SERB OPINION 2021-001

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Jackson,

Respondent.

Case No. 2020-ULP-08-0154

ORDER
(OPINION ATTACHED)

Before Chair Zimpher, Vice Chair Mills, and Board Member Lumpe: August 5, 2021.

On August 19, 2020, the Ohio Association of Public-School Employees, Local 410 ("Charging Party" or "Intervenor" or "Union") filed an unfair labor practice charge against the City of Jackson ("Respondent", or "City"), alleging that the City violated Section 4117.11 of the Ohio Revised Code ("O.R.C."). On October 22, 2020, the State Employment Relations Board ("SERB," "Board," or "Complainant") determined that there was probable cause to believe that the City had committed or was committing unfair labor practices and directed the matter to a hearing. SERB's General Counsel issued a Complaint on November 17, 2020.

Intervention was granted to the Union on December 4, 2020, and the matter was heard before a SERB Administrative Law Judge ("ALJ") on January 21, 2021. Following the hearing the parties filed post-hearing briefs. The ALJ held the proposed order in abeyance to coincide with the issuance of the proposed order in companion SERB Case No. 2020-ULP-10-0205. Following a hearing in 2020-ULP-10-0205, at which the ALJ, *inter alia*, took evidence regarding whether a tentative agreement of the parties became a successor collective bargaining agreement, on June 3, 2021, the ALJ issued Proposed Orders in 2020-ULP-08-0154 and 2020-ULP-10-0205.

After reviewing the Unfair Labor Practice Charge, Complaint, Answer, Proposed Order, Exceptions, Responses to Exceptions, and the entirety of the information contained in the record, the Board adopts the Finding of Fact, Analysis and Discussion, and Conclusions of Law in the Administrative Law Judge's Proposed Order, *incorporated herein by reference*, finding that Respondent, City of Jackson, violated section 4117.11(A)(1), and (5), of the Ohio Revised Code.

Further, upon review of the Union's Motion to Strike, filed on July 14, 2021, and Respondent's Memorandum in Opposition, the Board GRANTS the motion and ORDERS the Clerk's Office to strike the improperly filed transcript from the record.

The City of Jackson is ordered to:

A. CEASE AND DESIST FROM:

(1) Transferring bargaining unit work away from the unit without bargaining in violation of O.R.C. 4117.11(A)(1) and (A)(5); and

(2) Requesting that bargaining unit employees cease affiliation with their exclusive representative in violation of O.R.C. 4117.11(A)(1).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) Offer all affected employees reinstatement to their former respective positions of superintendent and return the bargaining unit to the way it was before reorganization (*status quo ante*) and provide affected employees with any pay or benefit differential, subject to offset, that may have accrued due to the actions of the Employer that removed them from the bargaining unit;

(2) Bargain in good faith with the Union for a successor agreement on any mandatory subject of bargaining including any reorganization affecting bargaining unit work;

(3) Post for sixty (60) consecutive calendar days in all the usual and customary posting locations where bargaining-unit employees represented by the Ohio Association of Public-School Employees, Local 410 work, the Notice to Employees furnished by the State Employment Relations Board stating that the City of Jackson shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and

(4) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

IT IS SO ORDERED

ZIMPHER, Chair; MILLS, Vice Chair, and LUMPE, Board Member, concur.

W. CRAIG ZIMPHER, CHAIR

TIME AND METHOD TO PERFECT AN APPEAL

This is a final appealable Order. You are hereby notified that an appeal from this Order may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal setting forth the order appealed from and the grounds of appeal with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the State Employment Relations Board's Order. A copy of the notice of appeal must also be filed with the State Employment Relations Board, at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, pursuant to Ohio Administrative Code Rule 4117-7-07.

PROOF OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, and upon each party's representative by ordinary mail, this 5th day of August, 2021.

ERIN E. CONN, ADMINISTRATIVE OFFICER

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

STATE EMPLOYMENT RELATIONS BOARD,	:	
Complainant,	:	**Case No. 2020-ULP-08-0154**
v.	:	
	:	**June 3, 2021**
CITY OF JACKSON,	:	
Respondent.	:	**RAYMOND M. GEIS**
	:	**Administrative Law Judge**

PROPOSED ORDER

I. INTRODUCTION

On August 19, 2020, the Ohio Association of Public-School Employees, Local 410 (the "Union" or "OAPSE") filed an Unfair Labor Practice Charge against the City of Jackson (the "City" or "Jackson") alleging that the City violated Section 4117.11 of the Ohio Revised Code. The State Employment Relations Board ("SERB") directed the matter to hearing on October 22, 2020 and the SERB General Counsel issued his Complaint on November 17, 2020.

