

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Municipal Construction Equipment Operators' Labor Council,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-195
	:	
Ohio State Employment Relations Board,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	
	:	

D E C I S I O N

Rendered on September 6, 2011

*Climaco, Wilcox, Peca, Tarantino & Garofoli Co., L.P.A., and
Stewart D. Roll, for relator.*

*Michael DeWine, Attorney General, and Aaron W. Johnston,
for respondent.*

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶1} Relator, Municipal Construction Equipment Operators' Labor Council ("relator"), is the exclusive bargaining representative for employees in two bargaining units of the city of Cleveland ("Cleveland"). Relator represents a group of construction equipment operators ("equipment operators unit") and a group of water plant operators, stationary engineers, and boiler operators in the Water Division and Property

Management Division ("water plant operators unit"). On July 17, 2009, the water plant operators unit went on strike and began to picket. The strike ended on July 29, 2009.

{¶2} On July 27, 2009, relator filed an unfair labor practice charge ("ULP charge") with respondent, Ohio State Employment Relations Board ("SERB"). In the ULP charge, relator asserted that Cleveland committed unfair labor practices in violation of R.C. 4117.11(A)(1) by: (1) sending a letter to relator's president asserting that the strike was illegal, (2) using non-bargaining unit employees to perform the work of bargaining unit employees, and (3) advising other unions that honored the water plant operators unit's picket line that their action was detrimental to public health and safety. Relator also asserted that Cleveland violated R.C. 4117.11(A)(7) by locking out non-bargaining unit employees who honored the water plant operators unit's picket line.

{¶3} SERB responded to the filing of the ULP charge by sending letters to relator and Cleveland requesting certain information related to the charge and requesting that each party submit all documentation and any witness statements supporting its position. On August 19, 2009, relator responded to SERB's information request with an explanatory letter that included supporting documentation and witness statements. Subsequently, on August 27, 2009, relator submitted a supplement to this letter containing an additional witness statement. Cleveland also submitted a letter on August 21, 2009, stating its position on the ULP charge, including supporting documentation and witness statements.

{¶4} On October 15, 2009, SERB dismissed the ULP charge for lack of probable cause to believe that Cleveland committed an unfair labor practice and lack of standing regarding relator's claim about Cleveland's actions toward other unions. On March 2,

2010, relator filed an original action in this court seeking a writ of mandamus. Pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals, the matter was referred to a magistrate of this court. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In his decision, the magistrate recommended that this court deny relator's request for a writ of mandamus.

{¶5} Relator timely filed objections to the magistrate's decision. SERB filed a memorandum in opposition to relator's objections. Under Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matters "to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law."

{¶6} Relator raises the following three objections:¹

1. The magistrate's decision must be overruled because his interpretation of the Ohio State Employment Relations Board's ("SERB") statutory duty to investigate: (1) failed to follow applicable rules of statutory interpretation, (2) ignored common usage definitions of that term, and (3) failed to follow the standard for administrative agency investigations established by *The Pennsylvania Rd. Co. v. Porterfield, supra*.
2. The magistrate's decision must be overruled because he failed to include in his findings of fact that the entirety of SERB's response to its duty to investigate was to submit written requests to the parties for information about Relator's unfair labor practice charge.
3. The magistrate's decision must be overruled because Relator presented evidence that was not reasonably rebutted by Cleveland or SERB which evinced probable cause that Cleveland committed unfair labor practices contrary to R.C. § 4117.11.

¹ In the summary of its objections, relator raises a fourth objection, claiming that the magistrate's decision should be rejected because he failed to mandate that SERB issue an unfair labor practice complaint against Cleveland. However, upon review of relator's brief we note that relator failed to separately argue this "objection" and that it is in effect simply an assertion that the magistrate's decision should be rejected because he failed to order the writ that relator seeks. Accordingly, we limit our analysis to the three objections separately argued in relator's brief. See App.R. 12(A)(2).

{¶7} SERB's decision on whether to issue a complaint in an unfair labor practice case is not reviewable on direct appeal. *State ex rel. Tritt v. State Emp. Relations Bd.*, 97 Ohio St.3d 280, 2002-Ohio-6437, ¶6. However, a writ of mandamus is available to remedy an abuse of discretion by SERB in dismissing a ULP charge. *Id.* A relator seeking a writ of mandamus must establish: " '(1) a clear legal right to the relief prayed for, (2) a clear legal duty upon respondent to perform the act requested, and (3) that relator has no plain and adequate remedy in the ordinary course of the law.' " *Kinsey v. Bd. of Trustees of the Police & Firemen's Disability & Pension Fund of Ohio* (1990), 49 Ohio St.3d 224, 225, quoting *State ex rel. Consol. Rail Corp. v. Gorman* (1982), 70 Ohio St.2d 274, 275.

