

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Columbus Board of Health, City of Columbus,

Respondent.

CASE NUMBERS: 94-ULP-02-0079

94-ULP-05-0275 ✓

ORDER  
(OPINION ATTACHED)

Before Chairman Pohler and Board Member Mason: March 21, 1996.

On January 31, 1996, the Hearing Officer's Proposed Order in the above-styled cases was issued. On February 20, 1996, the Columbus Board of Health, City of Columbus ("Respondent") filed exceptions to the proposed order. On March 1, 1996, the Complainant and Intervenor filed a joint response to the Respondent's exceptions. Also on March 1, 1996, the Complainant and Intervenor filed a motion to strike the attachment appended to the Respondent's exceptions since the attachment is not evidence of record in this matter.

The Board has reviewed the record, the Hearing Officer's Proposed Order, the Respondent's exceptions to the proposed order, and the Complainant's and Intervenor's response to the exceptions.

The Board grants the motion to strike; strikes the attachment to the Respondent's exceptions and the record; adopts additional Finding of Fact No. 39, which provides: "Beginning in February 1994, Mr. Fetters was treated differently than other Sanitarian 3s in terms of job duties. He was the only Sanitarian 3 performing field work on a regular basis. He was the only Sanitarian 3 performing job duties consistent with the description for a Sanitarian 1. (T. 327-328, 370, 389, 444)."; adopts the Findings of Fact, as amended, Conclusions of Law, and Analysis and Discussion in the attached Hearing Officer's Proposed Order, incorporated by reference; and issues the order set forth in Recommendation Number 2 in the Hearing Officer's Proposed Order, incorporated by reference. The Respondent is hereby ordered to:

A. CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117, or

Order  
Case Nos. 94-ULP-02-0079 & 94-ULP-05-0275  
March 21, 1996  
Page 2 of 3

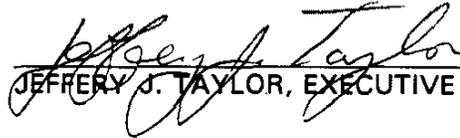
discriminating in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117 of the Revised Code, and from otherwise violating § 4117.11(A)(1) and § 4117.11(A)(3).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty (60) days in all of the usual and normal posting locations where the bargaining unit employees work, the NOTICE TO EMPLOYEES furnished by the Board stating that the Columbus Board of Health, City of Columbus (Respondent) shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B).
- (2) The Respondent immediately shall restore John Fetters to the status quo ante, specifically his job assignments under the supervision of Dr. Gesel as they existed prior to February 8, 1994.
- (3) 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.

POHLER, Chairman, and MASON, Board Member, concur. POTTENGER, Vice Chairman, absent.

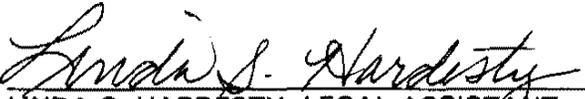
  
JEFFERY J. TAYLOR, EXECUTIVE DIRECTOR

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and 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 (15) days after the mailing of the Board's order.

Order  
Case Nos. 94-ULP-02-0079 & 94-ULP-05-0275  
March 21, 1996  
Page 3 of 3

I certify that this document was filed and a copy served upon each party on this

26<sup>th</sup> day of March, 1996.

  
LINDA S. HARDESTY, LEGAL ASSISTANT



# 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 Board and abide by the following:

**A. CEASE AND DESIST FROM:**

- (1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117, or discriminating in regard to hire or 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, and from otherwise violating § 4117.11(A)(1) and § 4117.11(A)(3).

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

- (1) Post for sixty (60) days in all of the usual and normal posting locations where the bargaining unit employees work, the NOTICE TO EMPLOYEES furnished by the Board stating that the Columbus Board of Health, City of Columbus (Respondent) shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B).
- (2) The Respondent immediately shall restore John Fetters to the status quo ante, specifically his job assignments under the supervision of Dr. Gesel as they existed prior to February 8, 1994.
- (3) 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.

COLUMBUS BOARD OF HEALTH, CITY OF COLUMBUS  
CASE NUMBERS: 94-ULP-02-0079 & 94-ULP-05-0275

BY \_\_\_\_\_

DATE \_\_\_\_\_

TITLE \_\_\_\_\_

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED**

This Notice must remain posted for sixty (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 Board.

**STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Columbus Board of Health, City of Columbus,

Respondent.

**CASE NUMBERS: 94-ULP-02-0079  
94-ULP-05-0275**

**AMENDED HEARING OFFICER'S PROPOSED ORDER<sup>1</sup>**

**I. INTRODUCTION**

On February 15, 1994, and May 17, 1994, John Fetters filed Unfair Labor Practice Charges against the Columbus Board of Health, City of Columbus (Health Department or Respondent) alleging that the Respondent has violated Ohio Revised Code §§ 4117.11(A)(1), (A)(3) and (A)(4).<sup>2</sup> On July 13, 1995, the State Employment Relations Board (SERB, Board or Complainant) determined that there was probable cause to believe that the Respondent has committed unfair labor practices by modifying Mr. Fetters' job duties and denying him access to his previous job location in retaliation for his engaging in protected activities. The Board consolidated the charges and on September 18, 1995, issued a Complaint against the Respondent alleging violations of §§ 4117.11(A)(1), (A)(3), and (A)(4).

A hearing was conducted on November 9, 1995, and November 28, 1995, wherein testimonial and documentary evidence was presented regarding the relevant issues. Subsequently, all parties filed posthearing briefs.

---

<sup>1</sup>This "Amended Hearing Officer's Proposed Order" includes the original Hearing Officer's Proposed Order and the additional finding of fact (Finding of Fact No. 39) by the Board.

<sup>2</sup>All references to statutes will be to the Ohio Revised Code, Chapter 4117, unless otherwise indicated. All references to rules are to the Ohio Administrative Code, Chapter 4117, unless otherwise indicated.

## II. ISSUES

- A. Whether the instant Unfair Labor Practice Charges were filed in a timely fashion in accordance with § 4117.12(B) and Rule 4117-7-01(A).
- B. Whether the Respondent's modification of John Fetters' job duties, as well as its other conduct and actions relating to John Fetters, constitute a violation of §§ 4117.11(A)(1), (A)(3) and/or (A)(4).

## III. FINDINGS OF FACT<sup>3</sup>

- 1. The Columbus Board of Health, City of Columbus is a "public employer" as defined by § 4117.01(B). (S.).<sup>4</sup>
- 2. The Columbus Municipal Association of Government Employees (CMAGE) is an "employee organization" as defined by § 4117.01(D). (S.).
- 3. John Fetters is employed by the Respondent, is a member of a bargaining unit represented by CMAGE, and is a "public employee" as defined by § 4117.01(C). (S.).
- 4. John Fetters has been employed by the Respondent for over 27 years. Mr. Fetters achieved his current classification, Public Health Sanitarian III, in April 1980. He is the second most senior Sanitarian III at the Health Department. (S.; T. 36-37, 155-156, 305-306, 469, 521; Jt. Exh. 2).
- 5. Mr. Fetters never has been disciplined during his 27-year tenure with the Respondent and has never received an unsatisfactory performance evaluation. (T. 59; Jt. Exh. 2).
- 6. In 1991, a group of management-level employees including Mr. Fetters, founded CMAGE to represent the interests of management-level employees both at the Health Department and the City of Columbus. Subsequently, the Respondent granted informal recognition to CMAGE pursuant to § 4117.03(C), and they entered into collective

---

<sup>3</sup>References to the transcript and/or exhibits in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for the related Findings of Fact.

<sup>4</sup>All references to the parties' Stipulations of Fact are indicated parenthetically by "S." All references to the transcript of the hearing are indicated parenthetically by "T." followed by the page number(s). All references to Intervenor's (Charging Party--John Fetters) exhibits in the record are indicated parenthetically by "Int. Exh." followed by the exhibit number. All references to the Respondent's (Board of Health) exhibits in the record are indicated parenthetically by "B.H. Exh." followed by the exhibit letter. All references to joint exhibits in the record are indicated parenthetically by "Jt. Exh." followed by the exhibit number.

bargaining negotiations. As a result of failing to reach agreement, Mr. Fetters testified on behalf of CMAGE as a member of its negotiating team in fact-finding hearings during 1992 as part of CMAGE's effort to obtain an agreement as a non-SERB-certified representative. This effort failed to produce an agreement between the parties. (S.; T. 19, 21-23, 68-69).

