**SERB OPINION 2021-002**

# 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-10-0205



**ORDER**
**(OPINION ATTACHED)**

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

On October 30, 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 January 28, 2021, 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 March 8, 2021.

Intervention was granted to the Union and the matter was heard before a SERB Administrative Law Judge ("ALJ") on May 5, 2021. On June 3, 2021, the ALJ issued Proposed Orders in 2020-ULP-10-0205 and companion case 2020-ULP-08-0154.

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[1], 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

[1] The Board relied upon the official recording of the hearing in coming to its decision, thus, the Union's Motion to Strike the unofficial transcript filed by the Employer is hereby granted.

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) Discriminating against bargaining unit members regarding tenure or other terms or conditions of employment in violation of O.R.C. 4117.11(A)(1) and (A)(3) by separating, disciplining, or threatening to terminate any of them for engaging in concerted protected activity, and

(2) Denying bargaining unit members their right to representation guaranteed under O.R.C. 4117.03(A) in violation of O.R.C. 4117.11(A)(1) and (A)(3).

**B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:**

(1) Offer reinstatement to Robin Poetker to her former position of superintendent and, further, provide full back pay, benefits, and seniority, retroactive to her severance and subject to offset;

(2) Grant Union representation at all pre-disciplinary meetings upon request to bargaining-unit represented employees;

(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

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| **Complainant,** | : | **Case No. 2020-ULP-10-0205** |
| **v.** | : | **June 3, 2021** |
| **CITY OF JACKSON,** | : | |
| **Respondent.** | : | **RAYMOND M. GEIS**<br>**Administrative Law Judge** |

# PROPOSED ORDER

## I. INTRODUCTION

This matter came to be heard on May 5, 2021. SERB directed this matter to hearing on January 28, 2021 and the SERB General Counsel issued his Complaint on March 8, 2021. The Ohio Association of Public-School Employees, Local 410 (the "Union" or "OAPSE") was conferred the status of Intervenor pursuant to Section 4117.12(B) of the Ohio Revised Code. At hearing, the Parties stipulated to the admission of all exhibits into the record for purposes of authenticity except for Respondent's Exhibit Number 2 containing, *inter alia*, purportedly retroactive amended minutes of City Council. Respondent's Exhibit 2 was nevertheless provisionally admitted over Complainant's objection. No post-hearing briefs were permitted.

## II. ISSUE

Whether Respondent violated Section 4117.11(A)(1), (A)(2) and (A)(3) of the Ohio Revised Code by laying off local Union Vice President Robin Poetker and, in so doing, 1) discriminated against her on the basis of her concerted protected activity and 2) coerced and/or interfered with her exercise of rights guaranteed under Chapter 4117. of the Ohio Revised Code.

## 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. The Ohio Association of Public School Employees, AFSCME Local 4, AFL-CIO and its Local 410 (the "Union" or "OAPSE") is an "employee organization" as defined by Section 4117.01(D) of the Ohio Revised Code and is the Board-certified bargaining representative for certain employees of the City of Jackson.

3. This bargaining unit was composed of Superintendents from various City departments and an Executive Assistant/Superintendent of Administrative Services/Cemetery ("Executive Assistant".)

4. The Union was certified by Complainant on March 13, 2003, and a joint amendment of certification was granted on June 6, 2006.

5. No objections to the original or amended certifications were filed by the City.

6. Since the Union became the exclusive representative in 2003, the parties have entered into five subsequent collective bargaining agreements (CBAs), including the latest CBA which expired on August 31, 2019.

7. Following the expiration of the latest CBA, the parties, on November 22, 2019, reached a tentative agreement (TA) for a successor agreement which was ratified by the Union.

8. On October 30, 2020, the Union filed an unfair labor practice charge ("ULP") with Complainant, pursuant to and in accordance with Section 4117.12(B) of the Ohio Revised Code and Section 4117-7-01 of the Ohio Administrative Code.

9. On January 28, 2021, Complainant determined that probable cause existed for believing a violation had occurred, authorized the issuance of a Complaint, and referred the matter to hearing.

10. A bargaining unit position had been held by the Union's Local Vice-President, Robin Poetker ("Ms. Poetker".)

11. Ms. Poetker had been the sole remaining member of the bargaining unit.

12. On July 20, 2020, the City posted a new non-bargaining unit, unclassified, position of Executive Assistant of Personnel Management and Human Resources.