Intervention was granted to OAPSE on December 4, 2020. This matter came to be heard on January 21, 2021; at hearing, the parties stipulated to the authenticity and admission of all exhibits. Complainant and OAPSE filed their joint post hearing brief on February 17, 2021. Respondent filed its post hearing brief on February 17, 2021. This proposed order was held in abeyance to coincide with the issuance of the proposed order in companion SERB Case No. 2020-ULP-10-0205.

II. ISSUE

Whether Respondent violated Section 4117.11(A)(1), (A)(2) and A(5) of the Ohio Revised Code by substantially eroding the bargaining unit through reassignment of most of the bargaining unit employees and bargaining unit work to newly created non-bargaining unit positions as part of a purported reorganization.

III. FINDINGS OF FACT

Stipulated Findings of Fact

1. The City of Jackson ("the City") is a "public employer" as defined by O.R.C. § 4117.01(B).

2. Nearly all of the former bargaining unit "Superintendents" were awarded the Department Head positions.

3. Each former Superintendent separately negotiated and executed a written contract of employment as to wages, time off and benefits; to be effective on or about July 28, 2020, and to continue for varying durations.

4. Once those individual contracts had been executed, the Safety Service Director advised each new Department Head, by email dated July 29, 2020, to notify their Union, and the City, that they had resigned from the Union.

5. On August 19, 2020, the Union filed an Unfair Labor Practice Charge with SERB pursuant to O.R.C. 4117.12(B) and O.A.C. 4117-7-01.

6. On October 22, 2020 SERB determined that probable cause existed and authorized the issuance of a complaint and referred the matter to hearing.

Additional Findings of Fact

7. On October 22, 2020 in related Case No. 2020-ULP-06-0096, SERB concluded that the acts and omissions of City Council concerning the tentative agreement ("TA") between the parties constituted constructive approval of a successor collective bargaining agreement ("CBA"). As a result, SERB deemed the CBA operative and dismissed the charge against Respondent City as moot. (Complainant/Intervenor Exhibit 1)

8. Jackson Safety Service Director David Swackhammer ("Swackhammer") told the eight former bargaining unit Superintendents who testified at hearing that their Superintendent positions were going to be abolished. Mr. Swackhammer also told the Superintendents they could apply for new non-bargaining unit "Department Head" positions, and that upon application each would be considered for continued employment. (witnesses accord)

9. All the former Superintendents who testified at hearing were selected for new Department Head positions. At least some of the work performed in the new Department Head positions was transferred from former bargaining unit positions.

10. The City requested that the employees cease affiliation with the Union after acceptance of their new positions so that the withholding of union dues could be discontinued. (Complainant/Intervenor Exhibit 5)

11. All eight former Superintendents voluntarily paid Union dues after the City stopped deducting dues on their behalf. Most of the employees refused to give consent to stop the deductions even though the City requested it.

Witness Testimony

At hearing, former bargaining unit Superintendents Steve Riegal, Karen Young, Joan Waugh, Ron Aldrich, Roy Hatten, Tom Woltz and Greg Oliver each testified similarly: Each witness stated that they were told the bargaining unit Superintendent position either would or could be abolished due to a reorganization. Each stated that they were encouraged to apply for the new exempt Department Head positions. Each testified that they preferred to remain in their Superintendent position but feared unemployment if they did not apply for the new non-union positions. All eight employees testified that they experienced some diminution of compensation through reduction in vacation, holidays, or pay (including overtime), and incurred increased health care premium sharing by becoming Department Heads. All eight employees testified that the new Department Head role was substantially similar to their former Superintendent role and that changes to duties and procedures were either negligible or non-existent.

Jackson City's Negotiator Andrew Esposito, of Clemens Nelson and Associates, testified that the Jackson City Council unanimously rejected the 2019 successor TA. Mr. Swackhammer testified that, as bargaining unit members, Superintendents could not perform needed managerial hiring, discipline, and budgetary duties. He explained that he felt this necessitated creation of new managerial positions to incorporate these duties, which would result in deletion of the old Superintendent positions by attrition.

IV. ANALYSIS AND DISCUSSION

Complainant has the burden to demonstrate by a preponderance of the evidence that Respondent committed an unfair labor practice. R.C. 4117.12(B)(3). For the reasons that follow, and based upon the stipulations of the parties as well as the testimony presented and evidence admitted at the hearing in this matter, Complainant has met its burden of proof regarding the allegation that Respondent violated Sections 4117.11(A)(1) and (A)(5), but not (A)(2), of the Ohio Revised Code.