7. From at least 1990 through early 1994, Mr. Fetters' primary responsibility, as "Enforcement Administrator" for the Health Department and under the supervision of Dr. Nathaniel Ofoe, was the enforcement of environmental health code violations, (e.g., nuisance, weed, litter, pollution, dangerous animals, and lead violations). Mr. Fetters also bore responsibility for conducting departmental hearings in the areas of food service, pollution, and lead, as well as serving on the city's Nuisance Abatement Board. Consequently, Mr. Fetters filed charges with the local Environmental Court and oversaw the prosecution of those matters. His duties were largely administrative and his responsibilities included little, or no, field work. However, Mr. Fetters' responsibilities as a Sanitarian III have not included supervising employees since approximately 1988. (T. 28, 59-61, 107-108, 140-141, 178, 188-189, 309, 345, 348-349).
8. In 1992-1993, many of the court matters, with the exception of nuisance and dangerous animals cases, were delegated to the Code Enforcement staff of the City of Columbus, Department of Development. Inevitable court docket delays and the non-existence of an applicable computer system created a backlog from time to time which Mr. Fetters suggested curing by restructuring the system to avoid delegation to Code Enforcement. Mr. Fetters' suggestions included computer upgrades and the assignment of one or two field sanitarians to work with the "Enforcement Administrator." (T. 63-64, 77-78, 81-82, 103-104, 442-444; Int. Exhs. 11, 12, 14, 33).
9. In July 1993, CMAGE filed election petitions with SERB for the Health Department and City units (Case No. 93-REP-07-0138). (S.).
10. Mr. Fetters was substantially involved in the CMAGE campaign leading up to the January 1994 election. Mr. Fetters' efforts in organizing Health Department employees included actively soliciting support, distributing literature, issuing newsletters, wearing union insignia at work, and obtaining signatures on petitions first, followed by signing bargaining unit members to CMAGE memberships. Additionally, Mr. Fetters served on the CMAGE "organization committee" and personally was responsible for obtaining virtually all the signatures of Health Department employees electing to become CMAGE members, as well as those authorizing dues deductions. (T. 19-20, 27, 65-66, 69-71, 180, 188).
11. The Respondent was fully aware of Mr. Fetters' significant and extensive involvement in the creation of CMAGE. Michael Pompili, the Assistant Health Commissioner for the Environmental Health Division of the Health Department, knew Mr. Fetters to be the

AMENDED HEARING OFFICER'S PROPOSED ORDER

Case Nos. 94-ULP-02-0079 & 94-ULP-05-0275

Page 4 of 16

- most critical CMAGE organizer at the Health Department in January 1994. (T. 34-35, 138-139, 271, 316).
12. Dr. Nathaniel Ofoe, Mr. Feters' supervisor until January 1994, personally was opposed to the formation of a CMAGE unit at the Health Department. Dr. Ofoe's supervisor, Michael Pompili, the Assistant Health Commissioner for the Environmental Health Division of the Health Department, was opposed to CMAGE's efforts as well. In fact, the Health Department administration was opposed to the formation of a CMAGE unit. (S.; T. 26, 59-60, 72, 119, 314-317, 348, 362; Int. Exh. 43).
  13. Dana Warner, a Health Department employee, was abruptly questioned by Michael Pompili, Assistant Health Commissioner, in late 1993, during the period of the election campaign, regarding the content of a private conversation he was having with Mr. Feters next to his work area. Mr. Warner found Mr. Pompili's conduct in this instance to be surprising and out of character. (T. 168-173).
  14. Dr. William Gesel is employed by the Respondent as a Public Health Veterinarian. He is a member of the CMAGE bargaining unit. Upon his hire in June 1977, Dr. Gesel's two primary duties were to make first and final rabies observations on animals involved in bites, and to supervise the grade A milk program. (T. 392-394, 405).
  15. Mr. Feters first approached Dr. Gesel about the possibility of working under his supervision sometime early in 1993. (T. 395).
  16. As of November 1, 1993, Dr. Gesel's duties included management of the rabies, nuisance, and dangerous and vicious animal programs. Responsibility for trailer park inspections was not included. Sanitarian Is or Sanitarians In Training with the various districts performed the dangerous animals and rabies field work for Dr. Gesel. (T. 366, 416-417).
  17. In the fall of 1993, Mr. Feters requested of Tom Horan, Assistant Commissioner of Health with responsibility for personnel matters, a change in supervisors, in large part due to his current supervisor's (Dr. Ofoe) perceived lack of understanding of Mr. Feters' job responsibilities. Mr. Feters requested to be transferred under the supervision of Dr. Gesel, who reported to Dr. Ofoe. Thereafter, in October 1993, Mr. Feters met with Tom Horan, Dr. Ofoe, and Deborah Mullens (a representative from Human Resources) regarding his request to change supervisors. There was no discussion of the potential for a change in job duties at this meeting and Mr. Feters did not make the request having contemplated such a result. Mr. Feters' transfer to the supervision of Dr. Gesel subsequently was approved and effective January 3, 1994. (T. 75-78, 80-81, 114-116, 206, 208-209, 213-216, 218, 254, 263, 351-352).
  18. In 1993 and 1994, the Health Department was reexamining its operations and preparing for the possibility of a 10-15% budget reduction. Although no deficit