13. The City interviewed candidates for the new position and hired non-bargaining unit member, Tonia Hatten, who began the new position on September 14, 2020.

14. The City also then directed Ms. Poetker to prepare a list of tasks/items she had not yet shown Ms. Hatten.

15. On October 8, 2020, the Union and Ms. Poetker filed a grievance concerning the assignment of Ms. Poetker's bargaining unit work to Ms. Hatten, a non-bargaining unit member.

16. The layoff was to take effect on October 30, 2020.

17. Ms. Poetker's layoff notice was not conditioned on the anticipated failure of an income tax levy on the November 3, 2020 general election ballot and expected decreased revenue to the City as a result of same.

18. The October 8, 2020 layoff notice issued by the City to Ms. Poetker provided that her layoff was due to the elimination of her job classification and position.

19. Two grievances filed by Ms. Poetker were denied by the City on or about October 28, 2020.

20. As a result of the City's October 30, 2020 layoff of Ms. Poetker, the Union's bargaining unit was rendered empty.

Additional Findings of Fact

21. Mayor-elect Randy Evans ("Evans") believed that the existing bargaining unit of Superintendents was wrongly certified by SERB and that the positions within it were exempt from collective bargaining under his personal definition of supervisor or manager.

22. At the December 29, 2019 City Council meeting, then Mayor-elect Evans asked the City Council to scuttle the TA so that it would not bind his incoming administration.

23. At no time did Respondent file with SERB a petition to clarify or amend the existing bargaining unit under O.A.C. 4117-5-01(E) to exempt one or more members of the unit from collective bargaining based upon a purported evolution of job duties.

24. At no time did Respondent attempt to bargain its anticipated reorganization prior to implementation. Respondent imposed its reorganization unilaterally, which had the effect of fully destroying the existing bargaining unit.

25. Service and Safety Director David Swackhammer reprimanded Poetker in writing for unexcused absences. The reprimand form requested Poetker to admit her guilt by checking a box indicating her agreement with Swackhammer's facts and conclusions (*i.e.* confession of judgment).

26. Poetker asked for Union representation immediately prior to presentation of the reprimand. Swackhammer did not obtain a waiver of Poetker's right to representation, nor did he summon a union representative.

27. Respondent's updated policies arguably permitted the conduct for which Poetker was reprimanded. The updated policy provided that late arrivals and absences must be reported within 1 hour of the scheduled start time. The Reprimand shows Poetker complied with the reporting requirement. Poetker's alleged misconduct does not unambiguously violate Respondent's policy and therefore will not support just cause. (C-I Bates 146 Section 4.03 Policy) (C-I Bates 266 – reprimand)

28. In a January 8, 2020 article appearing in the local newspaper The Telegram, editor Pete Wilson writes, "At the start of the meeting, Mayor-elect Randy Evans...requested that council not take action on the proposed contract and instead allow his new administration and new council members to tackle the issue fresh when they took office at the first of the new year."

29. Respondent's City Council rejected the TA before it on December 23, 2019.

30. The TA was never reopened under Section R.C. 4117.10(C) of the Ohio Revised Code, in part due to SERB's pronouncement that a successor agreement existed (within its dismissal of SERB Case No. 2020-ULP-06-0096). The Union reasonably relied upon SERB's pronouncement to its detriment. Respondent, however, never intended to reopen the contract. Therefore, the parties never reached ultimate impasse. This has the effect of carrying over the prior collective bargaining agreement *status quo ante* for purposes of remedy.

Witness Testimony

At hearing, the following persons testified: Mayor Randy Evans, Human Resources Manager Tonia Hatten, (Former) Seasonal Worker Brandy Hensley, Administrative Secretary Pamela Bowling, Union Vice President and former Superintendent Robin Poetker, and Safety and Service Director David Swackhammer.

Mayor Evans denied any anti-union animus. He articulated his belief that the Superintendents were management employees exempt from collective bargaining. He based his opinion on his years of experience as a construction businessman.