A circumvention of the duty to bargain, regardless of subjective good faith, is unlawful. *In re Mayfield City School Dist Bd of Ed*, SERB 89-033 (12-20-89). Section 4117.11(A)(5) of the Ohio Revised Code makes it an unfair labor practice for a public employer to refuse to bargain in good faith with an employee organization. Any reorganization transferring work outside the bargaining unit is a mandatory subject of bargaining. *Lorain City School Dist. Bd. of Educ. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 533 N.E.2d 264 (1988)

Here, Respondent essentially argues that because it validly rejected the successor agreement, the duty to bargain vanished and the doctrine of exclusive representation was no longer applicable. In other words, Respondent's view was that "no contract" equaled "no union," which equaled "no bargaining." As the following analysis shows, Respondent's perspective is wholly erroneous.

Respondent asserts that this Board's previous conclusion that there was an operative successor CBA at law must be set aside. SERB's conclusion is contained within its dismissal of another related charge in SERB Case No. 2020-ULP-06-0096. Respondent claims that SERB's conclusion is merely *dicta* from a dismissal, which is not the product of an adjudication by hearing and, therefore, does not trigger collateral estoppel. *In re Lima Pub Library Bd of Trustees, SERB* 2010-001 (2-19-2010) Respondent offers a newspaper article, and corrected meeting minutes to demonstrate that the CBA was never partially adopted by City Council, despite SERB's earlier conclusion to the contrary.

Such evidence, and the finding of a binding successor CBA or lack thereof is immaterial to the instant case. Even if Respondent were correct, the duty to bargain does not end with rejection of a tentative agreement. In such a situation, the law contemplates that all or part of the CBA is reopened, agreement is reached, or the parties reach ultimate impasse. R.C. 4117.10(B); *State Emp. Relations Bd. v. Brook Park*, 2012-Ohio-5716 ¶ 11, *cause dismissed sub nom. State Emp. Relations Bd. v. Brookpark*, 2013-Ohio-1019 ¶ 11

The duty to bargain is joint. Respondent incorrectly concluded that because it had rejected the contract, it no longer had a duty to deal with the Union. There is no evidence in the record to suggest that Respondent attempted to reopen part or all of the CBA, that the Union unequivocally waived the right to bargain, or that ultimate impasse was ever declared, and a last best offer made. "To be at ultimate impasse, there must be 'no realistic possibility that continuation of discussion at that time would have been fruitful'." *Twinsburg City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 2007-Ohio-957 ¶ 15 (citations omitted) Either an unexpired CBA was operative and Respondent violated its duty to bargain over the reorganization, which is a mandatory subject of bargaining, or the CBA was rejected and Respondent failed to continue its duty to bargain both a successor agreement and the reorganization.

Respondent's assertion that the bargaining unit members voluntarily chose to transfer to the new positions created by ordinance does not nullify Respondent's statutory duty to bargain. "[B]ecause the CBA does define the bargaining unit to include these [existing bargaining unit] positions, state law regulating collective bargaining—a higher law—supersedes [city ordinance]" *Cincinnati v. State Emp. Relations Bd.*, 2009-Ohio-2834, ¶ 26. The Union was entitled to reasonably rely on SERBs earlier dismissal of its unfair labor practice charge based on SERB's conclusion within its order that the successor CBA was operative and the matter moot. Under these circumstances, the Union could not have waived bargaining over the reorganization.

According to The Telegram newspaper article (Ex. R-1), the Union ratified the contract on November 25, 2019. The contract was considered by City Council on December 23, 2019. Respondent's claim that it was asked to wait for the new city administration to consider the contract is no excuse. Even accepting, *arguendo*, that all of Respondent's arguments were correct, Respondent violated Section 4117.11(A)(5) of the Ohio Revised Code by failing to continue to bargain collectively, either by refusing to consider the TA in good faith or by failing to continue to bargain after rejecting it.

Respondent's actions also constitute a stand-alone violation of Section 4117.11(A)(1) of the Ohio Revised Code. The Respondent's email to employees selected for the new Department Head positions, which asked them to resign once they accepted their new supposedly exempt managerial position is a direct attempt to influence each employee's affiliation with their exclusive representative. *In re Lima Pub Library Bd of Trustees supra.*