AMENDED HEARING OFFICER'S PROPOSED ORDER

Case Nos. 94-ULP-02-0079 & 94-ULP-05-0275

Page 5 of 16

actually materialized in 1993 or 1994, the Health Department still ultimately reorganized in the name of efficiency, but managed to do so without layoffs. (T. 219-221, 223-225, 281-289; B.H. Exh. H).

19. Dr. Gesel first became completely aware that his responsibilities were going to change significantly effective January 1994, as a result of a November 1993 staff meeting where the reorganization of the Environmental Health Division was discussed. He also first became aware that he would be responsible for supervising Mr. Fetters effective in January 1994 at this same staff meeting. (T. 395, 417-420, 424, 426-427).
20. In a memorandum to all Environmental Health Staff (of which Mr. Fetters and Dr. Gesel were members) from Dr. Ofoe, dated December 23, 1993, Dr. Ofoe summarized some of the restructuring changes to become effective January 3, 1994. These changes included Dr. Gesel's assumption of responsibility for the following programs: Mobile Home Parks, Dangerous Animal and Rabies Control. The memorandum noted that Mr. Fetters would be assigned to work under Dr. Gesel and also announced that enforcement activities would be carried out in each program area with the specifics to be worked out soon. (T. 109-111, 357-358; B.H. Exh. O).
21. For the period of time from the Mr. Fetters' change in supervisors effective January 3, 1994, through early February 1994, Mr. Fetters continued to perform his enforcement work as before and was not performing any "field work." Lower level Sanitarians and Sanitarians-In-Training continued to conduct the "field work," as it was considered an entry level responsibility. (T. 81, 83-84, 86, 118, 183, 191-192, 310, 366, 370, 416-417, 434).
22. Four days prior to the January 25, 1994 CMAGE election, Michael Pompili, Assistant Health Commissioner, wrote a letter to all prospective bargaining unit members expressing his opposition to CMAGE's efforts and the "problems" with unionization. (T. 314-317; Int. Exh. 43).
23. On January 21, 1994, four days prior to the CMAGE election, Dr. Gesel advised Mr. Fetters to stay out of the office in the afternoon(s). (T. 92-95, 431-432; Int. Exh. 20).
24. SERB conducted a representation election between CMAGE and the Respondent on January 25, 1994. CMAGE prevailed by three votes, 37 to 34. (S.; T. 26, 71).
25. The Respondent filed election objections based upon an interaction between a voter(s) and a SERB agent conducting the election. SERB found the objections to the election to be without merit and subsequently certified CMAGE as the exclusive representative of a bargaining unit of the Respondent's employees. (S.; T. 33).
26. Mr. Fetters' personnel file contains all of his vacation requests beginning with the day immediately following the CMAGE election (and none before). (Jt. Exh. 2).

