APPENDIX

TABLE OF CONTENTS

APPENDIX A

THE SUPREME COURT OF OHIO

Supreme Court of Ohio Clerk of Court

Case No. 2022-1299

[Filed January 17, 2023]

Barbara Kolkowski	)
	)
v.	)
	)
Ashtabula Area Teachers Association, et al.	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Ashtabula County Court of Appeals; No. 2021-A-0033)

/s/ Sharon L. Kennedy
Sharon L. Kennedy
Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/

APPENDIX B

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, ASHTABULA COUNTY

CASE NO. 2021-A-0033

[Filed September 6, 2022]

BARBARA KOLKOWSKI,

Plaintiff-Appellant,

- v -

ASHTABULA AREA TEACHERS ASSOCIATION, et al.,

Defendants-Appellees.

Counsel: For Plaintiff-Appellant: Robert Alt and Jay R. Carson, The Buckeye Institute, Columbus, OH.

For Ashtabula Area Teachers Association and Ohio Education Association, Defendants-Appellees: Ira J. Mirkin and Jeffrey J. Geisinger, Green, Haines, Sgambati Co., LPA, Youngstown, OH, and P. Casey Pitts, Altschuler Berzon, LLP, San Francisco, CA.

For Ashtabula Area City School District, Defendant-Appellee: David E. Pontius, Jeffrey A. Ford, and Jason L. Fairchild, Andrews & Pontius, LLC, Ashtabula, OH.

Judges: JOHN J. EKLUND, J. THOMAS R. WRIGHT, P.J., MARY JANE TRAPP, J., concur.

Opinion by: JOHN J. EKLUND

Opinion

JOHN J. EKLUND, J.

This matter concerns the application of several important principles and bodies of law. These issues form a five-way intersection that concerns: (1) contract interpretation, (2) Constitutional rights under the First and Fourteenth Amendments, (3) labor relations, (4) the R.C. Chapter 4117 statutory framework for public sector unions, and (5) questions of jurisdiction and standing. This intersection of legal principles raises important substantive and procedural issues affecting not only the parties' rights, but also Ohio's entire framework for public sector labor relations. We are called on to navigate this intersection of issues being mindful that it is a place where a nasty accident can occur, especially as in this case, where we have five cars arriving at the same time. Fortunately, just as the rules of the road provide guidance in yielding the right of way when multiple cars approach an intersection, Ohio's courts and legislatures have provided a framework for navigating this legal intersection by acknowledging and balancing the interests of those who occupy each lane.

Appellant, Barbara Kolkowski, appeals the order of the Ashtabula County Court of Common Pleas, granting the appellees' motions to dismiss her complaint for declaratory relief, injunctive relief, and money damages pursuant to 42 U.S.C. 1983. Appellant

claimed that her constitutional rights, and her statutory rights under R.C. 4117.03(A)(5), had been violated when she was not allowed to retain private counsel to represent her in arbitration proceedings. The arbitration arose from a grievance appellant asserted pursuant to the Collective Bargaining Agreement (CBA) between appellees, the Ashtabula Area Teachers Association (Association or Union) and the Ashtabula Area City Schools Board (Board). The Ohio Education Association (OEA) is also a named defendant-appellee in this matter.

Appellant raises two assignments of error arguing that the trial court erred in dismissing her case by finding that she did not have a right to retain her own counsel for the arbitration and by finding that there was nothing in the CBA between the Association and the Board that would allow appellant to decline Association assistance or Association counsel at the arbitration level of the grievance process.

After review of the record and the applicable caselaw, we find appellant's assignments of error to be without merit. The State Employment Relations Board (SERB) has exclusive jurisdiction over appellant's R.C. Chapter 4117 claims. Appellant lacked standing to initiate or independently conduct arbitration pursuant to the CBA between the Board and the Association. Finally, appellant's constitutional rights have not been violated by not being permitted to have her own counsel represent her at arbitration between the Association and the Board.

The judgment of the Ashtabula County Court of Common Pleas is affirmed.

Substantive and Procedural History

Appellant was employed as a guidance counselor by the Board. Appellant is not a member of the Association, however, pursuant to R.C. 4117.04, the Association serves as the exclusive collective bargaining representative for Board employees. Article XVI of the CBA governing the Association and the Board contains grievance procedures for resolving disputes arising under the terms of the CBA.

CBA Grievance Procedure:

The grievance procedure as provided in the CBA is a multi-step process. Level One involves the aggrieved bargaining unit member first discussing the matter with the member's immediate supervisor, the principal, or treasurer. If the response given at Level One is unsatisfactory, the grievant may proceed to Level Two by advancing the grievance to the superintendent. If the grievant is not satisfied with the Level Two response, the Association may advance the grievance to Level Three, an optional mediation step.

The CBA provides that "If the mediation effort is unsuccessful or is not initiated and the bargaining unit member remains aggrieved, *the Association may proceed to Level Four.*" (Emphasis added). To initiate the Level Four arbitration procedure, if "the bargaining unit member remains aggrieved, *the Association shall notify the Board in writing of its intent to submit the grievance to arbitration.*" (Emphasis added). The CBA provides that in arbitration proceedings, the "aggrieved shall be represented by the Association." The decision of the arbitrator is binding and the parties — the

Association and the Board — are to share the costs of arbitration. Finally, the CBA provides that the Association "shall have the exclusive right to determine whether to proceed to the arbitration step of the procedure."

Appellant's grievance:

In September 2020, appellant submitted a Level One and a Level Two grievance without resolution satisfactory to her.

Appellant proceeded through the first two levels of the grievance procedure without Association involvement, as the CBA contemplates and allows. Neither appellant nor the Association sought to advance the grievance to the Level Three optional mediation. After the denial of her grievance at Level Two, appellant sent the Association a letter requesting that her grievance be advanced to Level Four. Her letter stated that pursuant to Article XVI(C) of the CBA, she intended to "respectfully request that the Ashtabula Area Teachers' Association notify the Board of Education of my intent to submit the grievance to arbitration * * *." She further said that:

> pursuant to Ohio Revised Code § 4117.03[(A)](5), I invoke my right to adjust my own grievance in the arbitration and plan to retain my own counsel to represent me in the remainder of these proceedings without the intervention of the bargaining representative, with the understanding that a bargaining representative has the right to be present at the adjustment. In other words, I am not requesting any financial support, representation, or

services from the Union in this matter *other than submitting the notice and arbitration demand.* (Emphasis added).

The Association agreed to advance her grievance to Level Four arbitration but denied appellant's request to retain her own counsel to represent her at the arbitration. In support of the decision to deny her request for her own counsel, the Association determined that "pursuant to the contract she seeks to enforce via the grievance process, the [Association] will provide an advocate to present Ms. Kolkowski's case at arbitration and only that advocate will act as her representative during the arbitration." The Association cited Article XVI(C) requiring that the aggrieved person be represented by the Association at arbitration proceedings.

Appellant's lawsuit:

Appellant sued appellees in the Ashtabula County Court of Common Pleas seeking a declaration that she has the right to retain her own attorney to represent her at arbitration without Association involvement. The Association and the Board each filed a Motion to Dismiss and appellant filed an Amended Complaint in which she modified certain portions of the original Complaint and added the OEA as an additional defendant.

Appellant's Amended Complaint contained three counts seeking: (1) a declaratory judgment pursuant to 42 U.S. C. 1983 and R.C. 2721.03 that she was entitled to retain her own counsel for "arbitrating her grievance under the CBA"; (2) injunctive relief pursuant to

42 U.S.C. 1983 to enjoin the Association from requiring her to accept the Association's counsel for arbitration; and (3) damages, costs, and attorney fees pursuant to 42 U.S.C. 1983 on the basis that the Board and the Association, acting under color of state law, "purport to be acting pursuant to the exclusive representation provisions of R.C. 4117.04-05."

The Board filed a Motion to Dismiss the Amendment Complaint and the Association and OEA filed a Joint Motion to Dismiss to the Amended Complaint. Appellant responded, appellees each filed a reply, and appellant filed a sur-reply. On October 5, 2021, the trial court granted appellees' motions to dismiss pursuant to Civ.R. 12(B)(1) and (6). Appellant timely filed this appeal raising two assignments of error.

Assignments of Error and Analysis

Appellant's assignments of error state:

"[1.] The trial court erred by applying the U.S. Supreme Court's holding in *Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271, 104 S. Ct. 1058, 79 L.Ed 2d 299 (1984) to this case, which is factually distinct."

"[2.] The Trial Court Erred by Not Properly Applying Ohio Law, Including *Johnson v. Metro Health Med. Ctr.*, 2001-Ohio-4259, 2001 WL 1685585 (2001) and this Court's Decision in *Gaydosh v. Trumbull County*, 2017-Ohio 5859, 94 N.E. 3d 932, 2017-Ohio-5859 (11th Dist. 2017)."

Appellant argues that she has a constitutional right to retain and be represented at arbitration by her own counsel arising from the Due Process Clause of the Fifth and Fourteenth Amendments. She also claims that she has First Amendment rights to speak through the counsel of her own choosing, to avoid compelled speech by unwanted counsel, and to choose not to associate with a particular group. Finally, appellant argues that R.C. 4117.03(A)(5) confers upon her the right to "[p]resent grievances and have them adjusted without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment."

"An appellate court's standard of review for a trial court's actions regarding a motion to dismiss is de novo." *Bliss v. Chandler*, 11th Dist. Geauga No. 6006-G-2742, 2007-Ohio-6161, ¶ 91. In reviewing a Civ.R 12(B)(6) ruling, any allegations and reasonable inferences drawn from them must be construed in the nonmoving party's favor. *Ohio Bureau of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, ¶ 12. "[I]t must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought." *Id.* However, when reviewing a Civ.R. 12(B)(1) ruling "the court is not required to take the allegations in the complaint at face value." *Jones v. Ohio Edison Co.*, 11th Dist. No. 2014-A-0015, 2014-Ohio-5466, 26 N.E.3d 834, ¶ 7.

In conducting our de novo review, there are three distinct issues that we will address in turn. First, whether the trial court had the jurisdiction to hear the claims that plaintiff raised relating to R.C. Chapter 4117. Second, whether appellant had standing to bring her constitutional and statutory claims. Third, whether the Association's denial of her request to retain and be represented at arbitration by her own counsel for arbitration violated appellant's constitutional and/or statutory rights.

Jurisdiction of the Court:

Appellant bases her claims, at least in part, on R.C. Chapter 4117. Appellant claims that R.C. 4117.03(A)(5) confers upon her the right to have her grievance adjusted without Association intervention. She claims that the Association violated this right by refusing to allow her to retain and be represented at arbitration by her own attorney.

It is well established that the State Employment Relations Board (SERB) has exclusive jurisdiction over claims arising from R.C. Chapter 4117. SERB's exclusive jurisdiction to resolve unfair labor practices is vested in two areas: (1) where a party files charges with SERB alleging an unfair labor practice under R.C. 4117.11; and (2) where a complaint brought in a common pleas court alleges conduct that constitutes an unfair labor practice as enumerated in R.C. 4117.11. *State ex rel. Cleveland v. Sutula*, 127 Ohio St.3d 131, 2010-Ohio-5039, ¶ 16, 937 N.E.2d 88. "If a party asserts claims that arise from or depend on the collective bargaining rights created by R.C. Chapter 4117, the remedies provided in that chapter are

exclusive." *Franklin Cty. Law Enf't Assn. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 572 N.E.2d 87 (1991) paragraph two of the syllabus. "'SERB has exclusive jurisdiction over matters within R.C. Chapter 4117 in its entirety, not simply over unfair labor practices claims.'" *Sutula*, at ¶ 20, quoting *Ass'n of Cleveland Fire Fighters, Local 93 v. City of Cleveland*, 156 Ohio App.3d 368, 2004-Ohio-994, 806 N.E.2d 170, ¶ 12 (8th Dist.).

In part, Appellant alleges that appellees violated her rights under R.C. 4117.03(A)(5) by not allowing her to retain her own counsel for arbitration. R.C. 4117.11(B) provides that "[i]t is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to: (1) restrain or coerce employees in the exercise of the rights guaranteed in Chapter 4117 of the Revised Code." Therefore, this aspect of appellant's claim falls within the scope of R.C. 4117.11(B)(1) and is within the exclusive jurisdiction of SERB.

However, appellant has also asserted claims under 42 U.S.C. 1983 alleging that appellees' application of R.C. 4117.03(A)(5) and the CBA has violated her constitutional rights. In *Gibney v. Toledo Bd. of Educ.*, 40 Ohio St.3d 152, 532 N.E.2d 1300 (1988), the Ohio Supreme Court held that parties filing actions under Section 1983 are not required "to exhaust any administrative remedies provided in R.C. 4117.01 et seq. prior to obtaining relief in the court of common pleas." *Id.* at 153. To hold otherwise would force plaintiffs filing state court Section 1983 claims to "comply with a requirement that is entirely absent

from civil rights litigation of this sort in federal courts." *Id.* at 156.

We therefore conclude that appellant's claim as to the application of R.C. 4117.03(A)(5) falls within the exclusive jurisdiction of SERB and that the trial court had subject matter jurisdiction only over appellant's Section 1983 claims pursuant to *Gibney*.

Standing:

We next turn to whether appellant had standing under the CBA to bring her Section 1983 claims. We have determined that SERB has exclusive jurisdiction over R.C. Chapter 4117 claims. However, appellant has also asserted that the application of the CBA violated her constitutional rights. Although her claims implicate R.C. Chapter 4117, we must determine whether appellant has standing under the CBA to assert these constitutional violations. As *Gibney* demonstrates, when a party asserts a denial of constitutional rights under color of law by a state actor, the party need not exhaust administrative remedies through SERB.

Appellant's standing to assert these constitutional claims are rooted in the application of the CBA and R.C. Chapter 4117. She argues that appellees interpretation of the CBA has violated her constitutional rights. To address her standing, we must therefore apply R.C. 4117.03(A)(5) and the CBA to determine if she is a real party in interest.