{¶8} In its first objection, relator asserts that the magistrate's decision should be overruled because the magistrate did not properly interpret SERB's statutory duty to investigate ULP charges. Relator further argues that SERB failed to fulfill its statutory duty to investigate the charges relator filed. Specifically, relator asserts that SERB failed to investigate a letter that Cleveland sent to relator's president or a facsimile Cleveland sent to another union and that SERB failed to interview the witnesses relator identified.

{¶9} R.C. 4117.12(B) provides that "[w]hen anyone files a charge with [SERB] alleging that an unfair labor practice has been committed, the board or its designated agent shall investigate the charge. If [SERB] has probable cause for believing that a violation has occurred, the board shall issue a complaint and shall conduct a hearing concerning the charge." This statute does not define the required scope of a probable cause investigation.

{¶10} The Supreme Court of Ohio has recognized that "[i]t was clearly the

intention of the General Assembly to vest SERB with broad authority to administer and enforce R.C. Chapter 4117. This authority must necessarily include the power to interpret the Act to achieve its purposes." *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260 (internal citations omitted). SERB has established a rule providing that "[i]nvestigation of [ULP] charges shall be limited to the facts and issues raised in the charge and any facts or issues reasonably related to the charge." Ohio Adm.Code 4117-7-02(A). SERB's rules also provide that, upon a written request from an investigator, a party is required to submit information within the time deadline established by the investigator. Ohio Adm.Code 4117-7-02(D). This rule does not mandate that investigators use any specific method to obtain relevant information, but it clearly contemplates investigators using written requests for information to the parties. In this case, the SERB investigator submitted written requests for information to relator and to Cleveland. Both relator and Cleveland submitted responses to the investigator's written questions and supporting documentation.

{¶11} In *State ex rel. Hall v. State Emp. Relations Bd.*, 122 Ohio St.3d 528, 2009-Ohio-3603, the Supreme Court of Ohio considered an appeal of a writ of mandamus claim filed following SERB's dismissal of an employee's ULP charge against her former union. In tracing the history of the case, the court indicated that SERB used the same investigatory process used in the present case. "The labor-relations specialist requested that [the claimant] provide all documentation supporting her position, and the specialist requested that the union provide any witness statements supporting its position." *Id.* at ¶13. Following this investigation, SERB dismissed the charge for lack of probable cause. *Id.* In support of her mandamus claim, the employee submitted affidavits that had not

been submitted to SERB during its investigation of the ULP charge. *Id.* at ¶14. The Supreme Court ultimately held that the court of appeals erred in relying on these affidavits in granting the writ of mandamus because SERB could not abuse its discretion by failing to consider evidence that was not before it when it made its decision. *Id.* at ¶37. Further, the court noted that the SERB labor relations specialist instructed the claimant to provide all documentation supporting her charge, thereby implicitly approving this investigatory technique. *Id.* at ¶38.

{¶12} In *Hocking Technical College v. State Emp. Relations Bd.* (1990), 70 Ohio App.3d 18, we considered the scope of a SERB investigation of certain challenged votes in a representation election proceeding under R.C. 4117.07. Although SERB's role in a representation election proceeding differs from its function in investigating a ULP charge under R.C. 4117.12, we find the *Hocking Technical* decision to be instructive to our deliberations here. See *Springfield City School Support Personnel v. State Emp. Relations Bd.* (1992), 84 Ohio App.3d 294, 299-300 (explaining distinctions between SERB's functions in election proceedings and unfair labor practice proceedings).

