UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DOE AND JANE DOE, AS THE NATURAL PARENTS AND NEXT FRIENDS OF THEIR MINOR CHILD, JAMES DOE, Plaintiffs, vs. MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION, ET AL., Defendants.	CASE NO.: 2:08 CV 575 JUDGE GREGORY L. FROST MAGISTRATE JUDGE NORAH MCCANN KING **DEFENDANT JOHN FRESHWATER'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO THE EMERGENCY MOTION FOR PROTECTIVE ORDER AND GAG ORDER OF PLAINTIFFS AND THE MOUNT VERNON CITY SCHOOL DISTRICT DEFENDANTS**

NOW COMES Defendant, John Freshwater, by and through his trial attorney, Robert H. Stoffers of the law firm of Mazanec, Raskin, Ryder & Keller Co., L.P.A., and hereby respectfully submits the within Supplemental Memorandum in Opposition to the Emergency Motion for Protective Order and Gag Order of Plaintiffs and the Mount Vernon City School District Defendants. The within Memorandum addresses the All Writs Act, 28 U.S.C. § 1651(a). As discussed below, the All Writs Act is not applicable to the within matter and Defendant Freshwater asserts that the Emergency Motion is without merit and should be denied.

Respectfully submitted,

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SUPPLEMENTAL MEMORANDUM

I. INTRODUCTION

On September 24, 2008, the Court held a telephone conference with all counsel in regard to the pending Emergency Motion for Protective Order and Gag Order. During the conference, Plaintiffs and the Mount Vernon City School District (Mount Vernon) Defendants argued, for the first time, that this Court has authority under the All Writs Act, 28 U.S.C. § 1651(a), to issue the requested protective order and gag order.

Defendant Freshwater asserts that as a matter of law, the All Writs Act is not applicable to the within case since Plaintiffs and the Mount Vernon Defendants have failed to demonstrate and establish an independent basis for jurisdiction. Further, the All Writs Act is limited by the Anti-Injunction Statute and as such, it is not applicable in the within matter.

II. LAW AND ARGUMENT

a. There is a lack of the requisite jurisdiction for the issuance of a writ

The All Writs Act provides that "a court may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a). However, "a federal court must have an independent basis for subject matter

jurisdiction for a writ of mandamus to be issued pursuant to 28 U.S.C. § 1651(a)." *Maczko v. Joyce,* 814 F.2d 308, 310 (6th Circuit 1987); *(citing Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33, 34-35, 1 (1980) (per curiam); *Haggard v. Tennessee,* 421 F.2d 1384, 1386 (6th Cir.1970)). Therefore, the Plaintiffs and the Mount Vernon Defendants are required to establish an **independent** basis for subject matter jurisdiction for this Court to have jurisdiction in order to consider the application of the All Writs Act. The Plaintiffs and the Mount Vernon Defendants have not demonstrated that this Court has the necessary independent basis for jurisdiction over the requested injunctive relief.

Also, there are no constitutional depravations alleged within Plaintiffs' Amended Complaint or within the Emergency Motion for Protective Order and Gag Order, regarding the subject § 3319.16 Hearing.

Finally, during the telephone conference on September 24, 2008, there was a reference to *New Orleans Public Service, Inc. v. Council of the city of New Orleans,* 491 U.S. 350 (1989) in support of the Emergency Motion. In *New* Orleans, an electric utility company challenged the state rate-making authority's determination in regard to denying the utility the ability to increase its rates in response to an increase in wholesale rates by the Federal Energy Regulatory Commission. *New Orleans*, at 350 (Syllabus). The utility company sought relief both in state court in regard to the state rate-making authority's determination and in federal court attempting to enjoin the state rate-making body asserting that their decision was preempted by federal law. *Id.* The Court in *New Orleans* concluded that the *Burford* and *Younger* Abstention Doctrines did not apply such that the district court erred in abstaining from exercising jurisdiction. *Id*. at 350-351 (Syllabus).[1]

[1] In *New Orleans*, however, the denial of the exercise of the Abstention Doctrines in *New Orleans* is inapplicable to the case at bar. This is clear because in *Burford* the Court determined that "federal adjudication of the claim would

In regard to the jurisdictional issue presented in *New Orleans,* Defendant Freshwater asserts that this Court does not have jurisdiction to decide the Emergency Motion, in that jurisdiction has not been conferred on this Court or consented to by Defendant Freshwater, in regard to the subject matter (the § 3319.16 Hearing) of the Emergency Motion.

Therefore, since Plaintiffs and the Mount Vernon Defendants have failed to provide an independent basis for federal jurisdiction, their Emergency Motion is not properly before this Court and should be denied.