Tonia Hatten testified that she did not ask potential hires whether they were union adherents during employment interviews; former seasonal worker Brandy Hensley testified that during her interview for a full-time job Hatten asked Hensley if she was a union adherent, to which she replied in the affirmative. Hensley further stated that she believed her response led to her not being selected for the full-time position. Hensley is now a union millwright with a different employer.

Pamela Bowling testified that many of the job duties formerly performed by Poetker were now performed by non-union employees. She explained that she became familiar with Poetker's former job duties through observation when she worked in the same administrative building with Poetker.

Robin Poetker testified that she grieved her layoff. She stated that Mr. Swackhammer questioned whether she could fill out and file grievances on her own behalf, especially when it was more than one grievance. Poetker testified that although she requested a union steward when she was reprimanded, she ultimately signed the reprimand form without being provided union representation. Poetker testified that the request to agree with the statements and conclusion of the reprimand was a new provision not contained on the historical template.

David Swackhammer testified that Poetker withdrew her demand for a union representative once she knew she would receive a reprimand and not a suspension. Swackhammer testified that Poetker would have been given serious consideration for one of the new non-union positions had she applied. However, Swackhammer testified that Poetker would also have been fired for cause if the layoff had not gone through. Swackhammer maintained that the new non-union positions had component duties which were exempt from collective bargaining.

## IV. ANALYSIS AND DISCUSSION

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

"It is an unfair labor practice for a public employer, its agents, or representatives to [d]iscriminate in regard to...tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117. of the Revised Code." Section 4117.11(A)(3) of the Ohio Revised Code

Union Vice President Poetker engaged in concerted protected activity when she filed grievances opposing her layoff and when she opposed Respondent's reorganization. This reorganization was a *fait accompli* and contravened Respondent's duty to bargain. Moreover, she repeatedly urged Mayor Evans to respect the existence of the bargaining unit.

In opposing these unfair labor practices, Poetker was not required to mitigate her damages by trying to compete for a new non-bargaining unit position posted by Respondent. "It would be nonsensical to require a public employee...to accept an offer of employment for a job that was created illegally... in order to retain his right to continued public employment. *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 97 Ohio St.3d 269, 2002-Ohio-6322, ¶ 25 In fact, Respondent never made a true offer of employment for Poetker to accept.

Respondent does not deny that it laid off Poetker to eliminate the last bargaining unit position, or that it did so without bargaining. This failure to bargain is an unfair labor practice. Also, Respondent's argument, that it was illegal for Poetker to perform cemetery duties, thereby causing her position to become obsolete, is on its face at odds with Section 759.09 of the Ohio Revised Code. This section contemplates appointment of one or more Superintendents by the Public Service Director to run the cemetery. Respondent's reasoning appears to be mere pretext, based upon a false interpretation of law. As a result, it is more likely than not that Poetker was discriminated against, in substantial part because of her union adherence and her opposition to Respondent's illegal reorganization.

Respondent further discriminated against Poetker by denying her request for a union steward prior to discipline. The reprimand form presented to Poetker by Respondent demanded to know whether Poetker admitted to the infractions and agreed with the discipline, making it a form of interrogation. Because the language of the reprimand possessed an aspect of interrogation and was not simply a memorandum of disciplinary decision, Poetker was entitled to representation by a union steward. As a result of Respondent's denial, Poetker was forced to decide without representation whether or not to sign an admission of guilt.

Both Poetker and Service Director Swackhammer testified that she requested the assistance of a union steward. Swackhammer stated that Poetker later waived her request, which Poetker denies. Service Director Swackhammer's testimony is less plausible. Mr. Swackhammer testified that he had knowledge of labor relations due to his extensive corporate managerial experience at DuPont. Under the circumstances, a more punctilious Swackhammer would have honored the request for a steward or obtained a written waiver of the *Weingarten*[1] right with a witness, or not have included request for admission language in his reprimand in the first place.

Swackhammer thus knowingly discriminated against Poetker by denying her right to a Union representative in violation of Section 4117.03(A) and Section 4117.11(A)(3) of the Ohio Revised Code. Swackhammer's conduct distinctly violates Section 4117.11(A)(1) of the Ohio Revised Code, which makes it an unfair labor practice to "[i]nterfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117". This includes thwarting the right to representation at a quasi-investigatory meeting with the employer.