{¶13} In the *Hocking Technical* case, an election was held to determine whether a majority of the professional employees at Hocking Technical College ("the College") wanted the Hocking Technical College Education Association ("the Association") to represent them in collective bargaining. *Hocking Technical* at 20. Twenty-five of the ballots cast in the election were challenged and, because the number of challenged ballots could affect the outcome of the election, the parties submitted affidavits and evidence to SERB supporting their challenges. *Id.* at 21. The College also sought to submit a supplemental affidavit, but SERB ultimately determined that the motion to file a

supplemental affidavit was moot. *Id.* at 21-22. We concluded that SERB erred by not considering the supplemental affidavit because it did not conduct a proper investigation pursuant to its own rules. *Id.* at 23. "Any investigation, once undertaken, must include consideration of all the available evidence." *Id.* We found that SERB's investigation was not proper because it "precluded the parties * * * from submitting all the credible evidence which could have aided SERB in its determination." *Id.*

{¶14} In this case, there is no indication that SERB prevented the parties from submitting any credible relevant evidence. Furthermore, SERB asked the parties to provide "all" documentation and "any" witness statements supporting their positions. Each of the parties submitted a detailed explanation of its position, along with supporting documentation. Relator even filed a supplemental document, which SERB accepted. Thus, SERB's investigation in this case comports with the general model advocated in the *Hocking Technical* decision.

{¶15} Relator cites to *Pennsylvania R.R. Co. v. Porterfield* (1971), 25 Ohio St.2d 223, which held that the administrative agency in that case was not limited to the record before it but was "required to obtain all information, either from the parties or through independent investigation, necessary to discharge the duty imposed upon it by law." *Id.* at syllabus. Relator argues that SERB failed to obtain all necessary information. However, as the magistrate's decision notes, the *Porterfield* decision is distinguishable from the circumstances here. That case involved a property valuation contest in which the Supreme Court of Ohio had previously set aside the Board of Tax Appeals' prior decision and denied its request for additional instructions. *Id.* at 224. The Board of Tax Appeals remanded the matter to the Tax Commissioner, but the Supreme Court reversed

that ruling and remanded the case back to the Board of Tax Appeals to make its own determination. At that point, the Board of Tax Appeals declared that it had no choice but to determine the valuation question based on the evidence presented at the first hearing. *Id.* The Supreme Court reversed again, holding that, when the board determined that it lacked sufficient evidence to determine the property's value, it should have investigated further or demanded that the parties furnish additional evidence. *Id.* at 227.

{¶16} Relator argues that the *Porterfield* decision stands for the proposition that an administrative agency's duty to investigate must always include all factors relevant to the matter at hand. However, unlike the situation in the *Porterfield* case, this case involves a preliminary investigation to determine whether probable cause existed, not a final determination of the merits of the charge after a hearing. Moreover, there is no indication in the record that SERB believed it lacked sufficient evidence to determine whether a complaint should have been issued. In its notice of dismissal, SERB stated that the information gathered in the investigation revealed that Cleveland did not interfere with, restrain, or coerce union employees during their strike.

{¶17} Accordingly, we overrule relator's first objection to the magistrate's decision.

{¶18} In its second objection, relator asserts that the magistrate's decision must be overruled because he did not include in his findings of fact that the "entirety of SERB's response to its statutory duty to investigate was to submit written requests to the parties for information about Relator's unfair labor practice charges, and read their responses." (Relator's brief at 5). Relator argues this statement should be included in the findings of fact. Civ.R. 53(D)(3)(a)(ii), which provides for a magistrate to make findings of fact and conclusions of law, does not specify the level of detail required in those findings. We

have previously held that "when a party objects to [a magistrate's] report, it is essential that the report include sufficient information to permit the trial court to resolve the legal issues raised by the objection." *Zacek v. Zacek* (1983), 11 Ohio App.3d 91, 94. See also *State ex rel. Bedard v. Village of Lockbourne* (1990), 69 Ohio App.3d 452, 459 ("To comply with Civ.R. 53, a [magistrate's] report must refer to facts contained in the record that support the conclusion and recommendation of the [magistrate].").

{¶19} In this case, the magistrate's decision includes a finding of fact that SERB issued investigation letters to relator and respondent requesting specific information and all documentation regarding the charges. (Magistrate's Decision, ¶30.) Thus, in this respect, the magistrate's decision satisfies the requirement of referring to facts that support his legal conclusion that SERB fulfilled its duty to investigate the ULP charge. (Magistrate's Decision, ¶51.) Relator effectively argues that the findings of fact should include a statement that this constituted the "entirety" of SERB's investigation. This is not necessarily inconsistent with the findings of fact in the magistrate's decision. However, based on our conclusion that SERB fulfilled its statutory duty to investigate, we need not determine which statement, if not both, is accurate. See *State ex rel. Medcorp, Inc. v. Ryan*, 10th Dist. No. 06AP-1223, 2008-Ohio-2835, ¶4. The magistrate's decision contains sufficient information to support his conclusions without further description of SERB's investigation.