"The threshold requirement of standing depends upon whether the plaintiff has a real interest in the subject matter of the action." *Nat'l City Real Estate*

Servs. LLC v. Shields, 11th Dist. Trumbull No. 2012-T-0076, 2013-Ohio- 2839, ¶ 20. *State ex rel. Dallman v. Court of Common Pleas, Franklin Cty.*, 35 Ohio St.2d 176, 298 N.E.2d 515 (1973), syllabus. If a claim is asserted by a party who is not the real party in interest, then the party lacks standing to prosecute the action. *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio 275, 701 N.E.2d 1002 (1998). A lack of standing challenges the capacity of a party to bring an action but does not challenge the subject matter jurisdiction of the court. *Id.* Accordingly, a motion to dismiss for lack of standing is properly brought pursuant to Civ.R.12(B)(6) for failure to state a claim upon which relief can be granted. *Brown v. Columbus City Schools Bd. Of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶ 4.

R.C. 4117.09(A) provides that the "parties to any collective bargaining agreement shall reduce the agreement to writing and both execute it." In this case, the Board and the Association are the "parties to" the CBA; appellant is not. R.C. 4117.09(B) provides that the CBA "shall contain a provision that: (1) provides for a grievance procedure which may culminate with final and binding arbitration of unresolved grievances * * *. A party to the agreement may bring suits for violation of agreements or the enforcement of an award by an arbitrator in the court of common pleas of any county wherein a party resides or transacts business." Again, the parties to the CBA are the Board and the Association. Therefore, appellant does not have the right to negotiate the terms or procedures of the CBA which may include "final and binding arbitration of unresolved grievances." R.C. 4117.09(B). Nor can

appellant "bring suits for violation of agreements or the enforcement of an award by an arbitrator in the court of common pleas * * *." R.C. 4117.09(B).

Next, R.C. 4117.03(A)(5) provides that public employees have the right to "[p]resent grievances and have them adjusted without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment."

This statute plainly provides that an employee has the right to have grievances adjusted without the intervention of the bargaining unit "as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement." R.C. 4117.03(A)(5). In this case, the CBA provides that the aggrieved party "shall be represented by the association" at a Level Four arbitration. Therefore, appellant's demand to retain her own attorney to represent her at arbitration without Association involvement would be an adjustment that is "inconsistent with the terms of the collective bargaining agreement * * *." R.C. 4117.03(A)(5).

This court recently addressed a similar standing question in *Staple v. Ravenna*, 11th Dist. Portage No. 2021-P-0070, 2022-Ohio-261. In *Staple*, the appellant was a bargaining unit member who sought to retain private counsel for arbitration arguing that R.C. 4117.03(A)(5) granted him this right. *Id.* at ¶ 2.

All parties agreed that under the applicable CBA, only the union, and not Staple individually, had the right to initiate arbitration. *Id.* at ¶ 3. This Court concluded that Staple's claims were entirely dependent on the collective bargaining rights created by R.C. Chapter 4117. *Id.* at ¶ 17. We also held that Staple did not have standing to bring his claim and that there was no constitutional right to seek adjustment of the claim. *Id.* at ¶ 18.

This Court noted that "though there is little case law directly addressing Mr. Staple's exact issue, Ohio courts have often addressed a closely related matter: the issue of standing when a union member seeks reversal of an already arbitrated matter." *Id.* at ¶ 25, citing *Leon v. Boardman Twp.*, 100 Ohio St.3d 335, 2003-Ohio-6466, 800 N.E.2d 12, ¶ 17 (holding that an employee "whose employment is governed by a collective bargaining agreement that provides for binding arbitration will generally be deemed to have relinquished his or her right to act independently of the union in all matters related to or arising from the contract, except to the limited extent that the agreement explicitly provides to the contrary."); *Gaydosh v. Trumbull Cty.*, 2017-Ohio-5859, 94 N.E.3d 932 (11th Dist.) (holding that "once an employee subject to a collective bargaining agreement authorizes his or her union to pursue a grievance, the cause of action belongs to the union, and the employee lacks standing to prosecute the case.").

We held that under the CBA, Staple "had no choice but to authorize the Union to turn the grievance over to the Union. * * * Since Mr. Staple is not a party to the

CBA and the CBA does not grant him the right to independently arbitrate the matter, he does not have standing to seek an order compelling arbitration between the two parties to the CBA." *Staple* at ¶ 28; *See also Johnson v. Metro Health Med. Ctr.*, 2001-Ohio-4259, 2001 WL 1685585, *2 (2001); *Bailey v. Beasley*, 10th Dist. Franklin No. 09AP-682, 2010-Ohio-1146, ¶ 19; *Morrison v. Summit County Sheriff's Dep't.*, 9th Dist. Summit No. C.A. 20313, 2001 Ohio App. LEXIS 2701, 2001 WL 688895.

In the present matter, appellant has also argued that the trial court did not properly apply *Johnson v. Metro Health Med. Ctr., supra.* We disagree. *Johnson's* holding as to public employees' statutory rights under R.C. 4117.03(A)(5) similarly states that when "the employee chooses union representation, that employee lacks standing on all matters including an appeal." 2001-Ohio-4259, *Id.* at *2. The *Johnson* court said that

> this conclusion recognizes the necessity of subordinating the individual interest of a complainant to the collective good of a greater body. A union is no more than its members. By choosing to pursue this matter with the benefit of union representation under the collective bargaining agreement Johnson sacrificed her right as a party in interest, and the union obtained the right to pursue this matter for the benefit of all employees under the collective bargaining agreement. Johnson's union, not Johnson, was the sole party in interest adverse to MetroHealth.

Id.

Appellant insists that she, unlike in the above cases, has not subordinated her claim to the Union. She states that she has specifically rejected Association representation throughout the grievance process and that she wanted to use and pay for her own counsel throughout the arbitration process.

However, the CBA necessarily requires Association representation at the arbitration level. Under the CBA, appellant was free to, and did, act without Association representation at Level One and Level Two of the grievance process outlined in Article XVI, in accordance with R.C. 4117.03(A)(5). However, the Association has the "exclusive right to determine whether to proceed to the arbitration step of procedure." Next, if the Association determines that it wants to advance a grievance to arbitration, the Association must make a demand for arbitration to the Board. Individual grievants are not permitted to notify the Board of their intent to submit a matter for arbitration. Finally, the CBA provides that in arbitration proceedings, the "aggrieved shall be represented by the Association." Appellant simply did not have the right to determine that she would advance any grievance to arbitration without explicit Association approval and representation.

Appellant has also suggested that the CBA is ambiguous or vague and should be construed in her favor because it states that if "the bargaining unit member remains aggrieved, *the Association shall notify the Board in writing of its intent to submit the grievance to arbitration.*" (Emphasis added). Appellant says that the case "presents the unusual situation

where Ms. Kolkowski had no hand in drafting or approving the CBA yet is bound to it by statute." This situation is not unusual because appellant is not a party to the CBA. The Association and the Board are. They are the parties to renegotiate the contract or to have an arbitrator determine the application of any potentially ambiguous provisions.

Notwithstanding appellant's "unusual situation," the language in the CBA is plain. The heading Article XVI, Section F states "**Rights of the Grievant and the Association.**" That section provides that the Association has the "exclusive right to determine whether to proceed to the arbitration step of the procedure." The heading for Article XVI, Section C states "**Procedure.**" That section provides a procedural description of the grievance process and states that if "the bargaining unit member remains aggrieved, *the Association shall notify the Board in writing of its intent to submit the grievance to arbitration.*" (Emphasis added). Section C does not confer upon the bargaining unit member the right to proceed to arbitration if the grievance is not resolved at Level Two. Instead, it states the procedural requirements that follow if the bargaining unit member remains aggrieved. One of those procedural requirements is that the Association, if it has determined to do so in accordance with its rights under Section F, must notify the Board in writing of the intent to submit the matter to arbitration. The grievant has no right to unilaterally notify the Board of his or her intent to proceed to arbitration because the grievant has no right to proceed to arbitration.

Even appellant's letter to the Association contemplates the necessary subordination of her arbitration claim to the Association. She acknowledged the language of the CBA because she submitted the letter to the Association to "respectfully request that the Ashtabula Area Teachers' Association notify the Board of Education of my intent to submit the grievance to arbitration * * *." She further acknowledged the CBA's requirement that she submit her claim to the Association when she attempted to disclaim any Association representation *"other than submitting the notice of arbitration demand."* (Emphasis added). As in *Staple*, appellant "had no choice but to authorize the Union to turn the grievance over to the Union." *Staple*, 2022-Ohio-261 at ¶ 28.

Because appellant is not a party to the CBA and the CBA does not grant her the right to independently arbitrate this matter, she lacks the standing to compel the Board or the Association to allow her to arbitrate her claim with her own counsel. **Appellant's constitutional rights under the Contract**:

The Association's denial of appellant's request to retain her own counsel for arbitration did not violate appellant's constitutional or statutory rights. Appellant claims that the denial of her right to retain her own counsel violated her statutory right to adjust her grievance under R.C. 4117.03(A)(5). However, we have already determined that SERB retains exclusive jurisdiction over claims brought exclusively under R.C. Chapter 4117. Therefore, neither the court below nor this court has subject matter jurisdiction to pass on her statutory claim under R.C. 4117.03(A)(5).

Appellant's constitutional claims are also without merit. Appellant argues that the clause in the CBA requiring her to use Association representation for arbitration violates the constitutional rights of free speech, free association, and her right to retain the counsel of her choosing.

In *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979), a public employees' union argued that the union's First Amendment rights were abridged because the employer required employee grievances to be filed directly with the employer and refused to recognize union communication of employee grievances. *Id.* at 465. However, the U.S. Supreme Court disagreed saying that "the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." *Id.*

"The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition [the] government for redress of grievances" *Id.* at 464. However, the court said that the public employer's action was "simply to ignore the union. That it is free to do." *Id.* at 466.

In *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984), the challenged conduct was "the converse of that challenged in *Smith*." *Id.* at 286-287. In *Knight*, the government engaged in "meet and negotiate" meetings regarding terms and conditions of employment and to engage in "meet and confer" meetings on matters outside the scope of mandatory

negotiations. *Id.* at 275. These meetings took place "with the union and not with individual employees." *Id.* at 287. However, the court found that the "applicable constitutional principles are identical to those that controlled in *Smith*. When government makes general policy, it is under no greater constitutional obligation to listen to any specially affected class than it is to listen to the public at large." *Id.*

Therefore, the court said the Minnesota statute requiring public employees to select someone to represent them at these sessions was "rational for the state" to do so. *Id.* at 291. The court noted that the goal of "reaching agreement" and "basing policy decisions on consideration of the majority view of its employees makes it reasonable for an employer to give only the exclusive representative a particular formal setting in which to offer advice on policy." *Id.* at 291-292.

In *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809 (6th Cir. 2020), Thompson was not a member of the union, but was a schoolteacher employed by the Marietta High School and bound by the agreement between the school board and the union. *Id.* at 812. She filed a 42 U.S.C. 1983 suit against the union and the board arguing that Ohio's exclusive public sector union representation violated the First Amendment because the union was her exclusive statutory representative for purposes of bargaining with her employee, but she did not agree with the union's policies or beliefs. *Id.*

The court noted that public employers must bargain over all matters pertaining to wages, hours, or terms and other conditions of employment pursuant to R.C. 4117.08(A) and that almost all other topics are the

subject of permissive bargaining pursuant to R.C. 4117.08(C). *Id.* Thompson argued that R.C. Chapter 4117 violated her rights to be free from compelled speech, compelled association, and infringed on her right to freely communicate with her employer.

The court said that the "primary precedent blocking Thompson's way is *Knight*." *Id.* at 813. Following *Knight*, the court concluded that its holding extended beyond merely "meet and confer" and "meet and negotiate" sessions and that there is "no basis for concluding that the result should be different where the union engages in more traditional collective-bargaining activities." *Id.*

"In *Knight*, the Court framed the question presented in broad terms: whether the 'restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees within the bargaining unit who are not members of the exclusive representative and who may disagree with its views.'" *Id.*, quoting *Knight, supra*, at 273. Therefore, the court concluded that Thompson's compelled speech arguments fell within the broad holding of *Knight*. *Id.* The court also relied on *Smith, supra*, for the proposition that the employer had no obligation to listen, respond, or bargain with Thompson and that the employer's decision to bargain with the union would not violate her rights.

The necessary question for this Court to resolve is whether arbitration is one of the "more traditional collective-bargaining activities" that *Thompson* described as falling under the ambit of *Knight*.

Appellant claims her right to have her own counsel represent her at arbitration without Association intervention is based on a right to counsel in civil matters. *See Anderson v. Sheppard*, 856 F.2d 741, 748 (6th Cir.1988). However, appellant's right to participate in arbitration, individually or through counsel, is entirely contractual. Although she claims that arbitration is her only forum to be heard, she is missing the point that it is the CBA itself that empowers her to pursue employment grievances at all. As *Knight* provides, the government is not required to listen to her in the context in which she demands. Instead, the Board has the right to choose not to listen to her, which it has through its negotiation of the arbitration terms in the CBA. Without the CBA, appellant would have no right to pursue any grievance with her employer at all.

She also does not have a constitutional right to her own lawyer at her own expense to represent her at arbitration without Association intervention for the same reason. Her lawyer is merely her agent, and her lawyer has no additional right to speak in an arbitration setting than she would individually. Of course, appellant could retain a personal lawyer to provide legal advice to her during an arbitration proceeding, as is her right as an American citizen. Consequently, if she does, R.C. Chapter 4117 nor the CBA implicate this right. We merely speak of her individual right to retain a lawyer to advise and assist her without controlling or participating directly in the arbitration. This individual right does not extend to require the Association or the Board to allow her to

have her own counsel prosecute the arbitration without Association involvement as she requests.

Moreover, SERB has long recognized that a union's duty to represent its members requires balancing individual and collective interests. While it occurs most often in bargaining, it "also may be a legitimate concern in resolving grievances and other contract administration issues. Given this essential component of an exclusive representative's function, flexibility and deference must be accorded the union in its efforts to seek benefits and enforcement for the unit as a whole, even though the desires of individual employees or groups of employees within the unit may go unfulfilled." *In re AFSCME, Local 2312*, SERB 89-029, 1988 WL 1519971, at * 8 (Sept. 29, 1988). Indeed, in the present matter, appellant's grievances may have an effect on other employees similarly situated to her. At least some portion of her grievance relates to the interpretation of her job description, which could impact other Association members in the same position. Therefore, upon her request for arbitration, her individual right to pursue the grievance abated and the Association became the sole party in interest pursuant to the CBA. To determine otherwise would subordinate the Association's role as the exclusive representative of the bargaining unit members and would inappropriately privilege and empower individual voices within the unit.