Affirmative Defense of After Acquired Evidence not applicable and worded as a veiled threat in violation of Sections 4117.11(A)(1) and (A)(4) of the Ohio Revised Code.

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[1] SERB expanded an employee's right to representation beyond the persuasive authority contained in *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959 holding that the "right of representation" contained in R.C. 4117.03(A) is broader. *In re Trotwood--Madison City School Dist Bd of Ed*, SERB 89-012 (5-19-89). "*Weingarten* right" is the preeminent moniker for a bargaining unit member's right of representation during certain meetings with his or her employer and is used as such herein.

In its Answer, Respondent raises the "after acquired evidence doctrine" as an affirmative defense. This doctrine renders a discriminatee ineligible for reinstatement, where other subsequent evidence of misconduct would have led to his or her dismissal anyway (despite any illegal discrimination). Swackhammer testified he knew of the alleged misconduct before Poetker was laid off. "[T]he after-acquired evidence doctrine applies only in those cases in which the employer discovers the employee's wrongdoing after the employee is discharged or disciplined." *O'Brien v. Ohio State Univ.*, 2006-Ohio-4346, ¶ 18, aff'd, 10th Dist. Franklin No. 06AP-9462007-Ohio-4833, ¶ 18.

Additionally, the party raising the defense has the burden of proving it. *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 2020-Ohio-5371 Respondent's evidence is insufficient. Swackhammer testified that he surveilled Poetker's work computer and found she deleted hundreds of electronic files into the recycle bin. Swackhammer did not provide any extrinsic evidence of his purported observations and there is no corroborative evidence contained within Respondent's exhibits.

Raised as an affirmative defense, Respondent brought the alleged misconduct into the instant proceeding. Respondent had a full and fair opportunity to present corroborative evidence to support Swackhammer's testimony and litigate the matter to a conclusion.

Swackhamer's testimony standing alone is not preponderant evidence of misconduct. His testimony is less credible considering his claim, and that made by the Mayor, that their background made them competent and experienced in labor relations. Moreover, Respondent's assertion of this issue and its corresponding failure to present extrinsic or corroborative evidence to support the allegations against Poetker creates a negative inference that no such evidence exists. Therefore, Respondent had *no just cause* to bar reinstatement of Poetker under the after acquired evidence doctrine.

Respondent additionally violated Sections 4117.11(A)(1) and (A)(4) of the Ohio Revised Code by gratuitously stating in its Answer when raising its affirmative defense that, "[I]f reinstated, [Poetker] will immediately be terminated; in addition to being held personally financially liable; and accountable to the 'fullest extent of the law'."

These words were not necessary to raise the affirmative defense of after acquired evidence. Instead, these words are reasonably calculated to discourage Poetker; by threatening to terminate her if she wins before SERB and by threatening to sue her for damages to punish her for testifying. And these words appear to be reasonably calculated to apprise SERB that Respondent is unlikely to follow an order reinstating Poetker – conduct reasonably designed to dissuade SERB from giving a whole remedy.

Yet, Respondent failed to prove damages or just cause, either of which was necessary to reduce the remedy or backpay under the after acquire evidence doctrine. Thus, it is more likely than not that the real purpose of this extraneous phrase is to coerce and restrain Poetker in violation of R.C. 4117.11(A)(1) and discriminate against her for testifying at SERB in violation of R.C. 4117.11(A)(4). The extraneous language does

nothing to further the defense itself, but it is nevertheless justiciable as a distinct violation because it was brought into controversy by Respondent. *SERB v Toledo City School Dist Bd of Ed*, SERB ALJ 1999-ALJ-009 (4-15-99) (*stating due process does not require that each new allegation be the subject of...a separate hearing, so long as the employer is adequately informed...and has an adequate opportunity to prepare...*)

There is no violation of R.C. 4117.11(A)(2). Respondent sought to destroy the Union, rather than simply interfere with its internal administration, or dominate it.

In conclusion, Mayor Evans and Director Swackhammer showed specific animus toward the bargaining unit consisting of the former Superintendents and Poetker. In this case, the pair had a sincere belief that SERB's certification of the bargaining unit was wrong. They also believed Chapter 4117. of the Ohio Revised Code could be circumvented entirely through unilateral action (*fait accompli*). In carrying out these beliefs Respondent ignored any legal means to challenge unit composition, defied SERB, and surface bargained with no intention of implementing a successor CBA so that the stage could be set for Poetker's layoff.

Thus, Respondent engaged in improper self-help to illegally delete the CBA and the Union. Swackhammer testified in SERB Case No. 2020-ULP-08-0154 that Respondent believed there was no union because there was no contract. By extrapolation, Respondent believed all the dispute resolution mechanisms contained in R.C. Chapter 4117 of the Ohio Revised Code, including mediation and factfinding could be bypassed by leading the Union to a TA and rejecting it after expiration of the old CBA occurred. Such conduct cannot be tolerated for Chapter 4117. of the Ohio Revised Code to function.

**Remedy**: Did the TA become the successor CBA at law?

A. The dismissal of the complaint stating there is a CBA is NOT a decision.

> The dismissal directive SERB issued...does not constitute a *decision on the merits* of whether [Respondent] failed to properly accept or reject the tentative agreement under O.R.C. § 4117.10(B). The...SERB dismissal that does not result from the issuance of a complaint and a formal hearing on the merits is not a final appealable order and such a dismissal is not an adjudication...[C]ase law has established that the doctrine of res judicata does not apply to a finding of "no probable cause" by an administrative agency.
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> *In re Lima Pub Library Bd of Trustees*, SERB 2010-001 (2-19-2010)

Because SERB's pronouncement contained within its dismissal in Case No. 2020-ULP-06-0096 is not a decision on the merits, I must make a proposed finding now to ascertain a definite and certain remedy.

B. There is NO valid set of City Council minutes showing what actually happened.

Both sets of City Council minutes reflect that Mayor-elect Randy Evans petitioned Respondent to scuttle the tentative agreement ("TA") which was presented for a vote on December 23, 2019. "[C]ouncil did have the right to subsequently amend its journal so that the contents thereof should conform to the facts." *Myers v. Looker*, 17 Ohio Law Abs. 124, 127 (9th Dist.1934).

> After the record has been amended, it is entitled to the same respect as an original record. The only remedy of a person who is injured by such amendment and claims that the original entry was correct is by a direct proceeding to have the minutes as amended annulled, and the original minutes restored. While the amended minutes remain, they cannot be impeached or varied in a collateral proceeding. (citations omitted)
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> *State ex rel. Wuebker v. Bockrath*, 152 Ohio St. 77, 83 (1949)

The Parties agree that the ordinance to execute the agreement was not approved, but they argue over how it failed because of the effect it would have on constructive approval under *SERB v City of Jackson*, SERB 2005-002 (3-10-2005) (*holding that when a legislative body fails to either approve or reject a TA submitted to it within 30 days under R.C 4117.10 of the Ohio Revised Code, an ULP is committed, and a constructive agreement will be found*).

Either the City Council approved the ordinance on its first reading but failed to dispense with the requirement of three readings in accordance with R.C. 737.13 on the second vote, thus invoking *Jackson supra,* or the City Council waived the three-reading requirement on the first vote by declaring an emergency and then rejected the ordinance on the second vote invoking R.C. 4117.10 of the Ohio Revised Code.

Respondent's amended minutes add to the confusion by retaining the contradictory language below which appears prior to the rejection language:

**Ordinance 61-19 Duly Adopted**

**ORDINANCE 62-19**

**AN ORDINANCE BY THE LEGISLATIVE AUTHORITY OF JACKSON, OHIO TO ENTER INTO AN AGREEMENT WITH THE OHIO ASSOCIATION OF PUBLIC SCHOOL EMPLOYEES, OAPSE/AFSCME LOCAL 4/AFL-CIO AND ITS LOCAL NUMBER 410, FOR CERTAIN EMPLOYEES OF THE CITY OF JACKSON, AND TO EXECUTE THE AGREEMENT BETWEEN THE CITY AND BARGAINING UNIT AS REQUIRED AND DECLARING AN EMERGENCY.**

**First Reading**

Mr. Elliott made a motion to adopt the ordinance with a second by Mr. Ondera. In a voice vote all members agreed.

Even so, R.C. 737.13 demands a journalized recording of all votes by yea and nay. An undifferentiated voice vote will not suffice for adoption, even on a first reading. Regardless of which story one believes to be correct, none appears to be recorded properly at present.

In contrast to R.C. 737.13, which is designed to prevent accidental or secretive passage of legislation, Chapter 4117.10 of the Ohio Revised Code is a "capping" law designed to impute agreement, even when there is no agreement in fact due to nonfeasance by council. *In re East Palestine City School Dist Bd of Ed,* SERB 86-011 (3-20-86) Still, R.C. 4117.10 of the Ohio Revised Code will not find an agreement where there is substantial evidence of an affirmative rejection of a TA.

C. The TA was REJECTED in fact at the December 23, 2019 City Council meeting.

Union President Steve Riegel acknowledged Council's announcement that the TA was "defeated" at the December 23 council meeting. This corroborates Negotiator Andrew Esposito's testimony that the TA was affirmatively rejected rather than not approved. Both were at the meeting. *See* SERB Case No. 2020-ULP-08-0154 *Recording.*

The affidavits of each council member attesting to rejection of the TA were not created until after the Union filed its ULP charge in case No. 2020-ULP-08-0154. Also, the council clerk, who transcribed the minutes, did not testify as to what took place at the meeting. This calls into question the trustworthiness of Respondent's evidence.

Nevertheless, the evidence and testimony adduced indicates there is a preponderance of evidence that City Council rejected the TA on December 23 and attempted to correct its minutes thereafter to reflect that rejection. Thus, *Jackson supra.* is inapposite and cannot be used to find an agreement at law.

D. Respondent engaged in continuous ULP violations

A municipality operates in perpetuity; the actions of the 2019 council and 2020 Mayor are unified and continuing. R.C. 715.01. The record shows that there was no effort by incoming Mayor Evans either to go back to the bargaining table upon sitting for office, or to recognize the TA as the successor agreement in the first instance. Indeed, Director Swackhammer testified previously that Respondent thought the Union no longer existed after the rejection of the TA.

SERB technically dismissed Respondent's discrete liability in ULP Case No. 2020-ULP-06-0096 by applying the mootness doctrine without an adjudication by hearing. *In re Lima supra.* But the real conclusion to be drawn from that case is that City Council engaged in bad faith surface bargaining by never intending to approve a successor agreement, or it engaged in bad faith bargaining at the point it acquiesced to the Mayor-elect's lobbying. Either, or some combination of both, is a violation of R.C. 4117.11(A)(5) of the Ohio Revised Code.

Respondent's conduct in the present case relates to its earlier conduct to constitute a continuous ULP violation. This is because Respondent rendered all the Union's efforts to reach an agreement a waste of time in 2020-ULP-06-0096, substantially eroded the bargaining unit in SERB Case No. 2020-ULP-08-0154 through its unilateral

reorganization, and discriminated against Poetker to complete the total disintegration of the bargaining unit in the instant SERB Case No., 2020-ULP-10-0205. *In re Paulding Exempted Village School Dist Bd of Ed, SERB 90-010* (6-22-90) (*doctrine of continuing violation theory applicable where "those independent violations which successively recur and are based on facts and circumstances unique to the present claim of violation."*) Thus, Respondent's sweeping conduct was calculated to eliminate the union in three distinct but interrelated steps.

E. The Parties must return to *status quo ante* in order to effectuate a make whole remedy.

It is now appropriate for SERB to use its broad remedial power to impose *status quo ante* to return conditions to the point before Respondent's first unfair labor practice was committed. During *status quo ante* the prior contractual provisions carry over until the parties reach ultimate impasse. *State Emp. Relations Bd. v. Brook Park, 8th Dist. No. 98524*, 2012-Ohio-5716, ¶ 11, *cause dismissed sub nom. State Emp. Relations Bd. v. Brookpark*, 2013-Ohio-1019, ¶ 11 The *status quo ante* in the instant case consists minimally of all terms and conditions of the expired CBA and the unit organizational structure which existed prior to the posting of the Department Head positions.

O.A.C. 4117-9-02 requires parties, upon completion of a TA to notify SERB. Upon notification, "[SERB] shall suspend the statutory dispute settlement procedure until notified in writing by either party that the tentative agreement has been rejected." *Id.* It is not known whether Respondent ever tried to notify SERB of rejection. However, the dispute resolution procedures contained in R.C. 4117.14 of the Ohio Revised Code, including but not limited to factfinding, come back into operation upon rejection. (Note: The expired Agreement does not contain a superseding mutually agreed to dispute resolution procedure a.k.a. MAD.)