Respondent did not violate Section 4117.11(A)(2) of the Ohio Revised Code when it stopped collecting Union dues against the wishes of its employees. This section prohibits a public employer from attempting to "[i]nitiate, create, dominate, or interfere with the formation or administration of any employee organization." There is nothing in the record to show that Respondent attempted to create a new sympathetic "company union" or dominate the existing local. Indeed, all Respondent's actions point to ignoring the Union as though it were nonexistent. Even Respondent's refusal to withhold dues on a voluntarily basis for employees does not interfere with the internal "administration" of OAPSE. *See In re Springfield Local School Dist Bd of Ed,* SERB 97-007 (5-1-97) (*holding supervisor's statements to union employees that they would be replaced by new drivers if they did not end the strike does not unlawfully interfere with the union's administration under RC 4117.11(A)(2)*) *But See In re Pierce Twp, Clermont County, SERB 2001-008* (12-12-2001) *contra* (*holding that annihilation of a proposed bargaining unit pre-election is a violation of R.C. 4117.11(A)(2)*)

V. CONCLUSIONS OF LAW

1. The Respondent violated Sections 4117.11(A)(1) and (A)(5) of the Ohio Revised Code when it unilaterally implemented a reorganization that decimated a SERB certified bargaining unit of Superintendents, transferred work away from the bargaining unit to new non-unit positions, and did so without giving prior notice to and negotiating to impasse with the employee organization exclusively representing said unit.

VI. RECOMMENDATION

The following is respectfully recommended:

1. The State Employment Relations Board ("SERB") adopt the Findings of Fact and Conclusions of Law set forth, above, and that the SERB order the following:

2. The Respondent shall offer each Department Head employment as a Superintendent under the terms and conditions that existed before implementation of the reorganization, and before the expiration of the prior collective bargaining agreement (*status quo ante).* In the event a Department Head does not accept an offer of employment as a Superintendent, the Employer shall post and fill the position in accordance with the terms of the expired collective bargaining agreement.

3. The Respondent shall fully restore all accrued benefits, emoluments, terms and conditions of employment to any Department Head accepting the position of Superintendent to the *status quo ante*. Respondent shall pay interest at the statutory rate on any lost wages, including missed overtime (from the time of reassignments away from the bargaining unit) until the time of the final appealable order in this matter. Respondent shall add service time, vacation leave, personal leave, sick leave and any other leave to each employee's balances (which would have accrued but for Respondent's illegal reorganization). Respondent shall rebate any insurance premiums paid by employees in excess of the amount due under the *status quo ante* and pay interest thereon.

4. The Respondent shall conspicuously post to its website at https://www.jacksonohio.us/ a copy of the attached NOTICE for a minimum period of 60 days from the date of issuance of the final appealable order of the SERB. Furthermore, a copy of the notice shall be mailed or emailed to each Superintendent.

5. The Respondent shall bargain in good faith with Intervenor on any prospective reorganization involving mandatory subject(s) of bargaining and/or for a successor agreement.

ISSUED and **SUBMITTED** to the State Employment Relations Board in accordance with O.A.C. 4117-1-15 and **SERVED** on all parties listed below by Certified U.S. Mail, return receipt requested, this 1st day of June 2021.

RAYMOND M. GEIS
Administrative Law Judge

c:
Eugene P. Nevada, Esq. (Counsel for Respondent)
Kelly E. Babcock, Esq. (Associate Counsel for Respondent)
Kristen E. McKinley, Esq. (Counsel for Intervenor)
Lisa A. Reid, Esq. (Counsel for Complainant)
Ohio Association of Public-School Employees, AFSCME Local 4, AFL-CIO and Its Local 410 (Union)
City of Jackson, Ohio (Respondent)
State Employment Relations Board (Complainant)

NOTICE TO EMPLOYEES

FROM THE

STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF
THE STATE EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this notice. We intend to carry out the order of the State Employment Relations Board and to do the following:

A. CEASE AND DESIST FROM:

(1) Transferring bargaining unit work away from the unit without bargaining in violation of O.R.C. 4117.11(A)(1) and (A)(5); and

(2) Requesting that bargaining unit employees cease affiliation with their exclusive representative in violation of O.R.C. 4117.11(A)(1).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) Offer all affected employees reinstatement to their former respective positions of superintendent and return the bargaining unit to the way it was before reorganization (*status quo ante*) and provide affected employees with any pay or benefit differential, subject to offset, that may have accrued due to the actions of the Employer that removed them from the bargaining unit;

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(3) Post for sixty (60) consecutive calendar days in all the usual and customary posting locations where bargaining-unit employees represented by the Ohio Association of Public-School Employees, Local 410 work, the Notice to Employees furnished by the State Employment Relations Board stating that the City of Jackson shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and

(4) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the ORDER becomes final of the steps that have been taken to comply therewith.

SERB v. CITY OF JACKSON
Case No. 2020-ULP-08-0154

_____ _____
BY DATE

_____
TITLE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the State Employment Relations Board.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED