This court dismissed the union's action in *UAW* upon determining that the union's real objects were a declaratory judgment and prohibitory injunction and that the union had an adequate remedy in the ordinary course of law, through a declaratory judgment action. The Supreme Court agreed with our determination of the true nature of the union's complaint, stating, at ¶42, as follows:

Although the allegations of UAW's complaint are couched in terms of compelling affirmative duties, i.e., to "follow the law" in *Holeton* and *Glaspell*, the manifest objectives of relator's complaint are (1) a declaratory judgment that R.C. 4123.93 and 4123.931, as amended by S.B. 227, are unconstitutional under this court's holdings in *Holeton* and *Glaspell* and (2) a prohibitory injunction preventing the BWC from applying the amended statutory provisions.

The court also stated, at ¶57, as follows:

* * *if a common pleas court should find S.B. 227 unconstitutional and issue a prohibitory injunction preventing BWC from applying S.B. 227, there would be no need for a mandatory injunction that BWC not apply the predecessor statute, because it was found unconstitutional in *Holeton*.

Accordingly, the Supreme Court held that an action for declaratory relief and a prohibitory injunction would constitute an adequate legal remedy.

{¶11} Despite the general rule that it lacks jurisdiction to consider mandamus actions challenging the constitutionality of new legislation because they constitute disguised actions for declaratory judgment and prohibitory injunction, the Supreme Court acknowledged in *UAW*, at ¶44, that it has recognized limited circumstances in which a mandamus action may test a statute's constitutionality. See, e.g., *State ex rel. Watson v. Hamilton Cty. Bd. of Elections*, 88 Ohio St.3d 239, 242, 2000-Ohio-318 (considering a constitutional claim in mandamus where an action for a declaratory judgment and prohibitory injunction would not have been sufficiently speedy in an expedited election case); *State ex rel. Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 504, 1999-Ohio-123 (considering a constitutional challenge to the tort-reform act in mandamus, but noting that the Court would "entertain a public action only 'in the rare and extraordinary case' where the challenged statute operates, 'directly and broadly, to divest the courts of judicial power.' (Emphasis added.) We will not entertain a public action to review the constitutionality of a legislative enactment unless it is of a magnitude and scope comparable to that of [the tort-reform act].").

{¶12} In *UAW*, the Supreme Court distinguished both *OCSEA* and *Sheward*. The Court noted that, unlike the relator in *OCSEA*, the union in *UAW* did not allege any specific case in which BWC failed to comply with its alleged legal duty. The general rule precludes a mandamus action that presents "only a general and abstract question concerning the constitutionality of a legislative act instead of a claim that a 'specific public entity had failed to perform its clear legal duty[.]'" *UAW* at ¶51, quoting *OCSEA* at ¶19. In distinguishing *Sheward*, the Court stated that *UAW* was not a rare and

extraordinary case where the challenged legislation operated directly and broadly to divest courts of judicial power. Thus, the Supreme Court concluded that neither it nor the court of appeals had jurisdiction over the relator's claims, the real objects of which were a declaratory judgment and prohibitory injunction. The Supreme Court also held that a declaratory judgment action would offer the union an adequate remedy and that mandamus was, therefore, inappropriate.

{¶13} This case is more akin to *OCSEA* than *UAW*. Relator's complaint does not present only a general and abstract question concerning the constitutionality of H.B. 1. To the contrary, similar to *OCSEA*'s claim that SERB failed to comply with a legal duty by dismissing its petitions, relator here contends that SERB failed to comply with legal duties applicable to the removal of classified employees when it terminated her employment. In both instances, SERB's duty turned on the status of its employees' positions, which in turn depended on the constitutionality of a statutory amendment. Moreover, like in *OCSEA*, relator argues that she could not obtain complete relief in an action for a declaratory judgment. A declaration that H.B. 1 is unconstitutional, and an injunction prohibiting its continued application, absent a mandatory injunction, would not provide relator complete relief because it would not require the reinstatement of relator's employment. Accordingly, the availability of a declaratory judgment action does not provide a basis for precluding relator's mandamus action. For these reasons, we sustain relator's first objection.

{¶14} Although we agree with relator that an action for a declaratory judgment and prohibitory injunction in the court of common pleas would not offer her adequate

relief so as to foreclose a mandamus action, we must also consider, unlike the Supreme Court in *OCSEA*, whether the availability of an administrative appeal constitutes an adequate legal remedy that would preclude this mandamus action. Here, SERB raised the availability of the administrative appeal process as an adequate remedy at law in its motion to dismiss relator's action, although the magistrate did not discuss that potential remedy in her decision.

{¶15} Relator did file an appeal with SPBR from her removal, but SPBR dismissed the appeal upon SERB's motion to dismiss. According to SPBR's opinion, relator argued that H.B. 1 was unconstitutional because it violated Ohio's one-subject rule. SPBR, however, concluded that it possessed neither the authority to consider an appeal from the removal of an unclassified employee nor the jurisdiction to determine the constitutionality of H.B. 1.⁴ SPBR stated that it was required to presume the constitutionality of the statutory amendment placing relator's position in the unclassified service and, accordingly, dismissed relator's appeal for lack of subject-matter jurisdiction.

{¶16} Relator concedes that she was entitled to appeal SPBR's dismissal to the court of common pleas pursuant to R.C. 119.12. Nevertheless, she argues that, even if her right to appeal her removal to SPBR were an adequate remedy, which she contests, her right to appeal *from* SPBR to the common pleas court "is not only not adequate but also not part of the concept." This court has previously rejected relator's argument. In *State ex rel. Rennell v. Indus. Comm.*, 10th Dist. No. 07AP-67, 2007-Ohio-4597, the

⁴ The parties concede that SPBR lacks jurisdiction to declare a statute unconstitutional.

relator argued that an administrative appeal from SPBR's dismissal of his appeal for lack of jurisdiction was not an adequate remedy where SPBR lacked authority to hear his claim. We held that the relator's contention regarding SPBR's authority was irrelevant because "[t]he relevant issue is whether an adequate remedy at law existed because [the relator] could have appealed the SPBR's [dismissal] to the court of common pleas." *Id.* at ¶4. We concluded that, because "R.C. 119.12 permitted relator to appeal the SPBR's order to the common pleas court[,] an adequate remedy existed." *Id.* Clearly then, the availability of a R.C. 119.12 appeal from SPBR's dismissal order is relevant to the existence of an adequate remedy at law.

{¶17} Relator also argues that the common pleas court would have lacked authority to hear her constitutional challenge and to declare H.B. 1 unconstitutional in a R.C. 119.12 appeal. Rather, relator states, "[t]he only issue on appeal [would have been] whether or not [S]PBR did have jurisdiction to hear the as applied [retroactivity] challenge, conceding that it can not hear the facial [one-subject] challenge." We disagree. SPBR determined that it lacked jurisdiction to hear relator's appeal because relator was not a classified employee, based on SERB's mandatory presumption that the statute removing her position from the classified service was valid. The question before the common pleas court in an administrative appeal would have been whether SPBR had jurisdiction to consider relator's appeal from her removal, not whether SPBR had jurisdiction to decide constitutional questions.

{¶18} The Supreme Court of Ohio has held that an appellant may raise a facial constitutional challenge in an administrative appeal even where the appellant did not

raise that challenge before the commission or agency. See *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 195-96, 2006-Ohio-2181; see also *Derakhshan v. State Med. Bd. of Ohio*, 10th Dist. No. 07AP-261, 2007-Ohio-5802 (permitting an appellant to raise a facial constitutional challenge to the statute upon which the medical board relied to revoke his medical license on appeal); *Leon v. Ohio Bd. of Psychology*, 63 Ohio St.3d 683, 1992-Ohio-105 (considering argument that the regulation upon which the board relied to revoke the appellant's psychology license was unconstitutionally vague). A court may also consider an as-applied constitutional challenge in an administrative appeal. In contrast to a facial challenge, however, when a litigant challenges the constitutionality of a statute as applied to a specific set of facts, extrinsic facts are needed, and the litigant must raise the as-applied challenge, in the first instance, before the administrative agency to allow the parties to develop an evidentiary record. *Reading* at ¶15-16.

{¶19} On administrative appeal from SPBR, the common pleas court could have determined the constitutionality of H.B. 1 and, should the court have determined that H.B. 1 was unconstitutional, determined that relator remained a classified employee at the time of her removal. See *Barr v. Harrison Cty. Common Pleas Court*, 10th Dist. No. 05AP-760, 2006-Ohio-1348 (common pleas court and court of appeals considered and determined appellant's employment status on appeal from SPBR dismissal for lack of jurisdiction based on appellant's unclassified status). While relator points out that no factual record was created before SPBR, it is not clear from the record before this court whether relator actually raised her as-applied challenge to H.B. 1 in her SPBR appeal,

so as to preserve that argument. Nevertheless, assuming relator did preserve that argument, if the trial court had concluded that H.B. 1 was not facially unconstitutional and that extrinsic facts were necessary to determine whether application of amended R.C. 4117.02(H) to relator was an unconstitutional, retroactive application, the court could have returned the matter to SPBR for creation of a factual record. Regardless, contrary to relator's argument, the common pleas court would not have been precluded from considering and determining the constitutionality of H.B. 1 in its review of SPBR's dismissal.

{¶20} Relator next contends that an administrative appeal would not provide an adequate remedy because the common pleas court lacks the authority to order her reinstatement, but, instead, would have been constrained to ordering SPBR to accept jurisdiction over her appeal. While relator is correct that the common pleas court could not order her reinstatement, that fact does not render the remedy offered by the administrative appeal process inadequate. Of particular relevance in this regard is *State ex rel. Weiss v. Indus. Comm.*, 65 Ohio St.3d 470, 1992-Ohio-71. In *Weiss*, the Supreme Court denied an action for a writ of mandamus to compel reinstatement and payment of back wages where the relator was terminated after her position was removed from the classified service. In one of several separate SPBR appeals, the relator contested the removal of her position from the classified service. The Court noted the relator's concession that SPBR lacked jurisdiction over her appeal because the board did not have authority to issue a declaratory judgment determining the classified or unclassified status of an employee's position, but stated that the relator's

decision to forgo the completion of the administrative appellate process "does not make [that] process unavailable or inadequate." *Id.* at 474. As here, the common pleas court would have lacked authority in an administrative appeal to order the relator's reinstatement, which she sought in her mandamus action. Nevertheless, the Supreme Court held that the administrative appeal process was an adequate remedy, precluding mandamus. The Supreme Court went on to state, "before a writ of mandamus will issue to compel a classified employee's reinstatement or back pay, there must first be a final determination made in an appeal *from* SPBR * * * that the employee was 'wrongfully excluded from employment.' * * * Until this determination is made, a 'wrongful exclu[sion]' has not occurred, and mandamus does not lie." *Id.* at 476-77. (Emphasis added.)

{¶21} Had the common pleas court determined that H.B. 1 was unconstitutional, SPBR would have had jurisdiction on remand to consider whether relator was properly removed from her classified position and, if not, to order her reinstatement. Until that determination is made, a wrongful exclusion has not occurred, and mandamus is inappropriate. See *Weiss* at 477. For these reasons, we conclude that the administrative appeal process provided relator an adequate remedy at law.

{¶22} In her second objection to the magistrate's decision, relator states that the magistrate failed to consider binding precedent holding that a facial constitutional challenge may be initially raised in the court of appeals. Relator cites cases holding that a facial constitutional challenge to a statute may be raised on administrative appeal even if not raised at the agency level. See *Reading; Cleveland Gear Co. v. Limbach*

(1988), 35 Ohio St.3d 229. Those cases, however, do not address the availability of a writ of mandamus. Here, unlike in the cited cases, relator seeks to bypass the administrative appeal process and initially raise a constitutional challenge in a mandamus action. Both the magistrate and this court have concluded that relator's mandamus action fails because she had an adequate remedy in the ordinary course of law. In this regard, we discern no error in the magistrate's decision, and we overrule relator's second objection.

{¶23} For these reasons, although our reasoning differs from that of the magistrate, we conclude that relator is not entitled to a writ of mandamus, and we grant SERB's motion to dismiss.

*Objections sustained in part and overruled in part;
motion to dismiss granted and cause dismissed.*

BRYANT, P.J., and TYACK, J., concur.

A P P E N D I X
 IN THE COURT OF APPEALS OF OHIO
 TENTH APPELLATE DISTRICT

State ex rel. Kay A. Kingsley,	:	
Relator,	:	
v.	:	No. 09AP-1085
State Employment Relations Board,	:	(REGULAR CALENDAR)
Respondent.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on February 24, 2010

James R. Kingsley, and Nickolas D. Owen, for relator.

Richard Cordray, Attorney General, Michael C. McPhillips, and Reid T. Caryer, for respondent.

**IN MANDAMUS
 ON MOTION TO DISMISS**

{¶24} Relator, Kay A. Kingsley, has filed this original action requesting that this court issue a writ of mandamus finding that H.B. No. 1, 128th General Assembly is unconstitutional, ordering respondent, State Employment Relations Board ("SERB"), to

recognize relator as a classified employee, to reinstate relator to her former position of employment, and to award her the cost of her action and attorney fees. SERB has filed a motion to dismiss on grounds that relator's action is actually for declaratory judgment and not mandamus.

Findings of Fact:

{¶25} 1. SERB employed relator as an administrative law judge beginning January 1999.

{¶26} 2. At that time, relator was considered a classified employee.

{¶27} 3. Effective July 17, 2009, the 128th General Assembly passed Am.Sub.H.B. No. 1 ("H.B. No. 1"), Ohio's bi-annual budget bill. Among the changes implemented were revisions to R.C. Chapter 4117. As part of the revisions, several positions, including relator's, were changed from classified service to unclassified service.

{¶28} 4. On October 26, 2009, SERB notified relator that her employment as an unclassified administrative law judge was being terminated, effective October 30, 2009.

{¶29} 5. Relator contends she was terminated because certain board members disagreed with her ruling in a particular case. SERB asserts that her termination was a result of budgetary cuts made by SERB.

{¶30} 6. On November 20, 2009, relator filed the instant mandamus action asserting that H.B. No. 1 is unconstitutional and asking this court to order SERB to reinstate her to her former position and make her a classified employee.

{¶31} 7. On December 22, 2009, SERB filed a motion to dismiss.

{¶32} 8. On January 21, 2010, relator filed a motion opposing SERB's motion to dismiss.

{¶33} 9. The matter is currently before the magistrate on SERB's motion to dismiss.

Conclusions of Law:

{¶34} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545. In reviewing the complaint, the court must take all the material allegations as admitted and construe all reasonable inferences in favor of the nonmoving party. *Id.*

{¶35} For the reasons that follow, it is this magistrate's decision that this court should grant SERB's motion and dismiss relator's action.

{¶36} As above stated, relator is asking this court to declare H.B. No. 1 unconstitutional. If the statute is found to be unconstitutional, relator contends that she would again be a classified employee and her dismissal by SERB would be improper. Relator also asks this court to order SERB to reinstate her to her position and again designate her as a classified employee.

{¶37} In her memorandum in opposition to SERB's motion to dismiss, relator states that her complaint pleads the following three causes of action:

1. Amended RC §4117.02(H) is facially unconstitutional.
2. Amended RC §4117.02(H) is unconstitutional as applied to Relator's termination.

3. Amended RC §4117.02(H) violates RC §1.48 if it is applied retroactively to allow the chairman, and not the Board, to discharge her.

{¶38} Relator does not deny that she seeks declaratory relief in this court. Instead, relator contends that this is the only court wherein the statute can be found unconstitutional and SERB can be required to reinstate her to her position as a classified employee.

{¶39} As part of its argument, SERB contends that relator has an adequate remedy at law. Specifically, SERB argues that relator could file a declaratory judgment action and, if successful, SERB would have no choice but to consider her a classified employee. As a classified employee, relator would have certain rights which SERB would be required to provide her before terminating her from employment. Applying that reasoning, SERB argues that relator does have a plain and adequate remedy in the ordinary course of the law.

{¶40} This magistrate agrees with SERB's argument. Prior to the amendment to R.C. 4117.02, relator was a classified employee and, as such, had certain employment rights that an unclassified employee does not enjoy. In the event that the common pleas court found H.B. No. 1 unconstitutional, the amendments to R.C. 4117.02 could not be applied to her. Relator's termination would no longer be valid and SERB would be required to apply the former law to her. As such, the magistrate disagrees with relator's assertion that this court is the only court which can return her to her former position of employment. Instead, if the statute is found to be unconstitutional, her

termination was improper and she would be returned to her former position of employment as a natural result of the court's decision.

{¶41} In general, when the allegations of a complaint for a writ of mandamus indicate that the real objective of a special writ action is declaratory, then the complaint does not state a cause of action and must be dismissed for want of jurisdiction. *State ex rel. McGrath v. Ohio Adult Parole Auth.*, 100 Ohio St.3d 72, 2003-Ohio-5062. The court of appeals does not have original jurisdiction over declaratory judgment actions. *Id. State ex rel. Ministerial Day Care Assn. v. Zelman*, 100 Ohio St.3d 347, 2003-Ohio-6447.

{¶42} Because the magistrate finds that the true objective of relator's action is declaratory judgment and because relator can find adequate relief in the common pleas court, it is this magistrate's decision that this court should grant SERB's motion and relator's action should be dismissed.

s/s Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).