Respondent was required to bargain over deletion of the expired agreement before changing the *status quo. In re City of Circleville*, SERB 2005-007 (10-5-2005) (*holding that the status quo ante includes carryover of all prior contract provisions in an expired contract because O.R.C. Chapter 4117, unlike most other labor statutes, requires bargaining over the deletion of an existing provision of a CBA).*

## V. CONCLUSIONS OF LAW

1. Respondent violated R.C. 4117.11(A)(1) of the Ohio Revised Code when it coerced Poetker to choose between layoff or the prospect of a non-union position, without first bargaining reorganization involving diminution of bargaining unit duties.

2. Respondent violated R.C. 4117.11(A)(1) of the Ohio Revised Code when it restrained union official Poetker by denying her right to be represented by her

union, and by questioning her ability to file grievances instead of dealing with the matter from within the grievance process.

3. Respondent violated R.C. 4117.11(A)(1) and (A)(4) of the Ohio Revised Code by threatening to terminate Poetker "immediately" if she were reinstated. (This language went beyond the legal assertion of an affirmative defense.)

4. Respondent violated R.C. 4117.11(A)(3) of the Ohio Revised Code by laying Poetker off, transferring some or all her duties to a non-union official, and disciplining her for acts which were not clearly prohibited under policy. This constitutes discrimination based on her union activity as to tenure, terms, and conditions of employment.

5. Respondent did not violate R.C. 4117.11(A)(2) of the Ohio Revised Code because there is nothing in the record to show that Respondent initiated a union, created a union, dominated the union by choosing its leadership, or interfered with the formation of any union or attempted to run the Union, or contributed financial or other support to it. Instead, the Record reflects the Respondent eviscerated the bargaining unit and transferred work away including Poetker's position so that it would be union free.

## VII. RECOMMENDATION

The following is respectfully recommended:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth, above and;

2. Order Respondent to reinstate Robin Poetker to her position of Superintendent with all the pay, benefits, and emoluments enjoyed during the *status quo ante* as defined herein, full backpay minus unemployment compensation received from the time of the layoff to the time of reinstatement.

3. Order Respondent to rescind the written reprimand of Robin Poetker.

4. Order Respondent to cease and desist from threatening bargaining unit members, including Poetker, with immediate discharge or other adverse action, which is reasonably calculated to dissuade or discourage participation in a SERB proceeding.

5. Order Respondent to assign duties to Poetker consistent with her Executive Assistant/Superintendent of Administrative Services/Cemetery classification including but not limited to assignment as a Superintendent by the Public Service Director and City Council to perform cemetery duties commensurate with R.C. 759.09 et. seq.

6. Order Respondent to bargain in good faith with the Union on a successor agreement and to utilize and adhere to the mechanisms contained within R.C. Chapter 4117. of the Ohio Revised Code to foster collective bargaining.

7. Order Respondent to give prior notice to, and bargain with, the Union on any reorganization through ultimate impasse, prior to implementation.

8. Order Respondent to maintain the *status quo* pending negotiation of a successor agreement. The *status quo* includes all the terms and conditions of collective bargaining agreement No. 16-MED-06-0636 including but not limited to Article 2 Recognition.

9. Order Respondent to 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 final appealable order of the SERB. Furthermore, a copy of the notice shall be mailed or emailed to each Superintendent, including Poetker.

**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) Discriminating against bargaining unit members regarding tenure or other terms or conditions of employment in violation of O.R.C. 4117.11(A)(1) and (A)(3) by separating, disciplining, or threatening to terminate any of them for engaging in concerted protected activity, and

(2) Denying bargaining unit members their right to representation guaranteed under O.R.C. 4117.03(A) in violation of O.R.C. 4117.11(A)(1) and (A)(3).

**B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:**

(1) Offer reinstatement to Robin Poetker to her former position of superintendent and, further, provide full back pay, benefits, and seniority, retroactive to her severance and subject to offset;

(2) Grant Union representation at all pre-disciplinary meetings upon request to bargaining-unit represented employees;

(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-10-0205

_____ _____
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**