The CBA allows appellant to initiate the grievance process without Association involvement. However, the CBA clearly terminates that right at the arbitration step. This is in line with the statutory framework set

forth in R.C. Chapter 4117 which allows the parties to the CBA, the Board and the Association, to negotiate the parameters of arbitration procedures.

The Ohio legislature enacted R.C. Chapter 4117 with certain public policy interests in mind. The overriding policy behind Chapter 4117 is clearly articulated as "promoting orderly and constructive relationships between all public employers and their employees to the extent not contrary to Chapter 4117." Ohio Adm.Code 4117-1-01(B). We will not usurp the legislature's policy decisions with respect to how to balance these interests.

Although appellant's right to have her own representation at arbitration without Association involvement to make her own case at arbitration is distinct from the "meet and negotiate" and "meet and confer" statute reviewed in *Knight*, the principle of *Knight*, as described in *Thompson*, leads to the same conclusion. We conclude that arbitration is one of the "more traditional collective bargaining activities." *Thompson*, 972 F.3d at 813. The Board has negotiated a CBA with the Association and that CBA does not allow individual employees to represent themselves at arbitration. The Board listened to appellant as the CBA required at Level One and Level Two of the grievance process. Under *Smith* and *Knight*, the Board is under no obligation to listen to appellant at the arbitration level.

In *Knight*, the effect of the ruling was that the government was not obligated to listen to an individual union member. Under *Thompson*, the effect of the ruling was that an individual must be subjected to the

CBA and exclusive union representation. In this case, the CBA creates an exclusive arbitration representation clause preventing individuals from pursuing their own arbitration with their own counsel. The effect is of the same nature as in *Knight* and *Thompson* - a subordination of the right to act as an individual within a CBA negotiated between a public sector union and a public employer.

As discussed above, arbitration is a contractual means of resolving grievances and is part of the bargaining relationship between the employer and the union. R.C. 4117.09(B)(1) requires that public employers and unions execute a written CBA which "[p]rovides for a grievance procedure which may culminate with final and binding arbitration of unresolved grievances * * *." The grievance procedure is a negotiated procedure between the Association and the Board and does not statutorily require binding arbitration. The right to arbitration is contractual and is not a statutory or constitutional right. To the extent that this CBA does contain a collectively bargained binding arbitration procedure, that procedure specifically requires that grievants submit their grievances to the Association and submit to Association representation.

Appellant frames this issue as though her constitutional rights supersede any interpretation of the CBA which would limit those rights. This characterization miscasts the question. Appellant cannot compel the Board to listen to her or her chosen representative. *See Knight, supra.* The CBA at issue does not violate appellant's right of association. *See*

Thompson, supra. Appellant has no constitutional right to counsel of her choosing at a contractually governed arbitration. *See* R.C. 4117.09; *In re AFSCME, Local 2312, supra.*

It is incongruous with the principles of collective bargaining for appellant to argue that she has rights to free speech and due process which entitle her to be represented by the counsel of her choosing at a proceeding which she herself is not legally entitled to initiate. It would be incongruous for appellant to possess a constitutional right to hire her own attorney for an arbitration proceeding which is an optional portion of a negotiated grievance procedure between the Association and the Board. Finally, it is incongruous for appellant to individually assert a right to enforce the CBA in arbitration, the result of which may well affect the rights of other Association members under the CBA.

Based on the holdings in *Knight*, *Smith*, and *Thompson*, we hold that the Association and the Board, through the CBA, have not infringed upon appellant's Constitutional rights.

For the forgoing reasons, appellant's assignments of error are without merit and the judgment of the Ashtabula Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, P.J.,

MARY JANE TRAPP, J.,

concur.

APPENDIX C

IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

CASE NO. 2021 CV 34

[Filed October 5, 2021]

BARBARA KOLKOWSKI,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ASHTABULA AREA TEACHERS' ASSOCIATION, et al.,	)
	)
Defendants.	)

JUDGE: DAVID A. SCHROEDER
MAGISTRATE: APRIL R. GRABMAN

JUDGMENT ENTRY

PROCEEDINGS:

1. Defendant Ashtabula Area City Schools Board of Education's Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Civ.R. 12(B)(1) and (6) and Memorandum in Support, filed July 9, 2021.

2. Defendants Ashtabula Area Teachers' Association and the Ohio Education Association Motion to Dismiss First Amended Complaint, filed July 12, 2021.

3. Plaintiff's Brief in Opposition to Ashtabula Area city School Board's Motion to Dismiss, filed July 27, 2021

4. Plaintiff's Brief in Opposition to AATA and the OEA's Motion to Dismiss, filed July 28, 2021.

5. Defendants Ashtabula Area Teachers' Association and the Ohio Education Association Reply in Support of Motion to Dismiss First Amended Complaint, filed August 10, 2021.

6. Defendant Ashtabula Area City Schools Board of Education's Reply Brief in Support of the Motion to Dismiss filed August 10, 2021.

7. Plaintiff's Sur-Reply Opposing Motion to Dismiss filed September 2, 2021.

I. INTRODUCTION

This matter involves a complaint for declaratory and injunctive relief, which the Plaintiff initiated for being denied a request to retain her own counsel to represent her at a union initiated arbitration over an employment dispute. Plaintiff, a guidance counselor with the Ashtabula Area City Schools, filed a grievance over a change in her job duties in September of 2020. Plaintiff followed the union process of filing a grievance with Defendant Ashtabula Area School Board (hereinafter "the Board"). Plaintiff is not a member of

Defendant Ashtabula Area Teachers' Association (hereinafter "AATA" or "the union"). However, it is undisputed that she is employed pursuant to the terms of a Collective Bargaining Agreement (hereinafter "CBA"), and is therefore a member of the bargaining unit exclusively represented by the AATA.

The Court has summarized the grievance process into five steps: (1) Level 1 Grievance; (2) Level 2 Grievance; (3) union review of the grievance for arbitration; (4) if determined by the union to be arbitration worthy, then demand for arbitration; and finally, (5) arbitration. According to all parties involved, there were no issues in steps one or two of the process. Steps three and four are the focus of the complaint herein.

After receiving a denial of her grievance at both Level 1 and Level 2, Plaintiff requested the AATA demand arbitration on her behalf. After review, the AATA determined that the grievance was arbitration worthy and proceeded to make a demand to the Board for arbitration. Step five of the process, the actual arbitration, has yet to occur. Plaintiff filed the within action seeking declaratory and injunctive relief to allow to her to retain her own counsel to represent her at the arbitration.

Plaintiff alleges that she has a constitutional right to be represented by counsel of her choosing during the arbitration. The Board, the AATA, and the Ohio Department of Education (hereinafter "OEA") argue almost all of the same points as to why they believe Plaintiff's claims should be dismissed. First, Defendants argue that this is not a constitutional

question, but a contract law question. They believe this comes down to the specific language in the CBA, which is binding on Plaintiff. Their position is that under the CBA the union provides the representation for arbitration, and that Plaintiff has no right to retain her own counsel to represent her at arbitration. Defendants also argue that once Plaintiff asked for the AATA to become involved, the grievance was turned over to the union and Plaintiff lost standing. Finally, they argue that since this is a question regarding an issue with the CBA, the SERB has exclusive jurisdiction over this matter.

The Court has considered the arguments presented in the respective memoranda, particularly the legal authorities cited, and the pleadings herein. The Motions to Dismiss filed by the Defendants are well-taken.

II. LAW

A. CIV.R. 12(B)(6) FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Both Motions to Dismiss are brought under Civ. R. 12(B)(1) and Civ. R. 12(B)(6). Factors to be considered when deciding whether to grant injunctive relief, are (1) whether the party seeking injunctive relief is likely to succeed on the merits, (2) whether issuing injunctive relief will prevent irreparable harm for which there exists no adequate remedy at law, (3) whether and to what extent others will be injured by granting such relief, and (4) whether the public interest will be served by granting injunctive relief.

Cleveland v. Cleveland Elec. Illum. Co. (1996), 115 Ohio App.3d 1, 12, 684 N.E.2d 343. *DeRosa v. Parker*, 2011-Ohio-6024, ¶ 56, 197 Ohio App. 3d 332, 348, 967 N.E.2d 767, 779.

"A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted will only be granted where the party opposing the motion is unable to prove any set of facts that would entitle him to relief. *Korodi v. Minot* (1987), 40 Ohio App.3d 1, 3, 531 N.E.2d 318, 321. Indeed, before a court may dismiss an action under this rule, " * * * it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus. To make this determination, the court is required to interpret all material allegations in the complaint as true and admitted." *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641, 644 (1989)

B. CIV.R. 12(B)(1) LACK OF SUBJECT MATTER JURISDICTION

"The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641, 644 (1989).

III. ANALYSIS

A. SERB Has Exclusive Jurisdiction

Defendants argue that Plaintiff's claims should be dismissed because they arise out of certain rights that are enumerated in R.C. Chapter 4117. It is well established in Ohio that if an employee is seeking relief related to rights granted by R.C. Chapter 4117, then exclusive jurisdiction belongs to the SERB. Defendants refer to specific instances in Plaintiff's Complaint in which she references rights enumerated in R.C. 4117.03(A)(5) and R.C. 4117.10(A)(1).

Plaintiff argues that the SERB does not have exclusive jurisdiction because this is a constitutional and civil rights claim. Plaintiff claims that she is asserting a right that is independent of R.C. Chapter 4117. *See* First Amended Complaint at pg. 4. Plaintiff relies on two Ohio Supreme Court cases to support her argument. First is *Franklin Cty. Law Enf't Ass'n v. Fraternal Order of Police, Capital City Lodge No. 9.* 59 Ohio St.3d 167, 171, 572 N.E.2d 87, 91 (1991). The Court in *Franklin* stated, "Thus, as a matter of jurisdiction, if a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may properly be heard in common pleas court. However, if a party asserts claims that arise from or depend on the collective bargaining rights created by R.C. Chapter 4117, the remedies provided in that chapter are exclusive. Of course, even if a common pleas court has jurisdiction, R.C. 4117.10(A) in some cases may preempt the party's independent claim." *Id.*

Second is *Gibney v. Toledo Bd of Educ.* 40 Ohio St.3d 152, 156, 532 N.E.2d 1300, 1305 (1988). The Court in *Gibney* held, "Based on the foregoing, it is our view that the Supreme Court has rejected the use of exhaustion requirements in state-court Section 1983 actions unless Congress has provided otherwise. Furthermore, by imposing an exhaustion requirement on those filing Section 1983 actions in our state courts, such as plaintiffs in the case at bar, we would be forcing such civil rights victims to comply with a requirement that is entirely absent from civil rights litigation of this sort in federal courts." *Id.*

This Court believes that both parties are correct to an extent. There is no question that some of Plaintiff's claims are asserted specifically pursuant to rights under R.C. Chapter 4117. *See* First Amended Complaint at pg. 5, paragraph 26. However, Plaintiff is also making an argument that her being denied the right to retain counsel is a violation of her constitutional rights. This Court will not entertain any of Plaintiff's claims filed pursuant to R.C. Chapter 4117. As stated previously, it is well settled law in Ohio that the SERB has exclusive jurisdiction over those matters. This Court will analyze further Plaintiff's claims that her First and Fourteen Amendment rights have been violated.

B. CONTRACT v. CONSTITUTION

The pertinent part of the CBA contains the following language:

Level Four: Arbitration
In these proceedings, the aggrieved **shall** be

> represented by the Association. Each party shall have the right to subpoena witnesses. The decision of the arbitrator shall be binding on both parties. The parties shall equally share the expenses of the arbitrator. Each, however, shall be responsible for any additional expenses incurred including fees and expenses of its representatives.

CBA at pg. 75-76. Then further down on pg; 76, the contract continues with the following pertinent language:

> F. Rights of the Grievant and the Association
> 1. **The grievant has the right to Association representation at all meetings and hearings involving the grievance.**
> 2. The Association has the exclusive right to be present for the adjustment of any and all grievance . Any remedy must be with the agreement of the Association.
> 3. It shall be the exclusive right of the Association to issue forms to the grievant.
> 4. **The Association shall have the exclusive right to determine whether to proceed to the arbitration step of the procedure.**
> 5. The Association shall receive copies of all communications in the processing of grievances.

Defendants' position is that this language in the CBA governs the grievance procedure and arbitration proceedings at issue, and that this case is an application of contract law, not a question of a statutory right violation. Defendants make it a point to highlight that this language in the CBA was produced

as a result of negotiations between the AATA and the Board.

Plaintiff's position is that this clause in the agreement constitutes compelled representation in violation of her constitutional rights to free speech and free association, as well as her right to retain counsel. Plaintiff also argues that she has a statutory right pursuant to R.C. 4117.03(A)(5). As stated above, it is this Court's position that all claims brought pursuant to R.C. Chapter 4117 belonging exclusively to the SERB. This then brings us to Plaintiff's argument that her constitutional rights have been violated.

Defendants rely heavily on three main cases to support their position that Plaintiff's First and Fourteenth Amendment Rights have not been denied or violated. The first two cases are *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984), which relied on *Smith v. Arkansas State Hwy. Emp., Local 1315*, 441 U.S. 463, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979). The Court in *Smith* found that the Arkansas State Highway Commission did not violate the First Amendment rights with a grievance process that required all grievances to be submitted directly to the designated employee representative, rather than the union as a whole, prior to being considered by the commission. *Id.* The employee union filed suit to allege the commission was violating their individual union member rights by mandating that the grievances be submitted directly to the employee representative. *See id.* The U.S. Supreme Court held that the government was allowed to decide who they would listen or respond to when it came to

employee grievances. *See id.* "... the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." *Id.*

Knight involved a group of faculty instructors at a Minnesota college who were not members of the union that challenged the constitutionality of the exclusive representation clause to "meet and confer" that was authorized by the Minnesota Public Employment Relations Act. *See Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984). More specifically, the Minnesota Statute ... "grants professional employees, such as college faculty, the right to 'meet and confer' with their employers on matters related to employment that are outside the scope of mandatory negotiations." *Id.* Further, the statute requires these professional employees select someone to represent them at these sessions with their employer. *Id.* "If professional employees in an appropriate bargaining unit have an exclusive representative to 'meet and negotiate' with their employer, that representative serves as the 'meet and confer' representative as well. Indeed, the employer may neither 'meet and negotiate' nor 'meet and confer' with any members of that bargaining unit except through their exclusive representative." *Id* at 274-275. The group of faculty members argued that this "exclusive representation" part of the statute violated their First and Fourteenth Amendment Rights. *Id.* The U.S. Supreme Court rejected this argument. *Id.* The Court, relying on *Smith*, held:

> Appellees' speech and associational rights, however, have not been infringed by Minnesota's restriction of participation in "meet and confer" sessions to the faculty's exclusive representative. The state has in no way restrained appellees' freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative. Nor has the state attempted to suppress any ideas.
>
> It is doubtless true that the unique status of the exclusive representative in the "meet and confer" process amplifies its voice in the policymaking process. But that amplification no more impairs individual instructors' constitutional freedom to speak than the amplification of individual voices impaired the union's freedom to speak in *Smith v. Arkansas State Highway Employees, Local 1315*, supra. Moreover, the exclusive representative's unique role in "meet and negotiate" sessions amplifies its voice as much as its unique role in "meet and confer" sessions, yet the Court summarily affirmed the District Court's approval of that role in this case. Amplification of the sort claimed is inherent in government's freedom to choose its advisers. A person's right to speak is not infringed when government simply ignores that person while listening to others.

Id. While the case at hand is slightly factually different in the sense that Plaintiff wants her own counsel at arbitration and not a "meet and confer" session, *Knight*

makes clear that having a designated "exclusive representative" is not an infringement on ones ability of freedom of speech or association. *See id.* In the case at hand, at no point was Plaintiff denied the ability to speak to or the ability to be present at the proceeding. To the contrary, she was to be present at the arbitration and have a representative provided through the union. Further, the CBA provides that each party shall have the right to subpoena witnesses for the arbitration.

Even more factually similar to the case at hand is a recent case that arose out of the Sixth Circuit Court of Appeals, *Thompson v. Marietta Education Assn.*, 972 F.3d 809, 813-14, cert. denied sub nom. *Thompson v. Marietta Ed. Assn.*, 2021 WL 2301972. *Thompson* involved a high school Spanish Teacher employed by Marietta High School. *See id.* "The Marietta Board of Education governs the town's public schools. And the Marietta Education Association, a teacher's union, serves as the exclusive bargaining representative for the school district's employees." *Id.* at 812. Thompson was not a member of the association, and she ... "sued the Marietta Education Association and the Marietta Board of Education, arguing that Ohio's scheme of exclusive public-sector union representation violates the First Amendment." *Id.* Specifically, she argued that she is not a member of the association and did not agree with its policies or beliefs. *Id.* However, under R.C. 4117.05(A), the union was her "exclusive representative" for purposes of bargaining with her employer. *Id.*

The Court held in *Thompson*:

> *Knight* controls here. If allowing exclusive representatives to speak for all employees at "meet and confer" sessions does not violate the First Amendment, we see no basis for concluding that the result should be different where the union engages in more traditional collective-bargaining activities. It appears that every other circuit to address the issue has agreed. See, e.g., *Reisman v. Associated Faculties of Univ. of Maine*, 939 F.3d 409 (1st Cir. 2019); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861 (7th Cir. 2017); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016) (summary order). Thompson responds, arguing that *Knight* did not involve a compelled-representation challenge. But in *Knight*, the Court framed the question presented in broad terms: whether the "restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees within the bargaining unit who are not members of the exclusive representative and who may disagree with its views." 465 U.S. at 273, 104 S.Ct. 1058. Even assuming plaintiff's compelled-representation theory is technically distinguishable, such a cramped reading of *Knight* would functionally overrule the decision. And that is something lower court judges have no authority to do.

Id. The Court went on to later state:

Thompson's second claim fares no better. She argues that Ohio's system of exclusive representation unconstitutionally burdens her First Amendment right to engage with the government through speech, association, and petition. Thompson's theory seems to be that by allowing the Marietta Education Association to serve as her exclusive representative, Ohio unconstitutionally tilts the playing field against her speech. But this argument conflicts with two Supreme Court decisions. First, we consider *Smith v. Arkansas State Highway Employees*, Local 1315, 441 U.S. 463, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979) (per curiam). There, the Court held that the First Amendment imposes no "affirmative obligation on the government to listen, to respond[,] or ... [to] bargain." *Id.* at 465, 99 S.Ct. 1826. And since the government has no obligation to bargain with Thompson, it is difficult to see how the government's decision to bargain with someone else violates her rights.

Second, in *Knight*, the Supreme Court recognized that it was "doubtless true that the unique status of the exclusive representative ... amplifies its voice in the policymaking process." 465 U.S. at 288, 104 S.Ct. 1058. But amplification "is inherent in government's freedom to choose its advisers." *Id.* And a "person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.* Thus, *Knight* again forecloses Thompson's claim.

> This case presents First Amendment questions of considerable importance. But they are controlled by a fair reading of the Supreme Court's precedents.

Id.

As the Court held in *Thompson*, the Supreme Court's precedent is pretty clear on this issue. Based on this Court's reading of *Knight*, *Smith*, and *Thompson*, Plaintiff has not had any constitutional rights violated by being limited to the representative provided by the union. The government, or the Board in this matter, has an obligation under the CBA to participate in arbitration. The Board is not saying they won't participate in arbitration, they are saying they won't participate in arbitration with counsel of Plaintiff's choice. The Board has the right to choose who they will listen to and bargain with according to established past precedent set by the higher courts. Just as *Knight* foreclosed Thompson's claim, *Knight, Smith* and *Thompson* foreclose Plaintiff's First and Fourteenth Amendment claims here

This leads to the next question, is arbitration different than a "bargaining meeting" or a "meet and confer session". Plaintiff also argues that she has a constitutional and statutory right to her own counsel pursuant to the precedent of *Powell v. State of Ala.*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) and *Does v. Munoz*, 507 F.3d 961, 963. *Powell* recognizes an individuals constitutional right to be represented by counsel in a matter filed in a court of law. To determine what type of proceeding arbitration is, it is important to look at how one can proceed to arbitration.

As stated above, the right to arbitration is highlighted in the CBA that was binding on Plaintiff, which is not in dispute. R.C. 4117.09(A)(B)(1), provides the following:

> (A) The parties to any **collective bargaining agreement shall reduce the agreement to writing and both execute it.**
> (B) The **agreement shall contain** a provision that:
> (1) Provides for a grievance procedure which **may culminate with final and binding arbitration of unresolved grievances,** and disputed interpretations of agreements, and **which is valid and enforceable under its terms when entered into in accordance with this chapter.** No publication thereof is required to make it effective. A party to the agreement may bring suits for violation of agreements or the enforcement of an award by an arbitrator in the court of common pleas of any county wherein a party resides or transacts business.

A plain reading of the statute makes it clear that the right to arbitration is a contractual right that is outlined in each individual CBA, and that it is not a statutory right that a public sector employee is automatically entitled to. Again, the CBA at-hand states that the the aggrieved **shall** be represented by the Association at the arbitration process. A similar exclusive representation clause was at issue in *Williams v. McMackin*, 3rd Dist. Marion No. 9-91-43,

1992 WL 82529, *1. The CBA at issue in that case provided:

> The Employer recognizes the Union as the sole and exclusive bargaining representative in all matters establishing and pertaining to wages, hours, and other terms and conditions of employment for all full and part-time employees * * *. [Emphasis added.]
> That agreement further provides that an employee is entitled to the "presence of a union steward" upon request at a predisciplinary hearing if he reasonably believes that the interview may be used to support disciplinary action against him.

Id. While the Court found that the employee has a property interest in his/her employment and is entitled to certain due process rights, they still did not find that an employee is entitled to private counsel at such a hearing. *See id.* The Court stated:

> There is no evidence in the record to suggest that appellee in this case requested the presence of a union steward at his predisciplinary hearing. Instead, he claimed that he had a right to have his private counsel present. Nothing in the collective bargaining agreement gives appellee such a right.

Id. Because arbitration is a contractual right governed by the CBA, there is no reason to treat it any different than a bargaining meeting, meet and confer session , or a pre-disciplinary hearing. To put it simply, the arbitration process, as well as an employee's rights for

arbitration, are governed by the CBA. There is nothing in the CBA in the case-at-hand that gives Plaintiff, or any other employee governed by this CBA, the right to have private counsel present at arbitration.

C. Plaintiff Lacks Standing

Finally, Defendants argue that Plaintiff did not have right to retain her own counsel because the grievance was not hers to bring to arbitration, but the unions. Plaintiff's position is that the grievance was hers, and not the unions. Plaintiff argues that when she requested the union to review her grievance for arbitration, that she preserved her right under *Johnson v. Metro Health Med. Ctr. (Dec. 20, 2001)* to have her own representation. While Plaintiff certainly says this in her letter to the AATA dated November 5, 2020, this Court does not agree with Plaintiff's application of *Johnson* that she can do so. The Court in *Johnson* found:

> Johnson correctly argues that public employees have a statutory right under R.C. 4117.03(A)(5) to "present grievances and have them adjusted, without intervention of the bargaining representative, * * * ." However, we interpret this right to exist only before the employee invokes union representation. Once the employee chooses union representation, that employee lacks standing on all matters including an appeal.
>
> **This conclusion recognizes the necessity of subordinating the individual interests of a complainant to the collective good of a**

> **greater body.** A union is no more than its members. **By choosing to pursue this matter with the benefit of union representation under the collective bargaining agreement Johnson sacrificed her right as a party in interest, and the union obtained the right to pursue this matter for the benefit of all employees under the collective bargaining agreement. Johnson's union, not Johnson, was the sole party in interest adverse to MetroHealth.**
>
> This conclusion further recognizes a distinction between a party in interest and an interested party. **Clearly Johnson remained interested in the arbitration decision; however, when she asked for her union's help, she called upon the collective power of her fellow members, and ceased to stand alone. The necessary and just price paid by Johnson was subordination of her individual rights to those of her fellow union members.** Accordingly, we extend our decision in Stafford and Coleman to the case at hand.

Id. Plaintiff argues that the CBA gives her the authority to pursue arbitration because arbitration is demanded by the aggrieved person "if the bargaining unit member remains aggrieved". The Court does not interpret this phrase the same as Plaintiff. Looking at the process chronologically, this is another factor or element that has to be completed **before** the matter is turned over to the union, not vise versa. This does not give her the final authority to demand arbitration.

Again, that right remains exclusive to the union. The CBA provides that the association shall have the exclusive right to determine whether to proceed to arbitration. Based on the reading of *Johnson*, there is nothing in the CBA at-hand that gives Plaintiff the right to demand arbitration through the union, while also preserving a right to private counsel for the aribtration. To do so would be to invoke the old saying, "to have your cake and eat it too."

Plaintiff also relies heavily on *Gaydosh v. Trumbull Cty.*, 11th Dist. No. 2016-T-0109, 2017-Ohio-5859, 94 N.E.3d 932. The Court in Gaydosh stated, "Second, we find Mr. Gaydosh lacks standing on this issue. The Ohio courts of appeals considering this issue have found that, once an employee subject to a collective bargaining agreement authorizes his or her union to pursue a grievance, the cause of action belongs to the union, and the employee lacks standing to prosecute the case." *Id.* at ¶ 23.

Plaintiff attempts to distinguish her claim from the claim in *Gaydosh* by arguing that she did not accept the Union's assistance. However, the Court finds quite to the contrary. By requesting the AATA's review of the grievance, she was in fact doing just that. The Court's reading of the CBA is that an aggrieved party is not entitled to demand arbitration without going through the AATA. This is a necessary and required step.

The concept and reasoning behind the terms placed in a CBA is important to understand, The Ohio Supreme Court in *Leon v. Boardman Twp.*, 100 Ohio St.3d 335, 2003-Ohio-6466, 800 N.E.2d 12, provided the following insight:

The concepts developed in these cases are in large part the product of a synthesis of labor relations policy and contract law. Sound labor policy disfavors an individualized right of action because it tends to vitiate the exclusivity of union representation, disrupt industrial harmony, and, in particular, impede the efforts of the employer and union to establish a uniform method for the orderly administration of employee grievances. *See Fleming*, supra, 255 N.J.Super. at 140–141, 604 A.2d 657; *Melander*, supra, 194 Cal.App.3d at 547, 239 Cal.Rptr. 592. *See, also, Coleman v. Cleveland School Dist.* (2001), 142 Ohio App.3d 690, 692–693, 756 N.E.2d 759. But while this policy may serve as a justification for permitting, or even presuming, the contractual subordination of individual employee rights under a collective bargaining agreement, it does not go so far as to require such a result. **There is nothing in the national or state labor policy that precludes a collective bargaining agreement from giving the arbitral right to the aggrieved employee, rather than to his or her union.** *See, e.g., Vaca v. Sipes*, supra, 386 U.S. at 184, 87 S.Ct. 903, 17 L.Ed.2d 842, fn. 10 ("Occasionally, the bargaining agreement will give the aggrieved employee, rather than his union, the right to invoke arbitration."); *Retail Clerks Internatl. Assn., Local Unions Nos. 128 & 633 v. Lion Dry Goods, Inc.* (C.A.6, 1965), 341 F.2d 715, 720–721 (despite national policy favoring arbitration, only individual employees, and not the union, may arbitrate grievances

> under a collective bargaining agreement that gives the right of arbitration to "any individual employee who may have a grievance"). Thus, the proposition that emerges from these cases is that **an aggrieved worker whose employment is governed by a collective bargaining agreement that provides for binding arbitration will generally be deemed to have relinquished his or her right to act independently of the union in all matters related to or arising from the contract, except to the limited extent that the agreement explicitly provides to the contrary.**

Id. at ¶ 17. The bottom line here is that the CBA that is binding upon Plaintiff does not give her, or any other employee employed pursuant to this CBA, the right to demand arbitration. The right to demand arbitration belongs to the union. In Plaintiff's own grievance summaries, she lays out issues that may effect other guidance counselors employed in the district. So while Plaintiff certainly remains an interested party in the arbitration, she is no longer a party in interest. The union, not Plaintiff, is the sole party in interest adverse to the Board for purposes of arbitration. Based on *Johnson*, *Gaydosh*, and *Leon*, this Court finds that Plaintiff lacks standing because she is not a party to the arbitration.

IV. CONCLUSION

Analyzing all of the pleadings, motions, responses, and exhibits submitted in this matter, the Court finds that Plaintiff is unable to prove any set of facts that

would entitle her to relief. This Court does not have jurisdiction to hear claims related to Plaintiff's statutory rights enumerated in R.C. Chapter 4117. Further, after careful analysis of well settled precedent, the Court finds that Plaintiff is unable to prove any set of facts that would entitle her to the relief requested. Plaintiff is not suffering irreparable harm because she, while not a party to the arbitration herself, is still entitled to be present and have representation provided by the AATA.