{¶20} Accordingly, we overrule relator's second objection to the magistrate's decision.

{¶21} In its third objection, relator argues that the magistrate's decision must be overruled because it presented evidence establishing probable cause that Cleveland

committed unfair labor practices. Relator argues that, in light of this evidence, SERB abused its discretion by dismissing relator's ULP charge without issuing a complaint.

{¶22} The Supreme Court of Ohio has held that "SERB must issue a complaint and conduct a hearing on an unfair labor practice charge if, following an investigation, it has a reasonable ground to believe that an unfair labor practice has occurred." *State ex rel. Portage Lakes Edn. Assn. v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2839, ¶38. "Our review here, therefore, consists of determining whether SERB abused its discretion when it found that it lacked probable cause to proceed with a formal complaint and hearing on the charge, i.e., reasonable grounds to believe that a ULP had occurred." *State ex rel. Professionals Guild of Ohio v. State Emp. Relations Bd.*, 10th Dist. No. 08AP-417, 2009-Ohio-2155, ¶6. The Supreme Court of Ohio has stated that the role of SERB in investigating a ULP charge is "most closely analogous to that of a public prosecutor investigating a citizen's complaint of criminal activity," and that "the decision not to prosecute is discretionary, and not generally subject to review." *Portage Lakes* at ¶39. In considering a mandamus claim asserting an abuse of discretion in SERB's probable cause determination, "courts should not substitute their judgment for that of the administrative agency." *Id.* at ¶41.

{¶23} Relator argues that the letter sent from Cleveland's Director of Personnel to relator's president on July 15, 2009 (the "July 15 letter"), constituted evidence that Cleveland committed an unfair labor practice by attempting to coerce the water plant operators unit into refraining from striking. R.C. 4117.11(A)(1) provides that a public employer may not "[i]nterfere with, restrain, or coerce employees in the exercise of rights guaranteed in Chapter 4117. of the Revised Code." However, after reviewing the

evidence presented to SERB, we concur with the magistrate's assessment that the July 15 letter did not constitute an attempt to coerce the water plant operators unit. As noted above, relator represents two bargaining units within Cleveland. The language of the July 15 letter indicates that it was sent to relator's president in his capacity as the representative of the equipment operators unit, which did not intend to strike. For example, after explaining Cleveland's position on the dispute, the letter expresses the hope that the recipient's union and union members would decide to continue to work, rather than get involved in the dispute. Because the water plant operators unit had already served a strike notice, we agree with the magistrate that this language only makes sense when read as a request to the equipment operators unit. Further, Cleveland presented a copy of a nearly identical form letter that was sent to representatives of other unions. Read in this context, the July 15 letter does not constitute reasonable cause to believe that an unfair labor practice occurred.

{¶24} Accordingly, we overrule relator's third objection to the magistrate's decision.

{¶25} After an examination of the magistrate's decision and an independent review of the record and relevant law, we conclude that the magistrate has properly determined the issues raised by relator. We therefore overrule relator's objections to the magistrate's decision and adopt it as our own, including the findings of fact and conclusions of law set forth therein. We deny relator's request for a writ of mandamus.

Objections overruled; writ denied.

SADLER and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Municipal Construction Equipment Operators' Labor Council,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-195
	:	
Ohio State Employment Relations Board,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	
	:	

MAGISTRATE'S DECISION

Rendered on April 26, 2011

*Climaco, Wilcox, Peca, Tarantino & Garofoli Co., L.P.A., and
Stewart D. Roll, for relator.*

*Michael DeWine, Attorney General, and Aaron W. Johnston,
for respondent.*

IN MANDAMUS

{¶26} In this original action, relator, Municipal Construction Equipment Operators' Labor Council ("relator" or "CEO Union"), requests a writ of mandamus ordering respondent, State Employment Relations Board ("SERB"), to find probable cause to believe that the city of Cleveland ("employer" or "Cleveland") committed unfair labor

practices ("ULP"), and to issue a complaint and conduct a hearing on CEO Union's ULP charge.