B. The All Writs Act is limited by the Anti-Injunction Act

When the All Writs Act is applied with respect to ongoing state court proceedings, the scope of that Act is limited by the Anti- Injunction Act, 28 U.S.C. § 2283, which states:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Courts have construed the Anti- Injunction Act as having three limited exceptions in which injunctions over state court proceedings are appropriate. In order to issue an injunction against the continuation of state court proceedings, the federal court must find one of the three exceptions is satisfied. *See Atlantic C.L.R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 287 (1970). Thus, one of the following must apply: 1) an injunction is authorized by Act of Congress; or 2) an injunction is necessary in aid of the court's jurisdiction; or 3) an injunction will serve to protect or effectuate the court's judgments.

If an injunction falls within one of the three exceptions, then the All-Writs Act provides

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not unduly intrude into state governmental process or undermine the State's ability to maintain desired uniformity in the treatment of essential local problems." *New Orleans* at 351, Syllabus(a). In *Younger,* the state proceedings were council proceedings and not considered judicial in nature. *Id.* at Syllabus(b). In the case at bar, ORC § 3319.16 contains a significant state interest regarding the ability to control its public education system such that it would be clearly undermined by a federal court's intrusion into its decision making ability. Further, ORC § 3319.16 is, as discussed later in a footnote, a quasi-judicial proceeding including evidence introduction, witness examinations and a neutral referee. Therefore, the law in *New Orleans* is not applicable in the within matter.

the positive authority for federal courts to issue injunctions of state court proceedings. *In re Inter-Op Hip Prosthesis Product Liability Litigation*, 174 F.Supp.2d 648, 652-653 (N.D. Ohio 2001). The All Writs Act and Anti-Injunction Act "act in concert, and the parallel 'necessary in aid of jurisdiction' language is construed similarly." *Id.* at 653 (*citing In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 134 F.3d 133, 143 (3rd Cir.1998)).

In the within case, none of the exceptions to the Anti-Injunction Act apply. First, there is no statute or other act of Congress that authorizes the federal courts to issue injunctions in the circumstances of this case, a state statutory administrative hearing. Second, the requested injunction cannot be issued in aid of the Court's jurisdiction because the Court lacks jurisdiction over the subject matter of the Emergency Motion for Protective Order and Gag Order. Finally, the last exception, commonly referred to as the "relitigation exception," "was designed to permit a federal court to prevent litigation of an issue that previously was presented to and decided by the federal court. *See Torpf v. Fidelity National Title insurance Company,* 289 F. 3d 929 (6th Cir. 2002). In this regard, the Court has not decided and has not adjudicated any Motions for a Protective Order or Gag Order in regard to the subject Section 3319.16 Hearing. Accordingly, since the All Writs Act is limited by the Anti-Injunction Act, and since the Anti-Injunction Act is an absolute bar in enjoining state court proceedings, the Motion for a Protective Order and Gag Order regarding the § 3319.16 Hearing should be denied.[2]

[2] It is noted that the 6th Circuit has found in limited circumstances that state administrative proceedings are not considered state court proceedings for the purposes of 28 U.S.C. § 2283. *See American Motor Sales Corporation v. Runke,* 708 F.2d 202 (6th Cir. 1983). As to this issue, the *Runke* court analyzed *Gibson v. Berry*, 411 U.S. 564 (1973). *Gibson,* in recognizing the distinction between a state court proceeding and administrative hearing, declined to decide whether it is "tenable in all circumstances even where the administrative proceeding is adjudicatory or quasi judicial in character" in regard to § 2283. *Gibson* at 573. The *Runke* Court determined that the state administrative hearing in its case was not quasi-judicial in character and resembled a more "executive administrative proceeding" such that the Anti-Injunction Statute was not applicable. In this case, ORC § 3319.16 allows for a quasi-judicial hearing with the presentation of evidence, full exanimation of witness together with an independent referee. Further, any determinations made are subject to appeal to the respective common pleas court and district

WHEREFORE, Defendant John Freshwater respectfully requests the Court to overrule and deny the Emergency Motion for Protective Order and Gag Order of Plaintiffs and the Mount Vernon City School District Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2008, a copy of the foregoing *Defendant John Freshwater's Supplemental Memorandum in Opposition to the Emergency Motion for Protective Order and Gag Order of Plaintiffs and the Mount Vernon City School District Defendants* was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Robert H. Stoffers
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appellate court as a right. Therefore, Defendant Freshwater asserts that 28 U.S.C. § 2283 is applicable to an ORC § 3319.16 administrative hearing.