The public policy in honoring what is in the CBA is vital to so many employment contracts and the public interest as a whole. Numerous benefits are provided to employees that have the benefit of a union because of the specific bargaining power that a union has with employers. To simply ignore the language of the CBA would strip employers and unions of one of their most essential functions. This Court is not willing to do that.

ORDER:

1. Defendant Ashtabula Area City Schools Board of Education's Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Civ.R. 12(B)(1) and (6) and Memorandum in Support, filed July 9, 2021 is **GRANTED**.

2. The Defendants Ashtabula Area Teachers' Association and the Ohio Education Association Motion to Dismiss First Amended Complaint, filed July 12, 2021 is **GRANTED**.

THIS IS A FINAL APPEALABLE ORDER. Within three (3) days of the entry of this judgment upon the journal, the Clerk of Courts shall serve notice

in accordance with Civ. R. 5, of such entry and the date upon every party who is not in default for failure to appear and shall note the service in the appearance docket.

The Clerk is directed to serve notice of this judgment and its date of entry upon: Jay R. Carson, Esq.; Ira Mirkin, Esq.; Casey P. Pitts, Esq.; David Pontius, Esq.

/s/ David A. Schroeder
DAVID A. SCHROEDER, JUDGE
18

APPENDIX D

IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

CASE NO. 2021 CV 00034

JUDGE DAVID A. SCHROEDER

[Dated June 3, 2021]

BARBARA KOLKOWSKI,

Plaintiff,

v.

ASHTABULA AREA TEACHERS ASSOCIATION,

and

ASHTABULA AREA CITY SCHOOL DISTRICT,

and

OHIO EDUCATION ASSOCIATION,
225 East Broad Street
Columbus, OH 43216

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NATURE OF THE ACTION

1. Plaintiff Barbara Kolkowski is a guidance counselor in the Ashtabula Area City School District ("the District"). Although she is not a member of the Ashtabula Area Teachers' Association ("AATA") or the Ohio Education Association ("OEA"), she is employed pursuant to the terms of a Collective Bargaining Agreement ("CBA") and by law, is a member of the bargaining unit exclusively represented by the Ashtabula Area Teachers' Association.

2. In September of 2020, a dispute arose between Ms. Kolkowski and the District relating primarily to a supplemental contract and her duties. Ms. Kolkowski followed the grievance process set forth in the CBA. When she did not obtain a favorable resolution in the first two phases of the contractual grievance procedure, she told the Union that she wanted to demand arbitration of her grievance pursuant to the CBA. Ms. Kolkowski specified, however, that she wanted to use (and pay for) her own counsel to represent her through the arbitration process. The Union authorized the submission of her arbitration claim but declined to allow her to use her own counsel.

3. Ohio Revised Code 4117.03 (A)(5) provides that public employees have the right to "[p]resent grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and

as long as the bargaining representatives have the opportunity to be present at the adjustment." R.C. 4117.03(A)(5).

4. In addition to Ohio's statutory guarantee, the AATA and the District's interpretation of R.C. 4117.03(A)(5) and the CBA would deprive Ms. Kolkowski her rights to free speech and association as guaranteed by the First and Fifth Amendments to the U.S. Constitution and Article I, § 11 of the Ohio Constitution, and her qualified right to choose her own counsel recognized by Ohio and Federal Courts. *See Kitchen v. Aristech Chemical*, 669 F. Supp. 254, 257 (1991 W.D. Ohio) (noting civil litigant's qualified right to counsel of his own choice); *155 N. High, Ltd. v. Cincinnati Ins. Co.*, 72 Ohio St.3d 423, 429 (1995) (recognizing "party's right to be represented by his or her chosen counsel"); *Relizon Co. v. Shelly J. Corp.*, 6th Dist. Lucas No. L-02-1377, 2004-Ohio-6884, ¶49 ("The right to retain counsel in civil litigation is implicit in the concept of Fifth Amendment Due Process rights"); *Anderson v. Sheppard*, 856 F.2d 741, 748 (6th Cir. 1988) ("a civil litigant's right to retain counsel is rooted in fifth amendment notions of due process . . . .")

PARTIES AND VENUE

5. Plaintiff Barbara Kolkowski is resident of Leroy Township, in Lake County, Ohio. Ms. Kolkowski is employed as a guidance counselor by Defendant Ashtabula Area City School District ("the District").

6. Defendant Ashtabula Area City School District is a City school district created pursuant to R.C. 3311.02 and located in Ashtabula County, Ohio.

7. Defendant Ashtabula Area Teachers Association ("the AATA") is a labor union representing the District's teaching employees. The Union's headquarters is located in Ashtabula County, Ohio. The Union is affiliated with the Ohio Education Association, an Ohio teachers' union, and the National Education Association, a national teachers' union.

8. Defendant Ohio Education Association ("the OEA") is a statewide teachers' union. It is the parent union of the AATA. The OEA's website explains that "OEA is comprised of 748 local affiliates." The members and leadership of AATA are members of the OEA by virtue of their membership in the AATA. The OEA sets policy and procedure and directs its affiliates, like the AATA, on issues relating to nonmember representation and the prosecution of grievances.

9. All of the acts or omissions set forth in this Complaint occurred in Ashtabula County, Ohio.

FACTS

10. Chapter 4117 of the Ohio Revised Code creates a collective bargaining system for public employees in Ohio. Ohio Rev. Code Ann. § 4417.01, et seq.

11. As a guidance counselor in public school district, Ms. Kolkowski is a public employee governed by Chapter 4117.

12. On August 1, 2020, the Union entered into an amended Collective Bargaining Agreement ("CBA") with the District covering the period of August 1, 2018 – July 31, 2021. A copy of the CBA is attached to this Complaint as Exhibit A.

13. Ms. Kolkowski is not a member of the AATA or the OEA. She is, however, a member of the bargaining unit as defined by Article 1, Section C of the CBA and created pursuant to Ohio Rev. Code Ann. § 4117.05.

14. Accordingly, by statue, the Union is her exclusive representative for purposes of bargaining with her employer. Ohio Rev. Code Ann. § 4117.04(B).

15. The CBA to which Ms. Kolkowski is bound contains a multi-level procedure to address employee grievances. See CBA, Article XVI.

16. On September 16, 2020, Ms. Kolkowski initiated the contractual grievance procedure relating to a dispute over a supplemental contract and the duties assigned to her by filing a "Level One" request to have her grievance adjusted.

17. Ms. Kolkowski has thus far represented herself in pursuing her grievance.

18. On September 25, 2020, the District denied her grievance at Level 1.

19. Ms. Kolkowski, again, representing herself and without assistance from the AATA, sought a "Level Two" review of her grievance on September 28, 2020. On October 20, 2020, that, too, was denied.

20. Under the CBA, after a Level Two denial, an employee may demand mediation (Level Three) or Arbitration (Level Four) relating to the grievance. CBA, Art. XVI (C).

21. On November 5, 2020, pursuant to Article XVI (C), Ms. Kolkowski demanded that the AATA

submit a demand for arbitration against the District with the American Arbitration Association (AAA). A copy of Ms. Kolkowski's Demand is attached as Exhibit B.

22. Ms. Kolkowski also notified the Union that she was invoking her right to retain her own counsel (at her own expense) to arbitrate the grievance, rather than relying on a representative—who would not necessarily be a licensed attorney—that the AATA would provide to her.

23. Ohio Revised Code § 4117.03 (5) provides that public employees such as Ms. Kolkowski have a right to "[p]resent grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of *the collective bargaining agreement* then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment." *(Emphasis added).*

24. On November 25, 2020, the AATA responded by email to Ms. Kolkowski's counsel stating that it would submit the grievance to arbitration but would not permit Ms. Kolkowski to be represented by her own counsel. A copy of the email is attached as Exhibit C.

25. On December 14, 2020, the AATA submitted the grievance for arbitration to the AAA.

26. Pursuant to her rights under R.C. 4117.03 (A)(5), R.C. 4117.10 (A)(1)(a)as well as her rights to free speech and free association under the First and Fourteenth Amendments to the U.S. Constitution and Art. I, § 11 of the Ohio Constitution,

Ms. Kolkowski wants to choose her own counsel, to make her own arguments, and present her grievance in arbitration without the intervention of the AATA or OEA.

27. Moreover, Ohio and federal courts and the U.S. Supreme Court have recognized that litigants have "a right to representation by counsel of his or her choice" rooted in the Due Process Guarantees of the Fifth and Fourteenth Amendments. *See A.B.B. Sanitec W., Inc. v. Jeffrey J. Weinsten*, 8th Dist. Cuyahoga No. 88258, 2007-Ohio-2116, ¶25; *155 N. High, Ltd. v. Cincinnati Ins. Co.*, 72 Ohio St.3d 423, 429, 650 N.E.2d 869, 873 (1995); *Relizon Co. v. Shelly J. Corp.*, 6th Dist. Lucas No. L-02-1377, 2004-Ohio-6884, ¶49 ("The right to retain counsel in civil litigation is implicit in the concept of Fifth Amendment Due Process rights"); *Anderson v. Sheppard*, 856 F.2d 741, 748 (1988) ("a civil litigant's right to retain counsel is rooted in fifth amendment notions of due process . . . .").

28. The CBA defines "An aggrieved person" as the "person making the claim for himself/herself or for the Association . . . ." Likewise, the CBA defines "a party in interest" as "the person making the claim and any person who may be required to take action or against whom action might be taken in order to resolve the claim." CBA Art. XVI, A(3)-(4)(emphasis added). Under the CBA's plain language, Ms. Kolkowski is both the "aggrieved person" and a "party in interest." Further, as the CBA's use of the disjunctive conjunction "or" contemplates an aggrieved person like Ms. Kolkowski pursuing the claim on her own behalf.

29. The right to use the grievance procedure set forth in the CBA is thus a personal right belonging to the employee, not a right of AATA or the OEA.

30. The AATA's and the District's interpretation of 4117.03(A)(5) and her the rights under the CBA conflicts with what she believes to be a plain reading of the statute and the CBA, as well as her rights under the U.S. and Ohio Constitutions. Ms. Kolkowski accordingly seeks to have that question of construction determined before she proceeds with any arbitration.

31. Ms. Kolkowski is attempting to avail herself of rights under the District's and AATA's CBA, and to conform those rights to her constitutional rights. She does not allege an Unfair Labor Practice under R.C. 4117.11 due to such issue not being ripe at this time.

COUNT ONE: DECLARATORY JUDGMENT
42 U.S.C. §1983 and R.C. 2721.03

32. Ms. Kolkowski restates the allegations of Paragraphs 1 through 31 and incorporates here as if fully re-written.

33. Ohio Revised Code § 2721.03 provides that "[s]ubject to division (B) of section 2721.02 of the Revised Code, any person interested under a deed, will, written contract, . . . or other legal relations are affected by a constitutional provision, statute, . . . may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status,

or other legal relations under it." Ohio Rev. Code Ann. § 2721.03.

34. Further, 42 U.S.C. §1983, through 28 U.S.C. §2201 et seq., provide for declaratory and injunctive relief in protection of constitutional rights.

35. A definite, concrete, and live controversy exists between Ms. Kolkowski and the Defendants regarding the construction of the CBA, the construction of R.C. 4117.03 (A)(5), and Ms. Kolkowski's constitutional rights. Specifically, Ms. Kolkowski seeks to choose her own legal representation in the arbitration pursuant to her rights under the Due Process Clause, and the Defendants interpret the CBA to give her that right.

36. The First Amendment to the U.S. Constitution, and Art. I, § 11 of the Ohio Constitution, Ms. Kolkowski has the right to choose her own representative for the purpose of adjusting her grievance, the right to speak freely through that representative, the right to associate with that representative, and the right against being compelled to associate with a representative not of her choosing. In addition, the right to choose one's own legal counsel in civil litigation is a fundamental right under the Due Process Clause

37. Further, Article I, Section 16 of the Ohio Constitution provides that "All courts shall be open, and every person, for an injury done to him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

38. Ohio courts have recognized that a member of a bargaining unit, subject to a collective bargaining agreement, has a right to choose his or her own counsel in an arbitration proceeding under that agreement, provided that the bargaining unit member has not accepted the union's representation.

39. Under the rule first articulated in *Johnson v. Metro Health Medical Centr.*, 8th Dist. Cuyahoga No. 79403, 2001 WL 1685585, (Dec. 20, 2001), if Ms. Kolkowski accepts the AATA's representation at the pending arbitration, she will be deemed to have waived her rights to choose her own counsel and surrendered the right to pursue her grievance to the union. *Id.* at * 2.

40. In addition, the AAA Employment Arbitration Rules, which govern arbitrations under the CBA provide that "[a]ny party may be represented by counsel or other authorized representatives." Rule 19, AAA Employment Arbitration Rules and Mediation Procedures, Revised October 1, 2017.

41. Further, to the extent that the CBA purports to deny Ms. Kolkowski her right to choose her own counsel in the CBA arbitration violates her First and Fifth Amendment rights under the law, and that provision is substantively unconscionable on the basis that it unfairly stacks the deck against her in any arbitration proceeding.

42. Specifically, while the CBA would require the AATA or OEA to provide "representation" to Ms. Kolkowski, it does not require the AATA or OEA to

provide Ms. Kolkowski with a licensed attorney to represent her in the arbitration proceedings.

43. On information and belief, based on the prior statements and practice of the District and the AATA, inmost arbitrations under the CBA, the AATA does not provide the grievant with a licensed attorney, but rather with a "labor representative." The Board, conversely, is usually represented by counsel.

44. This creates a substantively unfair playing field in an adjudicatory proceeding, where the Board is represented by legal counsel but the grievant is not.

45. Accordingly, Ms, Kolkowski seeks a declaration from this court declaring those rights under the CBA, Ohio statute, and the U.S. and Ohio Constitutions.

COUNT TWO: INJUNCTIVE RELIEF PURSUANT TO 42 U.S.C. §1983

46. Ms. Kolkowski restates the allegations of Paragraphs 1 through 45 and incorporates them here as if fully re-written.

47. Pursuant to this Court's equitable powers, Ms. Kolkowski seeks a preliminary and permanent injunction enjoining the Defendants from requiring her to accept the AATA's representative as her representative in the arbitration and compelling the arbitration of her grievance with her counsel of choice.

48. If Ms. Kolkowski is forced to arbitrate while represented by an individual (who, at the apparent sole discretion of the union, may or may not even be an attorney) she did not choose and does not control, she

will suffer irreparable harm in the form of the denial of her statutory and constitutional rights.

49. Indeed, current Ohio case law teaches that while courts recognize a bargaining unit member's right to be represented by the counsel of his or her choice, that right is waived if the bargaining unit member accepts representation from the union.

50. Ms. Kolkowski has no adequate remedy at law to prevent the deprivation of these rights if the arbitration goes forward and she is unable to choose her own counsel. She must either give up on her grievance or accept the union's representation and waive her rights to hire her own counsel.

COUNT THREE: ACTION FOR DAMAGES PURSUANT TO 42 U.S.C. §1983

51. Ms. Kolkowski restates the allegations of Paragraphs 1 through 47 and incorporates here as if fully re-written.

52. In denying Ms. Kolkowski her choice of counsel, the Defendants are purporting to act under color of state law. Specifically, the Union is acting in concert with the District, purport to be acting pursuant to the exclusive representation provisions of R.C. 4117.04-05. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 931, 102 S.Ct. 2744, 2750, 73 L.Ed.2d 482 (1982).Accordingly, for purposes of this action, Defendants are state actors, and are acting under color of law.

53. Ms. Kolkowski has well-recognized rights under the U.S. Constitution, specifically, rights of speech,

association, to choose her own counsel, and to due process of law.

54. In denying Ms. Kolkowski her choice of counsel and the constitutionally guaranteed freedom of speech and association that flows from that choice, the Defendants have violated Ms. Kolkowski's rights under the First, Fifth and Fourteenth Amendments.

55. Accordingly, pursuant to 42 U.S.C. § 1988, Ms. Kolkowski is entitled to nominal damages, to be determined by the Court, and her reasonable attorneys' fees and costs in this action.

WHEREFORE, Ms. Kolkowski seeks the following relief;

1. As to Count One, a declaration from this court declaring that she has the right to choose her own counsel for the purposes of arbitrating her grievance under the CBA, and to make her own choices in regard to that representation and the arguments raised without intervention by the AATA or OEA provided those adjustments are not inconsistent with the terms of the CBA;

2. As to Count Two, an injunction prohibiting the Defendants from requiring her to accept the AATA or OEA's representative as her representative in the arbitration, and compelling the arbitration to proceed with her counsel of choice; and,

3. Nominal damages, in an amount to be determined by the Court, and her reasonable costs and attorneys' fees;

4. Any other relief this Court deems just and equitable.

Respectfully submitted,

/s/ Jay Carson
Jay R. Carson (0068526)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(216) 642-3342
j.carson@buckeyeinstitute.org

Counsel for Plaintiff
Barbara Kolkowski

CERTIFICATE OF SERVICE

The foregoing Motion was served on Ira Mirkin, Green Haines Sgambati, 100 Federal Plaza East, Suite 800, Youngstown, Ohio 44503, imirkin@green-haines.com; and David Pontius, Andrews & Pontius, LLC, 4810 State Rd. Ashtabula, OH 44005,dpontius@andrewspontius.com, and Casey Pitts, Altschuler Berzon LLP, 177 Post St., Suite 300 San Francisco, CA 94108 by regular U.S. Mail, postage prepaid, and email, this 3rd day June, 2021.

/s/ Jay Carson
Jay Carson
Attorney for Plaintiff

APPENDIX E

CERTIFIED EMPLOYEES GRIEVANCE FORM

[Received September 28, 2020]

(Not to be completed until Level Two of procedure.) Grievance must be stated in clear and concise terms, specifying the alleged violation. Staple any attachments to this sheet.

Section of Contract Agreement allegedly violated
See page 2
(Article) (Section) (Page(s))

Statement of Grievance: See pages 2-10 and Exhibits A-E

Relief Sought: See pages 10-11

/s/ [Illegible Signature] 9/28/20
Signature of Grievance Chair Date

/s/ Barbara Kolkowski 9/28/20
Signature of Grievant Date

DISPOSITION BY ADMINISTRATOR AND REASONS THEREFOR

DATE OF LEVEL TWO MEETING OCT. 2, 2020

Disposition: GRIEVANCE DENIED

Reason: NO VIOLATION OF COLLECTIVE BARGAINING AGREEMENT

/s/ [Illegible Signature] 10-30-2020
Signature of Level Two Administrator Date

_____
Signature of Grievance Chair Date

DATE OF LEVEL THREE MEETING _____

Disposition: _____

Reason: _____
_____
_____

/s/ [Illegible Signature] [Illegible Date]
Signature of Level Three Administrator Date

_____
Signature of Grievance Chair Date

APPENDIX F

ASHTABULA AREA CITY SCHOOLS
CERTIFIED EMPLOYEES
DISCUSSION FORM
(Level One)

[Received September 16, 2020]

Name of Employee Barbara Kolkowski

Date of Discussion Meeting 9/21/20

Department Guidance

Employee's Concern: Attached are summaries of four concerns/issues (A-E) that form a level one grievance under the Collective Bargaining Agreement. I am filing this due to time constraints under the CBA to preserve my rights.

All parties must sign below to acknowledge that discussion transpired.

/s/ [Illegible Signature] 9/21/20
Signature of Level One Supervisor Date

/s/ Barbara Kolkowski 9/21/20
Signature of Employee Date

/s/ [Illegible Signature] 9/21/20
Signature of Association Representative Date

_____
Signature of Grievance Chair Date

Response: Grievance denied. No violation of the collective bargaining agreement. 9/25/20
(Response due within 5 days)

ASHTABULA AREA CITY SCHOOLS
GRIEVANCE # ____

Received 9/16/20 [Illegible Signature]

Grievance (Level One – date September 16, 2020):

Issues (Concern):

A) I received a Supplemental Contract a copy which is attached for extra duty days beyond the Teacher's schedule in the Collective Bargaining Agreement ("CBA") for performing my regular duties. This Supplemental Contract violates the CBA and AACS Board policy with respect to myself in that i) it contains a new clause that was added this year that forces me to give up tenure and property rights that I am entitled to as well and forces me to make an admission that is untrue and against my rights and interest; and ii) the Supplemental Contract is for 10-days when my Job Description clearly states that extra duty days for a Guidance Counselor in my position is to be 20-days extra duty for a total of 205-days, which is consistent with what the other 7-12 Guidance Counselors are being paid per Board policy and the CBA – this further is an abuse of discretion by the Board because it has capriciously or arbitrarily awarded larger supplemental contracts (in terms of extra duty days) to certain Guidance Counselors while not awarding the same supplement contract to me who performs the same (or more) duties (all Job Descriptions are the same).

B) I just learned within the last 30 days that my Job Description requires a 205-day term per year. AACS Board policy 3120.01 requires my Job Description to be reviewed with me upon starting my position as Guidance Counselor by my immediate supervisor, and AACS Administrative Guideline 3120.01 requires that the Job Description be signed attesting to the

opportunity to discuss the Job Description with such supervisor. This was not done so I was not aware that the other Guidance Counselors were being paid 10-days more/year, and according to the CBA and Board policy I was not. These actions by the Board again were an abuse of discretion and a violation of the CBA and Board policy because it capriciously or arbitrarily awarded larger supplemental contracts (in terms of extra duty days) to certain Guidance Counselors while not awarding the same supplement contract to me who performs the same (or more) duties (all Job Descriptions are the same). I have worked both nights and weekends to keep up with my duties and what I perceived to be my duties based on past experience and on a yearly basis have put in more than those 10-extra duty days I was not paid.

C) I have been writing 504 plans for the past five years. No other Guidance Counselor in the District writes 504 plans. Last year I did the 504 plans with the understanding that the District was going to review our process this year. I believe I was the only Guidance Counselor assigned this responsibility due to my Special Education degree and license – this is not a requirement of any of the Guidance Counselor Job Descriptions and in essence asking me to do another job. I just learned within the last 30 days that my 7-12 Guidance Counselor Job Description does not include writing 504 plans as a Performance Responsibility. You and I met about this on September 9 and 10, but given the CBA Grievance procedures require me to start a Grievance or lose my rights under the CBA that is why this is included. My thoughts were that this should be consistent from building to building, and amongst

Guidance Counselors. Also, if Guidance was to handle this role then this should be formally assigned and added to our Job Descriptions by the Superintendent (as required). Importantly, if this is done, reviews should take into account this additional role (and the number of 504's and commensurate time required) with the reasonable understanding of what is possible in all functions due to these expanded duties.

I would note that there is some consensus among Guidance and within Special Education that Guidance Counselors SHOULD NOT write 504 plans. Guidance Counselors should be attending 504 meetings as an advocate for the students and parents. Reassigning the role of writing 504 plans to Guidance would create a conflict of interest for the Guidance Counselor and likely is not in the students best interests. I've heard this is consistent with ASCA guidelines and guidance given by the ODE.

D) I have been handling all of the Lakeside Junior High School scheduling for the past seven years. Given Guidance handles this role in Grades 7-12 then this should be formally assigned and added to our Job Descriptions by the Superintendent (as required). Importantly, if this is done, reviews should take into account this additional role (and the time required to perform this task) with the reasonable understanding of what is possible in all functions due to these duties.

E) The Guidance Counselor 7-12 Job Description should be updated by Guidance at both the High School and the Junior High in conjunction with the Principals, Assistant Principals, and Administration. This would allow us to better meet the District's needs and truly

reflect those Performance Responsibilities that are necessary and truly needed to support our students and staff.

ASHTABULA AREA CITY SCHOOLS BOARD OF EDUCATION

TEACHER'S SUPPLEMENTAL LIMITED CONTRACT (EXTENDED SERVICE)

This Teacher's Supplemental Limited Contract (Extended Service), hereinafter "Agreement" between the Ashtabula Area City Schools Board of Education, hereinafter "Board", and **Barbara Kolkowski,** hereinafter "Employee" is executed in accordance with action of the Board taken on **19th** day of **August, 2020**. The Board hereby employs Employee for the **2020-2021** school year for an additional **10** days of actual service between **July 1, 2020,** and **June 30, 2021** which are in addition to the teacher's regular teaching duties undiminished by the use of sick leave, personal leave, or any other leaves of absence allowed by state law or Board policies. Upon proper authorization, such leaves may be taken during the extended service period but will not count as "days of actual service" for purposes of this Agreement. Employee shall perform the duties of the position as prescribed by the laws of the State of Ohio, the rules, regulations and policies of the Board and position job description adopted by the Board.

In consideration of such service, the Board agrees to pay Employee the sun of **$3,677.00**, in accordance with the policy of the Board, the terms and provisions set forth herein, and the Master Agreement. The compensation for this position may be increased during the term of this contract but shall not be reduced except as provided by law or as set forth herein.

The duration of the Agreement shall be for one (1) school year and shall not automatically renew.

Employee acknowledges the requirement of ORC 3319.11(I)that he/she may not serve under a contract exceeding one year or duration AND HEREBY WAIVES ANY CLAIM THAT HE/SHE IS ENTITLED TO PRIOR NOTICE OF CONTRACT NON-RENEWAL OR TO A CONTINUING CONTRACT.

Dated this 19th day of August 2020.

Effective: 2020-2021 School Year

ASHTABULA AREA CITY SCHOOLS
BOARD OF EDUCATION

/s/ [Illegible Signature] President Date: 08/19/2020

/s/ [Illegible Signature] Treasurer Date: 08/19/2020

_____ Employee Date: _____

Please sign all three copies and return two copies to the Human Resources office immediately.

APPENDIX G

[Dated July 15, 2020]

[SEAL] State of Ohio
State Employment Relations Board
65 East State Street, 12th Floor
Columbus, Ohio 43215-4213
(614) 644-8573
ULP@SERB.ohio.gov

Case No.

UNFAIR LABOR PRACTICE CHARGE

INSTRUCTIONS: File *one original and one copy* of this form with the State Employment Relations Board at the above address. Serve *one copy* on the party against whom the charge is brought. See Ohio Administrative Code Rule 4117-1-02. If more space is require a for any item, attach additional sheets; please number the items accordingly.

NOTE: If you wish to file unfair labor practice charges against both the employer and the union, then separate Unfair Labor Practice Charge forms must be filled out. For the form(s) to be filed against the union, fill out all sections of this form. For the form(s) to be filed against the employer, fill out all sections except section four, which is used to identify the employer for charges filed against the union or its representative(s).

1. Party Filing Charge: (*Check One*) ☐Employee Organization/Union ☑ Employee ☐Employer ☐Other_____	
Name: Barbara Kolkowski	
Address: 6340 Taylor Road	Telephone: work ( ) home (440) 254-8818
City, County, State, Zip: Leroy Township, Lake County, Ohio 44077	E-mail: kolkowskis@roadrunner.com
2. Name of Person Representing the Party Filing Charge: (Representative must file a Notice of Appearance form.) Brian Kolkowski - attorney	
Address: 6340 Taylor Road	Telephone: (440) 225-9235
City, State, Zip: Leroy Township, Ohio 44077	E-mail: kolkowskis@roadrunner.com
3. Party Against Whom This Charge is Brought: (*Check Only One*) ☑ Employee Organization/Union ☐ Employee ☐Employer ☐Other_____	
Name: Ashtabula Area Teacher's Union/OEA c/o Lisa Love, Local President	

Address: 6610 Sanborn Road	Telephone: (440) 992-1240
City, County, State, Zip: Ashtabula, Ashtabula County, Ohio 44004	E-mail: lisa.love@aacs.net
4. Employer: ***(If different from item 1 or 3)*** Ashtabula Area City Schools	
Address: 6610 Sanborn Road	Telephone: (440) 992-1200
City, County, State, Zip: Ashtabula, Ashtabula County, Ohio 44004	E-mail: mark.potts@aacs.net
5. Basis of Charge: Check all the boxes that apply. (See item #5 on the instructions for a link to the information needed to complete this section). Charges against employers: (A)(1) ☐ (A)(2) ☐ (A)(3) ☐ (A)(4) ☐ (A)(5) ☐ (A)(6) ☐ (A)(7) ☐ (A)(B) ☐ Charges against unions: (B)(1) ☑ (B)(2) ☑ (B)(3) ☐ (B)(4) ☐ (B)(5) ☐ (B)(6) ☑ (B)(7) ☐ (B)(8) ☐ Jurisdictional Work Dispute O.R.C. 4117.11 (D) ☐	
6. Statement of Facts: Provide a detailed statement of the facts explaining the alleged violation(s). Include who, what, where, when, how, and all dates. If you need more space, you may attach a separate sheet containing the Statement of Facts. 1. I first learned that I was being reassigned on April 27th, 2020 from my position as Guidance	

Counselor to that as a Special Education Teacher due to a purported RIF in which no teacher lost
their job, and my Guidance position was filled by another Guidance Counselor on a limited contract, see
Exhibit SERB 0. I am 58 and have 15 years Seniority in the Ashtabula Area City Schools, and am being
replaced by a low cost Guidance Counselor on a limited contract who is in her 20's. Since I was notified .
I attempted to work with my Union under the Grievance procedures as defined in the negotiated
Collective Bargaining Agreement ("CBA"). I am filing this charge with the State Employee Relations
Board ("SERB") because I believe my Union has committed an Unfair Labor Practice ("ULP") in
not only exhibiting conduct that was arbitrary, discriminatory, and in bad faith in openly advocating for
rights of one employee over another to preserve jobs in direct contravention to the CBA (cont. pg. 3)

A failure to provide the above information could result in the charge being dismissed for failure to provide a clear and concise statement.

DECLARATION

I declare that I have read the contents of this Unfair Labor Practice Charge and that the statements it contains are true and correct to the best of my knowledge and belief.

To distinguish originals, please do not use black ink for signatures.

/s/ Barbara Kolkowski
Signature of Person Confirming the Content of Form

7/15/20
Date

Barbara Kolkowski
Print or Type Name

THIS UNFAIR LABOR PRACTICE CHARGE WILL NOT BE ACCEPTED FOR FILING UNLESS THE PROOF OF SERVICE IS FULLY COMPLETED AND BEARS AN ORIGINAL SIGNATURE OF A REPRESENTATIVE OF THE PARTY FILING THE CHARGE.

PROOF OF SERVICE

I certify that an exact copy of the foregoing Unfair Labor Practice Charge has been sent or delivered to: Ashtabula Area Teachers Union/OEA

(Name and complete address of party against whom this charge is brought) 6610 Sanborn Road, Ashtabula, Ashtabula County, Ohio 44004
By ☐Regular U.S. Mail ☐Certified U.S. Mail ☑Hand Delivery ☐Other _____ this 15th (day) of July (month), 2020 (year). [Illegible Signature] Signature of Person Confirming Service of Form /s/ Brian Kolkowski Print or Type Name

(and past practice) instead of balancing both of the affected employees' rights to fair representation by the Union, but more troubling is that the Union's Labor Relations Consultant ("ULRC") has given every indication as I attempted to work through the Grievance process with him that he is unwilling to become actively engaged and fairly assist and represent me in advocating my case under the Grievance procedure as defined under the CBA.

2. I am filing this charge because I understand that I have 90 days from the date I first learned of the ULP, and from when I determined I would suffer damage as a result of the actions that resulted in the ULP. By my calculation this 90-day period ends on July 26, 2020. I expect to serve the Union President or Vice President at the mediation hearing that is being held today, July 15, 2020.

3. I have been in contact with my Union on a number of occasions since April 27, 2020 and during those meetings statements were made by Union representatives (either the President, the Vice President or the ULRC) that convinced me not only did the Union/Union's representatives take affirmative and blatantly biased steps to convince the District to have me reassigned but also their statements I believe were meant to dissuade and ultimately intimidate me from pursuing my Grievance. I believe the Union has violated its duty of fair representation of me in this matter for which I will go into more detail.

4. On April 15th, 2020, the Union received a 45-day letter outlining 4 primary school positions that were being eliminated (I had worked as a Guidance Counselor in the Junior High School), see Exhibit SERB 1.

5. On April 29th, 2020 I wrote a letter to the School District Superintendent asking him as required under the CBA "to put into writing all of the specifics, in detail, as to why you (and possibly others who were involved) made" the decision to reassign me, see Exhibit SERB 2. The Superintendent wrote me that same day and stated in pertinent part "When I met with the union president and vice-president, I was informed that you would have to move because you had a license that allowed you to move and others did not. *This did not sound right to me as you have significant seniority over the other two [Guidance Counselors] (Melissa and Rhea), but they said the union contract ensured jobs not assignments and that you would have to move to save the elementary counselor's job.* I double-checked and Margie Jones [the certified personnel secretary] confirmed that this was the case and that in the past Tony Nappi got bumped from guidance after 34 years and had to teach PE his last year and also Steve Evanson has been bumped from guidance in the same way.", see Exhibit SERB 3.

6. On Thursday, April 30th, I met with Dr. Potts, the School District Superintendent, who indicated to both my husband and I how bad he felt. Dr. Potts further indicated he ONLY considered Article IX, Section B.2 of the contract when making my reassignment given that's what the Union and Margie Jones had told him

was proper. He confirmed he did not consider Article V, and in particular Article V, Section D of the CBA because based on the information he received he didn't think he had to. My husband and I explained to him that we believed the Union and Board were misreading Article IX, Section B.2 and how it should be properly interpreted both according to the law and the rest of the CBA, particularly Article V. He indicated if this was correct, the Board would try and correct this mistake.

7. On May 20th, 2020, prior to filing my Level 1 Grievance I met with the Union representatives via Zoom. Attending the meeting from the Union was Lisa Love, Local President; Aaron Chamberlain, Local Vice President; and Chris Dodd, ULRC for the Union/OEA. During that meeting I learned from the Union that the School District and Union only considered Article IX of the CBA when reassigning me and claimed that my reassignment was consistent with past practice. The Local President at different times during the meeting made statements like "too bad you were a go getter and got more licenses", "you have a job and that's the main thing", and the Union was "concerned with people having jobs - period". I also learned that: a) no people were discharged as a result of the 45-day letter; b) other than myself the others who were reassigned were individuals whose positions were being eliminated; c) consistent with what Dr. Potts previously indicated to me – the Union also confirmed that the district did not make a comparison of mine, Melissa Nooney's and Rhea Drost's area of competence, major or minor field of study, length of service in the building and subject from which reassignment was

made, nor if each of these factors when considered in total were established to be equivalent for all three did they look to seniority amongst us three as required under Article V, Section D1 of the CBA; d) consistent with what Dr. Potts previously indicated to me neither the Union nor Dr. Potts considered any obligations of both the Union and Board with respect to my reassignment as set forth in Article V of the CBA; and e) the Union and Board instead relied on a purported past practice for allowing my reassignment and replacement with a bargaining unit member on a limited contract even though the Union for its part could not come up with one concrete example of an individual in the District that was ever reassigned and replaced this way.

8. I filed my Level 1 Grievance and it was denied on May 26th with no explanation for the denial. Scott Anservitz, the Principal to whom I report and met with as required for the Level 1 Grievance was apparently out of the loop regarding decisions that were made to reassign me. Attached are my notes from the meeting, which Mr. Anservitz has verified are accurate. Exhibit SERB 4.

9. On May 27th, I requested my Level 2 Grievance. There were 12 issues under the CBA I believe either both the District and Union ignored purposely, or that the Union's actions were so far outside a wide range of reasonableness that their conduct was wholly irrational in pushing for my reassignment. Both the Union and the District received copies of my forms. I sought assistance in preparing these forms from a Plaintiff's side employment attorney, Denise Knecht, who is

experienced in looking at CBA's and who helped me draft these issues for my Grievance. Ms. Knecht was perplexed given the evidence in this case that particularly the Union but also the Board were taking this stance. Exhibit SERB 5a-1.

10. On June 2nd, I meet with Chris Dodd, the Union/OEA ULRC and Aaron Chamberlain, Local Vice President of the Union both of whom indicated they would be attending my Level 2 Grievance. At that meeting I asked both Aaron and Chris whether they had read and investigated the 12 issues I set forth in my Level 2 Grievance. Chris, the ULRC, admitted he had made no effort to do either. He also pointed out that he believed my Grievance didn't "hold water" and "any other way would lose Union jobs". When I asked him how he could say it doesn't "hold water" when he hasn't even looked at the 12 issues I filed, he defiantly stated that "they [the Union and Board] followed RIF procedures and that was all they had to do". Even though Mr. Dodd didn't review and investigate my claims and he couldn't provide a scintilla of evidence showing how past practice allowed them to reassign me as they did, I believe he tried to threatened me by saying if he was at the meeting and the District asked whether they followed proper contract procedures he was going to answer yes – this along with his other statements seemed to me like he wanted me to drop my Grievance. Finally I was told during this meeting that the Union was concerned if I was to prevail they were going have to deal with the other affected person [Rhea Drost] – who replace me as the Guidance Counselor in violation of the CBA. Chris apparently not believing he bullied and dissuaded me enough indicated he heard

my husband would be attending the Level 2 Grievance, and that the CBA didn't permit it. I told him that my husband would be attending, and that the CBA specifically stated "the Superintendent shall meet with the aggrieved person and a representative of the aggrieved's choice" to which he countered that because the Union is the sole bargaining representative for collective bargaining that the "representative" had to be Union leadership – which in further reading the CBA didn't make any sense. This meeting as well as my earlier meetings with the Union made it clear to me that the Union, was purposely trying to derail my Grievance. It also made it clear to me that the Union's actions were arbitrary, discriminatory and/or in bad faith.

11. Also on June 2nd, I received documents from the District pertaining to public record requests I made. These requests provided me with information related to the personnel files of Rhea Drost, Melissa Nooney and Tony Nappi. In the public records request I learned that: a) Tony Nappi (who the Union and District relied on for past practice) wasn't reassigned for the purpose of opening up a position for anyone let alone an individual on a limited contract – Nappi's Guidance Counselor position was being eliminated like the 2 intervention specialists under the April 15th 45-day letter in the instant case who were being reassigned under the RIF provision in Article IX, Section B.2 of the CBA; b) the Board and Union at that time understood that even though Tony Nappi was being reassigned under a RIF that they needed to look at all sections of the agreement in accordance with the CBA and particularly the reassignment provisions of

Article V, Section D as written in his letter of reassignment shows, Exhibits SERB 6 and 7, which apparently is actual and real past practice; c) with respect to Rhea Drost (who replaced me upon my reassignment to save her job), even though the Union received the 45-day letter on April 15th, and the 45-day letter indicated that the Primary School Guidance Counselor position was being eliminated – surprisingly the Board approved and the Board President and Treasurer signed a two year limited contract for Rhea Drost on that very same day (see Exhibit SERB 8). I believe the Union had notice of this contract extension at the time. Why would the Board sign such a costly extension of a contract for an individual sitting in a position the Board indicated that very same day through their Superintendent they intend to eliminate?; and d) Drost's and Nooney's personnel records compared with my own make it clear if the Superintendent had viewed the contract as a whole and performed the assessment required in Article V, D1 for reassignment the factors would point overwhelmingly to retaining me in my current position. I also learned from the District based on a public records request that the School District could not identify any past or current bargaining unit members of the District that had been reassigned under similar conditions to my reassignment, so Nappi and Evanson are the only evidence provided as to past practice and their treatment supports my positions on the CBA interpretation contrary to what the District and Union claimed.

12. On June 3rd, I spoke with Steve Evanson, the other person the District cited as an example of purported

past practice. Steve indicated to me he wasn't reassigned from his position as Guidance Counselor as alleged by the Union and District but was instead allowed to "bump" under Article IX, Section B3 of the CBA because of Seniority under the CBA. He "bumped" into a position held by a Guidance Counselor named Teri Chadowski – who was then displaced. Steve Evanson's licenses are set forth in Exhibit SERB 9. If Steve Evanson had been treated like myself he would have been moved in to a 7-12 History teaching position, and Teri Chadowski would have been left in her Guidance position. This again is the actual and real past practice of the District.

13. On June 4th, 2020, I had my Level 2 Grievance meeting. Chris Dodd, the OEA ULRC cancelled coming to the meeting at the last minute claiming some "child care issue", which I was informed of by Aaron Chamberlain, the Local Vice President of the Union. In attendance were Dr. Potts, the District Superintendent; David Pontius, the District's outside legal counsel; Aaron Chamberlain, the Union's Local Vice President; my husband, Brian Kolkowski and myself. At the meeting the district's outside legal counsel denied my request that I be able to record the meeting. At the meeting, I read my statement setting forth the facts, and why I believed based on the CBA the District must reinstate me with respect to each of the issues set forth in my Level 2 Grievance, see Exhibit SERB 10. Dr. Potts, the Superintendent nodded in agreement with most if not all of the points I made. Both the Union representative, Aaron Chamberlain, and the attorney for the District stated I made a compelling case, but neither were willing to

make any statements on the record or enter into further discussion as to how this case could be resolved. They and the Superintendent otherwise all remained silent as to the issues I set forth, making no effort to advance this Grievance to resolution.

14. On June 10th, 2020, I was notified my Level 2 Grievance was denied with no explanation for the denial.

15. I requested Level 3 Mediation immediately, which is scheduled for 11 am on July 15th. Chris Dodd, the OEA ULRC won't be attending because even though he had a month to set the date his schedule is now is supposedly too busy.

16. My husband who is seeking additional public records on his own from the District just received a disturbing email from David Pontius, the attorney for the District, in which Mr. Pontius asked my husband a question as to where my husband intended to be for the mediation. My husband innocently replied "I understand the Union is using one of the elementary schools to have all on Barb's side [of the mediation] together", which is a common practice for a mediation to get everyone who is supposed to be on the same side together. Mr. Pontius then replied "I didn't know that the union was on your wife's side. In fact I understand that they advocated for the direction ultimately taken by Dr. Potts", ultimately admitting he thought this statement was funny. A copy of the complete exchange is set forth as Exhibit SERB 11.

17. Given these type of cavalier statements by the School District attorney and the statements by the

Union's representatives my husband believes that Chris Dodd and the School District attorney are working together, either implicitly or explicitly, with the ultimate goal to squash or derail my Grievance. It is also even more abundantly clear to me that my Union is not moving forward in good faith with respect to my Grievance but merely going through the motions.

18. My husband who is a former school board member of 12 years in another District finds it quite peculiar that Mr. Dodd handles issues for both the classified and certified unions of the Ashtabula Area City Schools given the huge conflict of interest in having one person negotiate give and take on two CBA's, which might benefit one of the unions/CBA's disproportionally or in cases like my own where the ULRC might get too cozy with the District when it only involves an expendable bargaining unit member who can be thrown under the "bus".

19. I have further attached a Summary of an attorney's legal analysis of how the CBA should have been interpreted in relation to my reassignment, there is also further analysis analysis I used in my Level 2 Grievance Statement, both of which I and attorney's I consulted with believe the District and Union should have reasonably interpreted the CBA requiring with respect to my assignment in the light of the facts provided herein, see Exhibit SERB 12.

APPENDIX H

[Dated August 10, 2020]

EXHIBIT SERB 15
GENERAL AFFIDAVIT
OF BARBARA KOLKOWSKI

State of Ohio
County of Lake

Personally came and appeared before me, the undersigned Notary, the within named Barbara Kolkowski, who is a resident of Lake County, State of Ohio, and makes this her statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of her knowledge:

1. On June 2nd, 2020 beginning at around 2:30 pm, I met with Union representatives in preparing for my Level 2 Grievance under the Collective Bargaining Agreement ("CBA").

2. The meeting was a virtual meeting on a platform called Zoom, which was arranged by the Union.

3. In attendance at the start of the meeting was myself, Chris Dodd, the OEA Labor Relations Consultant for the Ashtabula Area Teachers Association, our local Union, and our local Vice President, Aaron Chamberlain.

4. During the meeting I had a number of questions I wanted addressed so I could be certain my Grievance was being handled seriously by the Union and my interests were being fairly considered.

5. My first question at the meeting was to ask who from the Union would be in attendance at my Level 2 Grievance hearing on Thursday, June 4th. I was told by both Chris Dodd and Aaron Chamberlain that they would each be there at the meeting

6. I next asked whether the Union had a grievance procedure manual that the Union uses when representing bargaining unit members like myself. Chris Dodd told me its outlined in the contract, upon which I asked whether there was a separate procedure manual, and he answered not that he knew of.

7. I then asked if there was a check list that was used to follow when the Union handled a Grievance. Chris Dodd replied there is nothing that is required that each individual or union does their own procedure. Every local does it differently so Aaron does it as he sees fit.

8. I asked whether the Union had investigated my Grievance and each of the issues I set forth. Aaron read the Grievance forms, and Chris didn't respond. Chris Dodd indicated they investigated this is how the contract language had been interpreted in the past. I asked don't you think you have a duty to investigate the issues of my Grievance. Chris Dodd indicated he was told there were other issues and you involuntarily moved and were against it. He asked is that correct to which I answered yes. He further stated that the Union looked into that and based on the seniority list there

was no other least senior person that could have moved.

9. I indicated to Chris Dodd that I didn't think the Union followed the reassignment procedures in the CBA. Chris Dodd indicated to me that the Union believed they followed the CBA correctly talking with the past labor relations consultant (Eric) this is the way the Union has always interpreted the language, when it comes to a RIF situation and the reassignment of an individual.

10. I then asked you haven't taken any steps to investigate each of the issues of my Grievance, is that correct. Chris Dodd indicated from what he was told there were 12 issues. I indicated there were and one for example was Article V, Section A4 requires any assignment change made without a bargaining unit member's consent is considered a reassignment and subject to the provisions of that article in the CBA. I ask him if he sought any legal advice about that. To which Chris Dodd responded your situation wasn't a reassignment it was actually a reduction in force.

11. I then asked Chris have you read any of these Grievances, have you seen these 12 things [issues]. Chris Dodd indicated to me he hadn't seen what I wrote up, but he was told it was quite substantial. He then went on to state that he knew it sounds bad from the Union's standpoint but it was a RIF – it was reduction in force not just a reassignment, so the RIF language is what would be used in this situation.

12. Trying to move the conversation forward, I then asked if my Grievance is denied after the Level 2

meeting will the Union take my Grievance to mediation and/or arbitration. Chris Dodd indicated it was not for Aaron and him to decide but it was for the Executive Council of the Union to decide. I asked who was the Executive Council to which Chris replied it was the building representatives, President, Vice President, Treasurer and Secretary of your Association.

13. I then asked whether either Chris or Aaron had any advice for me for the Level 2 Grievance meeting on Thursday, June 4th. Chris Dodd (who hadn't read or investigated my Grievance or the issues I presented) stated truly I don' t believe this Grievance holds water because it has been enforced the way it happened multiple times in years past, unfortunately the interpretation that Dr. Potts went with from my consultant advice is the correct way to do it because in any other way would cost a Union member their job.

14. I then asked Chris how he can say it doesn't even hold water when he hasn't looked at the 12 issues of the Grievance I set forth. Chris Dodd indicated the reassignment was a result of a RIF. He further indicated according to the contract, the Superintendent has the ability to reassign teachers to lessen the effect of the RIF. He added I was reassigned to essentially lessen the effect to zero – so the RIF would have been one but because they reassigned you it was zero.

15. I then asked Chris and Aaron again whether they think they followed the reassignment procedures. Chris Dodd again indicated they followed the RIF procedures in the contract which is standing language in the contract for this situation.

16. I then indicated to Chris and Aaron that I wanted to make sure that they were representing me as a bargaining unit member on Thursday in my best interests. Chris Dodd indicated they would be representing the contract, to which I replied I don't believe you are looking at the contract as a whole but just focusing on one thing (section of the contract). I then stated so you aren't going to be representing me but just the contract, to which Chris Dodd state he is representing me.

17. Chris Dodd went on to state if I am there and I am asked whether the school district followed contractual procedures I am going to say yes. Chris then indicated he didn't need to be there. At that point I told him I wanted him to be there and fairly represent my interests. Chris stated I get that but I am not going to lie to them and say that no she should have stayed there because that is going to cost the other person a job. Aaron then stated if somehow they decide Barb you can keep your position then the Union is going to have to represent the other guidance counselor to which I replied if you put yourself in that position it is not my fault.

18. Finally, Chris Dodd asked me whether or not my husband was going to be at the Level 2 Grievance meeting. I told him yes he was. To which Chris told me he couldn't go into the meeting with me. I told him it says in the CBA on page 70 that I can have a representative of my choice. Chris stated he knows what it says but that means it must be a Union or Association representative, referring Article I of the CBA. I indicated that wasn't how I interpreted the CBA

and we could have that discussion with the school district before the Level 2 Grievance meeting.

19. At the finish of my second significant meeting with Union representatives I was disappointed because I felt the Union would be of no help or assistance in my Level 2 Grievance meeting and I was scared that Chris Dodd would maliciously follow through on his threats. I also believed that given the position the Union was taking that the School District had no incentive to find in my favor. I knew I had sought good legal advice from an experienced team of attorneys, but if the Union would not even review and investigate issues that an experienced team of attorneys found that given the Union in essence controlled the Grievance process, my chances of succeeding would be difficult. I was further disappointed because I believe during both the May 20 meeting and the June 2 meetings the Union was misleading me by misrepresenting the strength and validity of their position, and unwillingness to understand their duty of representation was not to save jobs but rather to represent all affected individuals fairly, impartially and objectively. This meeting also made me question any loyalty or admiration I had for the Union given their threats, refusal to review and investigate the issues in my Grievance, refusal to participate in any meaningful way in the Grievance process, and by their dissuading me by providing little or no assistance.

20. Attached to this Affidavit is a voice recording of the actual meeting which I encourage SERB to review. I have created this Affidavit as a transcript summary of the actual meeting.

Further Affiant say not.

Dated this 10th day of August, 2020.

/s/ Barbara Kolkowski
Barbara Kolkowski

Sworn to and subscribed before me, on this 10th day of August, 2020.

[SEAL] /s/ Mark Pennington
Mark Pennington

MARK PENNINGTON
ATTORNEY AT LAW
NOTARY PUBLIC
STATE OF OHIO
My Comm. Has No
Expiration Date
Section 147.03 R. C.

APPENDIX I

[Dated August 10, 2020]

EXHIBIT SERB 14
GENERAL AFFIDAVIT
OF BARBARA KOLKOWSKI

State of Ohio
County of Lake

Personally came and appeared before me, the undersigned Notary, the within named Barbara Kolkowski, who is a resident of Lake County, State of Ohio, and makes this her statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of her knowledge:

1. On May 20, 2020 beginning at around 3:30 pm, I met with Union representatives in preparing for my Level 1 Grievance under the Collective Bargaining Agreement ("CBA").

2. The meeting was a virtual meeting on a platform called Zoom, which was arranged by the Union.

3. In attendance at the start of the meeting was myself, Chris Dodd, the OEA Labor Relations Consultant for the Ashtabula Area Teachers Association, our local Union, and our local President, Lisa Love.

4. During the meeting it was joined by Aaron Chamberlain, local Vice President and the Grievance Committee chair for the local Union.

5. I indicated at the start of the meeting that I wanted to understand from the Union the facts surrounding my reassignment, and to help the Union better prepare my Grievance.

6. I asked a series of questions during the meeting so I could get a better understanding from the Union's point of view why I was reassigned.

7. Specifically first, I asked the Union to explain under the RIF notice provided by the district, how the four positions being eliminated were handled. The RIF Notice is attached as AFF 1 Exhibit A.

8. I understood from what Lisa Love explained during the meeting that the four positions eliminated were all primary school positions, and they were two intervention specialist ("IS") positions at Huron and Ontario elementary schools, a 2nd grade teaching position and a primary guidance position. I also understood from Lisa Love that the teacher in the IS position at Huron was moved into an Alternative Ed position at Lakeside High School; the teacher in the IS position at Ontario retired; the 2nd grade teacher replaced another teacher Kathy Nordquest who was retiring, and the primary school guidance counselor, Rhea Drost, was moved into my position after I was reassigned to make room for her.

9. I understood from Lisa Love that with respect to the guidance position that the Union looked at different

people in guidance positions with other licenses to see who could be moved to save a position.

10. Lisa Love said to me it's too bad you were a go getter and got more licenses. You were the only one who had anything [licenses] other than guidance.

11. Lisa Love confirmed to me that the two more junior guidance counselors, Melissa Nooney and Rhea Drost, were both on limited contracts with 4 years and 2 to 3 years respectively within the district.

12. Lisa Love was quick to attempt to defend the Union's actions by indicating she had checked with the people in Columbus and it was clear and unambiguous the way they [Union] followed the contract, indicating she had even wrote that down because she was impressed that it was unambiguous. She further indicated to me that I had a job and that's the main thing.

13. When I asked Lisa Love if any people were discharged as a result of the RIF Notice, she indicated no one was and that the Union was able to move everybody to save positions.

14. I indicated that this was not a district wide RIF but rather the 4 positions in the RIF notice were all in the elementary school, and Lisa Love confirmed this that the only positions being RIF'ed were at the elementary school.

15. I asked were any of the people who were reassigned given a list of open positions to determine which ones they wanted. Lisa Love indicated that no one who was reassigned was given a list of open positions.

16. Lisa Love indicated a number of times during the meeting that the school district would likely see more RIF's in the few weeks or by July I. As of the date of signing this Affidavit it is my understanding that no further RIF's have taken place.

17. I asked if any of the other people who were reassigned were demoted by receiving a lower salary in their new position. Lisa Love told me that no other person who was reassigned received a lower salary or was demoted. Chris Dodd agreed I was losing compensation but disagreed with my term demotion. Both Chris and Lisa agreed it was a pay cut. I explained because guidance counselors in the school district were required to work an extended contract it was indeed a demotion.

18. I asked what steps did the district take with respect to their obligations under the language of Article V, Section D1 of the CBA, and more specifically whether the school district made a comparison of mine, Melissa Nooney's and Rhea Drost's area of competence, major or minor field of study, length of service in the building and subject from which the reassignment was made, and whether they looked at seniority. I was told by Lisa Love that the school district and Union actually followed Article IX, Section B2 of the RIF section of the CBA only, and that licensure was the main thing that the Union considered.

19. I asked if it was recognized or discussed given the fact that no one lost their job, this isn't considered a RIF under the CBA. Chris Dodd indicated to me with a RIF you don't reduce people only positions, and it was considered a RIF under the CBA because the Union

lost a position. Lisa Love further added that a RIF is always positions not people.

20. I asked whether there was any effort by the school district Superintendent to place me in an equivalent position (as required under the CBA, Article V, Section D3). Lisa Love indicated to me that the Union just placed me in an open position. She didn't think the school district had anything equivalent available.

21. I asked whether they were concerned about membership in the Union, to which Lisa Love responded that the Union was concerned about people having jobs period.

22. I indicated that Article V, Section D of the contract requires the Superintendent to set forth his specific reasons for the reassignment in writing which I requested. I also indicated that I received those reasons, which I forwarded to the Union. I pointed out that his response doesn't show in any way that consideration was given to the procedural requirements under that Article and Section, and asked the Union whether that was true. Lisa Love again reiterated that once again the Union and school district are only dealing with Article IX because this was RIF.

23. I asked why didn't the school district recommend that those on limited contracts whose jobs were being eliminated be given a notice of nonrenewal. Lisa Love indicated that movement was done to save their jobs. Chris Dodd jumped in and indicated that this has been a long time practice in the school district that anytime there is a RIF this is the procedure the school district follows, and that the Union has taken the position for

a long period of time the stance that the Union was going to preserve the most number of jobs before letting people sit on a RIF list. The Union attempted to do a certain amount of hand waiving to establish past practice but couldn't come up with a single identifiable person during the meeting that they understood was reassigned this way, particularly to make room for a bargaining unit member on a limited contract.

24. I asked why I wasn't allowed to bump someone (under Article IX, Section B3) under the CBA. Chris Dodd indicated to me that it was because I was placed into an open position, and to allow me to move into a guidance position would result ultimately in someone losing their job.

25. At the end of the meeting I felt that my Union had made a decision to push for my reassignment out of their own interest, were going through the motions with me and hadn't represented my interest in discussions with the school district.

26. Attached to this Affidavit is a voice recording of the actual meeting which I encourage SERB to review. I have created this Affidavit as a transcript summary of the actual meeting.

Further Affiant say not.

Dated this 10th day of August, 2020.

/s/ Barbara Kolkowski
Barbara Kolkowski

Sworn to and subscribed before me, on this 10th day of August, 2020.

[SEAL] /s/ Mark Pennington
Mark Pennington

MARK PENNINGTON
ATTORNEY AT LAW
NOTARY PUBLIC
STATE OF OHIO
My Comm. Has No
Expiration Date
Section 147.03 R. C.