Findings of Fact:

{¶27} 1. Since August 2007, CEO Union has been the exclusive bargaining representative of those persons employed by Cleveland as water plant operators, building stationary engineers, and stationary boiler room operators.

{¶28} 2. The last signed collective bargaining agreement states it covers the period of April 1, 2004 through March 31, 2007. The water plant operator/stationary engineer bargaining unit employees of the CEO Union were on strike from July 17 until July 29, 2009.

{¶29} 3. On July 27, 2009, CEO Union filed a ULP charge, case No. 2009-ULP-07-0394, against Cleveland alleging that Cleveland had violated R.C. 4117.11(A)(1) by (1) sending a letter from its director of personnel to the union president claiming that the strike was illegal; (2) using non-bargaining unit employees to perform the work of bargaining unit employees contrary to Cleveland's City Charter Section 132; and (3) falsely advising other unions that honoring the picket line was detrimental to the public health and safety. The ULP also alleged that Cleveland violated R.C. 4117.11(A)(7) by locking out non-bargaining unit employees who honored the employee organization's picket line. The employee organization sought lost wages because allegedly the employer's actions lengthened the strike.

{¶30} 4. As part of its investigation, SERB issued an initial investigation letter with specific information requests to both CEO Union and Cleveland. SERB requested specific information regarding the bargaining unit and the collective bargaining agreement

but, also, requested that each party provide a response to the charges and all documentation regarding the charges. Further, both CEO Union and Cleveland were instructed to provide witness statements which supported their respective positions.

{¶31} 5. Both CEO Union and Cleveland filed timely responses to the request for information.

{¶32} 6. CEO Union submitted a written argument in the same format as the questions presented with attachments. Cleveland's response included a summary of the background and facts, a written argument and attachments.

{¶33} 7. The attachments included a copy of the certification of the CEO Union as the exclusive representative of the employees, the latest contract between Cleveland and the union, a copy of an e-mail from counsel representing the union accepting Cleveland's offer and ending the strike, a July 15, 2009 letter from Cleveland's Director of Personnel and Human Resources to the President of CEO Union, a letter from Cleveland's Director of Personnel and Human Resources to the Business Agent of the International Brotherhood of Electrical Workers, Local 38, an excerpt of the city of Cleveland City Charter, the ULP, witness statements, Press Release from July 2009 from the Cleveland Mayor, e-mails between counsel for the CEO Union and Cleveland's Chief Assistant Director of Law, the Report and Recommendations of the Fact-Finder, e-mails between the Fact-Finder and counsel, the notice of the Rejection of the Report and Recommendation of the Fact-Finder and Issuance of Notice of Intent to Strike, job descriptions, and SERB Board minutes.

{¶34} 8. On October 15, 2009, SERB dismissed the ULP charge based on a finding that no probable cause existed to believe Cleveland violated R.C. 4117.11. The dismissal provides, in pertinent part, as follows:

Pursuant to Ohio Revised Code § 4117.12, the Board conducted an investigation of this charge. The investigation revealed that no probable cause existed to believe Charged Party violated Ohio Revised Code § 4117.11. Information gathered during the investigation revealed that Charged Party did not interfere with, restrain or coerce the bargaining-unit members prior to or during the strike. Charging Party did not provide any information to support its allegation that on July 29, 2009, Charged Party "took back" its July 15, 2009 offer of "new collective bargaining terms." Charged Party provided information to show that the parties met on July 13, 2009 and July 16, 2009, and that the Charging Party rejected all offers to negotiate a more favorable wage package. Charging Party did not provide sufficient information to support the § 4117.11(A)(7) allegation. Charging Party appeared to lack standing to file an allegation on what took place in other union's bargaining units. Accordingly, the Board dismisses the charge with prejudice for lack of probable cause to believe that an unfair labor practice has been committed by Charged Party, and for lack of standing regarding Charged Party's actions involving other employee organizations.

{¶35} 9. On March 2, 2010, relator filed the instant mandamus action asserting that SERB abused its discretion by failing to satisfy its duty to investigate the ULP charge before making the no probable cause determination.

Conclusions of Law:

{¶36} Relator asserts that SERB abused its discretion in dismissing its ULP charge and thus it is entitled to a writ of mandamus to compel SERB to issue a complaint and conduct a hearing on the ULP charge. For the reasons that follow, the magistrate disagrees.

{¶37} R.C. 4117.12(B) provides that "[w]hen anyone files a charge with the board alleging that an unfair labor practice has been committed, the board or its designated agent shall investigate the charge." If the board has probable cause for believing that a violation occurred, it shall issue a complaint and conduct a hearing. *Id.* The board's determination that probable cause is lacking is not reviewable by direct appeal. *Ohio Assn. of Pub. School Emp., Chapter 643, AFSCME/AFL-CIO v. Dayton City School Dist. Bd. of Edn.* (1991), 59 Ohio St.3d 159. A dismissal by SERB of ULP charges for lack of probable cause is reviewable by a mandamus action. *State ex rel. Serv. Emp. Internatl. Union, Dist. 925 v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 173. A writ of mandamus will issue to correct an abuse of discretion by SERB in dismissing ULP charges. *State ex rel. Leigh v. State Emp. Relations Bd.* (1996), 76 Ohio St.3d 143, 145. An abuse of discretion means a decision is unreasonable, arbitrary or unconscionable. *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.* (2001), 92 Ohio St.3d 529, 533.

{¶38} The term "probable cause" is not defined in the Ohio Revised Code. The Supreme Court of Ohio stated in *State ex rel. Portage Lakes Edn. Assn., OEA/NEA v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2839, ¶38, "SERB must issue a complaint and conduct a hearing on an unfair labor practice charge if, following an investigation, it has a reasonable ground to believe that an unfair labor practice has occurred."

{¶39} The court explained in *Portage Lakes* that the issue of probable cause is one of fact. In making its determination, SERB considers the evidence that supports the allegations of the charge and the information that rebuts the charge or the defense to the violation. In *Portage Lakes*, the court warned that since mandamus proceedings are

premised upon a relator establishing an abuse of discretion by SERB in making its probable cause determination, courts should not substitute their judgment for that of the administrative agency. Id. at ¶41.

{¶40} After reviewing the record in this case, the magistrate concludes that SERB did not abuse its discretion in dismissing CEO Union's ULP charge for lack of probable cause.

{¶41} CEO Union contends that SERB failed to comply with its R.C. 4117.12 duty to find probable cause existed to support its ULP charge against Cleveland. Relator's charge included an allegation that Cleveland sent a letter in July 2009 to the president of the CEO Union stating that the pending strike was illegal and that severe institutional and individual penalties would result from that strike. Relator argues that the letter was sent in direct violation of R.C. 4117.11(A)(1), a prohibition against interfering with, restraining and coercing union members in an attempt to stop the strike. Cleveland contends that the letter was sent to another union or bargaining unit which CEO Union also represents, i.e., the equipment operators union, a non party to the action.

{¶42} Two separate bargaining units were represented by CEO Union and its president. The language of the letter clearly supports Cleveland's position. The letter begins, "As you may know, the Municipal Construction Equipment Operators' Labor Council (MCEOLC) has served a 10-day strike notice on the City of Cleveland." Further in the letter, after discussing the impending strike, the Director states, "We hope that your Union and your members decide to continue to work and not get involved in this dispute." But the CEO Union was already involved in the dispute as representative of the water plant operator/stationary engineer bargaining unit. The language of the letter only makes

sense as written to the president of CEO Union as the representative of the equipment operator's union.

{¶43} Relator argues that a fax sent from Cleveland's Director of Personnel to the business agent for the International Brotherhood of Electrical Workers on July 21, 2009 requiring the union members to end the sympathy strike and return to work because the strike was detrimental to the public health or safety also violated R.C. 4117.11(A)(1). Since Cleveland had sent a press release on July 15, 2009 stating that the CEO Union strike would not affect water service, relator contends that the July 21, 2009 letter was designed to interfere with, restrain or coerce relator's members in their exercise of their right to strike.

{¶44} The press release discussed only an impending strike by the CEO Union, and that it would not impact water services. It did not discuss strikes by other unions. That the electricians decided to enter into a sympathy strike after July 15, 2009 and after the time the press release was announced, does not impact the validity of the press release. The press release could have been accurate at its release. The fact that a second bargaining unit decided to strike after the city made the announcement does not mean that the strike by the second bargaining unit could not have impacted the water supply and the public health and safety.

{¶45} Cleveland contends that CEO Union does not have standing to raise this issue because it is asserting the rights of a third party, the IBEW Local 38 Union. Additionally, Cleveland contends that CEO Union does not have standing to raise the issue of non-bargaining unit employees who honored the employee organization's picket line who were allegedly locked out. Cleveland contends that the employees were not

locked out and that CEO Union does not have standing to raise this issue. SERB agreed that CEO Union did not have standing to raise the issue.

{¶46} CEO Union argues that the language of R.C. 4117.11(A)(7) provides that: "It is an unfair labor practice for a public employer, its agents, or representatives to: * * * (7) Lock out or otherwise prevent employees from performing their regularly assigned duties where an object thereof is to bring pressure on the employees *or an employee organization* to compromise or capitulate to the employer's terms regarding a labor relations dispute." (Emphasis added.) CEO Union argues that since it is an employee organization, it has standing to bring the action. However, the ULP provides: "The employer violated ORC 4117.11(A)(7) by locking out *non-bargaining unit employees* who honored the employee organization's picket line." (Emphasis added.) Thus, the language of the ULP itself provides that it is non-bargaining unit employees that possibly had their rights violated. CEO Union does not represent the non-bargaining unit employees.

{¶47} The ULP charged that Cleveland used non-bargaining unit employees to perform the work of bargaining unit employees, contrary to Cleveland's City Charter. Cleveland provided evidence that the work was performed by other qualified employees already employed by the city. The responsibilities were assumed by the managers who possessed higher license requirements than the striking employees.

{¶48} SERB is charged with holding hearings, adopting rules and procedures and exercising other powers appropriate to carry out Chapter 4117 of the Revised Code. See R.C. 4117.02. There is no mention in R.C. Chapter 4117 of the interpretation of city charters being within SERB's jurisdiction. In fact, other than some exceptions which are

not applicable here, R.C. Chapter 4117 "prevails over any and all other conflicting laws." R.C. 4117.10(A).

{¶49} Relator argues that it is entitled to a writ of mandamus because SERB failed to satisfy its duty to investigate the ULP charge. Relator contends that SERB failed in its duty because it did not interview any witnesses, did not demand the production of documentary material, or demand answers to written interrogatories. The statutory framework does not require SERB investigators to contact witnesses as part of its investigation. The SERB investigator sent Information Requests to both the charging party and the charged party. Both parties were asked to provide witness statements and all relevant documents. None of the information was refused by the investigator.

{¶50} Relator argues that SERB's duty to investigate is broader than the actions it took in this case, pursuant to *Pennsylvania Rd. Co. v. Porterfield* (1971), 25 Ohio St.2d 223. In *Pennsylvania Rd.*, the Supreme Court of Ohio found that the Board of Tax Appeals was not limited to the record before it but was "required to obtain all information, either from the parties or through independent investigation, necessary to discharge the duty imposed upon it by law." *Id.* at syllabus. However, in that case, the Board of Tax Appeals believed it was following a Supreme Court mandate and had to decide the case on the record in front of it, even though the evidence was insufficient to make a determination, rather than conduct an investigation and hearing or demand that further additional evidence be provided. That situation is different than the one at issue, where there is no contention that the evidence is insufficient to make a determination.

{¶51} This case is similar to *State ex rel. Professionals Guild of Ohio v. State Emp. Relations Bd.*, 10th Dist. No. 08AP-417, 2009-Ohio-2155, in which the relator

sought a writ of mandamus ordering SERB to vacate its earlier dismissal of ULP charges brought by relator. After referring the matter to a magistrate, this court adopted the magistrate's decision as its own, including the findings of fact and conclusions of law. In the magistrate's decision, the magistrate addressed the relator's contention that SERB did not fulfill its obligation to investigate because it did not speak to witnesses or obtain witness statements from them. The magistrate stated, at ¶137, as follows:

Nothing in the statutory framework prescribes a specific method whereby SERB is required to investigate ULP charges. The fact that SERB investigators actually contact witnesses in one situation and do not find it necessary to contact witnesses in another situation does not lead to the conclusion that SERB failed to properly investigate [relator's] ULP charges in the instant case and [relator] is unable to direct this court's attention to any case law holding to the contrary. * * *

Thus, it cannot be said that SERB failed to properly investigate the ULP charge.

{¶52} Based on the foregoing, the magistrate concludes that relator has failed to establish that SERB abused its discretion in dismissing the ULP charge or that SERB failed to properly investigate the charge. For all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ *Kenneth W. Macke*
KENNETH W. MACKE
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).