**AMENDED HEARING OFFICER'S PROPOSED ORDER**

**Case Nos. 94-ULP-02-0079 & 94-ULP-05-0275**

**Page 6 of 16**

27. Mr. Fetters was a member of CMAGE's bargaining team subsequent to the January 1994 election and SERB certification. (T. 27, 72-73).
28. Mr. Fetters serves as the CMAGE representative (steward) for Health Department employees. (T. 28).
29. Mr. Fetters' job duties first significantly changed on February 8, 1994, when he was assigned the responsibility of conducting dog bite investigations. This fact was confirmed in a memorandum authored by Dr. Gesel, which he was directed by his supervisors to issue, to all District Supervisors, dated February 10, 1994. The memorandum stated that Mr. Fetters would be responsible for making first and final observations in the Rabies Program and he would investigate all Dangerous Animal complaints. Thereafter, Mr. Fetters' responsibility for referrals to code enforcement as well as departmental hearings for food service and pollution ceased. (T. 39-42, 86-87, 108, 180, 429-430; Int. Exh. 16).
30. Conducting dog bite investigations is considered undesirable and entry-level work traditionally performed by Sanitarian Is, Sanitarians-In-Training, or even seasonal interns. Previously, others specifically had shunned this type of work. (T. 86-87, 142-147, 181-183, 191-192, 310, 366, 441-442).
31. Mr. Fetters filed an Unfair Labor Practice charge (Case No. 94-ULP-02-0079) with SERB on February 15, 1994. (S.).
32. In a memorandum dated March 8, 1994, from Dr. Gesel to Mr. Fetters, Dr. Gesel confirmed for Mr. Fetters that his job duties included trailer park inspections and complaints effective March 1, 1994. Dr. Gesel also affirmed his advice previously given on January 21, 1994, that Mr. Fetters begin his "field work directly from court and finishing in the field without the necessity of returning to the office." (T. 46-49, 92-95, 183-184, 405-407, 431-432; Int. Exhs. 17, 20).
33. Trailer park inspections involve personally inspecting trailer parks for code violations such as garbage compliance, distance violations, and inspecting sewer and water hook-ups. Prior to its reassignment to Mr. Fetters, this work was performed by Bob Kramer, a Sanitarian I. (T. 84, 88, 351, 365, 403; Int. Exh. 17).
34. Mr. Fetters filed an Unfair Labor Practice charge (Case No. 94-ULP-05-0275) with SERB on May 17, 1994. (S.).
35. Dr. Gesel's assignments to Mr. Fetters of dog bite investigations and trailer park inspections, as well as his instructions to Mr. Fetters to not return to the office in the afternoons, were the result of what Dr. Gesel's supervisors had instructed him to do. Dr. Gesel's supervisors were Ted Strouth, Dr. Nathaniel Ofoe, and Michael Pompili (in that order). Dr. Gesel felt caught in the middle between Mr. Fetters and his own

- supervisors as to matters affecting Dr. Gesel. (T. 86-87, 92-94, 183-185, 404, 440-441; Int. Exh. 20).
36. In May 1994, Mr. Fetters requested, and was denied, the use of a city vehicle to use in the course of his job duties. (T. 45-46, 50-51; Int. Exh. 21).
37. In December 1989, the Health Department determined that it no longer would maintain a fleet of automobiles and, instead, would reimburse employees for mileage. Those still driving Health Department vehicles at the time could continue to do so until the vehicles were no longer serviceable. As of the date of the hearing in this matter, only two automobiles remain serviceable, and both are assigned to employees. No Sanitarian IIIs are permanently assigned a Health Department vehicle. The Health Department has a number of employees who drive their personal vehicles and are reimbursed for mileage. The number of miles those employees travel in a month ranges from approximately 15 to 1,200 miles. Mr. Fetters travels approximately 600-700 miles per month. (T. 124-127, 227-232, 234, 262-263; B.H. Exh. U; Int. Exhs. 1, 21).
38. On July 13, 1995, SERB determined that there was probable cause for believing the Respondent had committed, or was committing, unfair labor practices, consolidated these matters for hearing, and directed that a Complaint be issued. (S.).
39. Beginning in February 1994, Mr. Fetters was treated differently than other Sanitarian 3s in terms of job duties. He was the only Sanitarian 3 performing field work on a regular basis. He was the only Sanitarian 3 performing job duties consistent with the description for a Sanitarian 1. (T.327-328, 370, 389, 444).

#### **IV. ANALYSIS AND DISCUSSION**

- A. Whether the instant Unfair Labor Practice Charges were filed in a timely fashion in accordance with § 4117.12(B) and Rule 4117-7-01(A).**

The Respondent contends, and filed a motion to the effect, that the instant charges were not filed in a timely fashion in accordance with § 4117.12(B) and Rule 4117-7-01(A) and thus, SERB is without jurisdiction. Specifically, § 4117.12(B) provides in pertinent part:

The board may not issue a notice of hearing based upon any unfair labor practice occurring more than ninety days prior to the filing of the charge with the board, unless the person aggrieved thereby is prevented from filing the charge by reason of service in the armed forces, in which event the ninety-day period shall be computed from the day of his discharge.

Similarly, Rule 4117-7-01(A) provides:

A charge that an unfair labor practice has been or is being committed may be filed by any person. Such charge shall be filed with the Board within ninety days after the alleged unfair labor practice was committed. If the charging party is prevented from filing a charge by reason of service in the armed forces, the charge shall be filed no later than ninety days after the day of his or her discharge.

The Board reiterated the standard for determining whether an action is timely in SERB v. City of Cincinnati, SERB 91-003 (6-7-91) at 3-13, stating:

*In In re City of Barberton*, SERB 88-008 (7-5-88); *opinion upheld, SERB v. City of Barberton*, 1990 SERB 4-46 (CP, Summit, 7-31-90), SERB determined the point in time in which the ninety-day period starts running:

To begin tolling of the ninety-day period, two conditions must be present. The first is the acquired knowledge, or constructive knowledge, by the Charging Party of the alleged unfair labor practice which is the subject of the charge. The second is the occurrence of actual damage to the Charging Party resulting from the alleged unfair labor practice.

See also, Franklin County Sheriff's Dept. v. SERB, 1992 SERB 4-16 (10th Dist. Ct. App., Franklin, 1-28-92).

The Respondent contends that the ninety-day limitations period commenced no later than November 16, 1993, as a result of staff meetings wherein the reorganization of the Health Department was discussed. Contrary to the Respondent's assertions, the record reveals that the result of the meetings was only the knowledge that Dr. Gesel would be assuming some additional duties as well as gaining the supervision of John Fetters. There was no discussion regarding the specific duties to be performed by Mr. Fetters under the supervision of Dr. Gesel. Indeed, this general announcement was repeated in a memorandum to all Environmental Health Staff from Dr. Ofoe, Assistant Director of Environmental Health, dated December 23, 1993, wherein Dr. Ofoe summarized some of the restructuring changes to become effective January 3, 1994.<sup>5</sup> Again, no specifics regarding Mr. Fetters' job duties were discussed. Most interestingly, in spite of Mr. Fetters' change in supervisors effective January 3, 1994, Mr. Fetters' job duties did not change until February 8, 1994.<sup>6</sup> As a

---

<sup>5</sup>Findings of Fact (F.F.) No. 20.

<sup>6</sup>F.F. Nos. 21, 29.

consequence, the November staff meetings and December memorandum could be said to fall into the "advance notice" category of promises, threats, announcements and various formal or informal decisions not normally triggering the ninety-day statute of limitations. SERB v. City of South Euclid, SERB 91-004 (6-7-91), at 3-19. Thus, the actual damage to Mr. Fetters did not occur until his job duties changed on February 8, 1994. As was stated by the Ohio Supreme Court in Cincinnati Metro. Hous. Auth. v. State Emp. Relations Bd., 53 Ohio St.3d 221, 227, 1990 SERB 4-67 (1990), at 4-70, "Thus, a statute of limitations begins to run when an unlawful act occurs, not upon advance notice of the act."

The same principles apply to the second charge filed on May 17, 1994, in response to the assignment to Mr. Fetters of trailer park inspections in March 1994, as well as the denial of Mr. Fetters' May 1994 request to be supplied with an automobile.<sup>7</sup>

Based upon the foregoing, the instant charges were filed in a timely fashion and the Respondent's motion to dismiss on the grounds that the instant charges were not timely filed is denied.

**B. Whether the Respondent's modification of John Fetters' job duties, as well as its other conduct and actions relating to John Fetters, constitute a violation of §§ 4117.11(A)(1), (A)(3) and/or (A)(4).**

The Respondent is alleged to have violated §§ 4117.11(A)(1), (A)(3), and (A)(4) which state in relevant part as follows:

- (A) It is an unfair labor practice for a public employer, its agents, or representatives to:
  - (1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code. . . .
  - (3) Discriminate in regard to hire or 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. . . .
  - (4) Discharge or otherwise discriminate against an employee because he has filed charges or given testimony under Chapter 4117. of the Revised Code[.]

The Respondent is found to have violated §§ 4117.11(A)(1) and (A)(3), but not (A)(4), for the reasons contained within the analysis and discussion to follow.

---

<sup>7</sup>F.F. Nos. 32, 36.

In State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn., 66 Ohio St.3d 485, 498 (1993), the Ohio Supreme Court articulated the test to be applied by SERB to determine whether an individual has been the victim of discrimination on the basis of protected activity under § 4117.11(A)(3):

[T]he "in part" approach must be broad enough to take into account the actual or true motive of the employer. Thus, only when the employer's decision regarding the employee was actually motivated by anti-union animus must a ULP be found. In determining actual motivation in the context of the "in part" test, the requirements of R.C. Chapter 4117 are best fulfilled when SERB considers the evidence before it in the framework of a single inquiry, focusing on intent of the employer.

The Court further defined the test as follows:

We further hold that under the "in part" test to determine the actual motivation of an employer charged with a ULP, the proponent of the charge has the initial burden of showing that the action by the employer was taken to discriminate against the employee for the exercise of rights protected by R.C. Chapter 4117. Where the proponent meets this burden, a prima facie case is created which raises a presumption of anti-union animus. The employer is then given an opportunity to present evidence that its actions were the result of other conduct by the employee not related to protected activity, to rebut the presumption. SERB then determines, by a preponderance of the evidence, whether a ULP has occurred.

Id. at 499.

In In re Ft. Frye Local School District Board of Education, SERB 94-017 (10-14-94), SERB was provided with its first opportunity to interpret and apply the Ohio Supreme Court's Adena opinion. Acknowledging that the new standard mandates that SERB's primary focus be on the motive of the employer, SERB held:

The Adena standard involves a three-step process:

- (1) The Complainant has the initial burden of showing that the action by the employer was taken to discriminate against the employee for the exercise of rights protected by R.C. Chapter 4117. Where this burden is met, a prima facie case is created which raises a "presumption" of anti-union animus.

- (2) The Respondent is then given the opportunity to present evidence that its actions were the result of other conduct by the employee not related to protected activity for the purpose of rebutting the presumption of anti-union animus.
- (3) The Board then determines, by a preponderance of the evidence, whether an unfair labor practice has occurred.

Id. at 3-107.

To make out a prima facie case of discrimination under § 4117.11(A)(3), the Complainant must establish the following elements: (1) that the employee at issue is a public employee and was employed at relevant times by the Respondent; (2) that he or she engaged in concerted, protected activity under Chapter 4117, which fact was either known to Respondent or suspected by Respondent; (3) that Respondent took adverse action against the employee under circumstances which could, if left un rebutted by other evidence, lead to a reasonable inference that Respondent's actions were related to the employee's exercise of concerted, protected activity under Chapter 4117. In re Ft. Frye Local School District Board of Education, SERB 94-016 (10-14-94).

The record clearly supports the conclusion that a prima facie case is made out in this matter. John Fetters was at all relevant times a public employee.<sup>8</sup> Mr. Fetters also engaged in concerted, protected activities, which fact was known to the Respondent.<sup>9</sup> Not only was Mr. Fetters one of the founders of CMAGE, but he openly engaged in significant organizing activities on its behalf including distributing literature, issuing newsletters, wearing union insignia at work, obtaining signatures on petitions, and testifying in fact-finding hearings. Moreover, Michael Pompili, the Assistant Health Commissioner for the Environmental Health Division of the Health Department, acknowledged Mr. Fetters to be the most critical organizer at the Health Department in January 1994. Finally, combined with Mr. Fetters' aforementioned organizing activities, the Respondent's significant changing of Mr. Fetters' job duties, first on February 8, 1994, and next in March 1994, could lead to a reasonable inference, if left un rebutted, that the Respondent's actions were related to Mr. Fetters' exercise of concerted, protected activities.

The Respondent's rebuttal is based upon its claim that the change in Mr. Fetters' job duties was driven not only by a budgetary process possibly necessitating reductions, but the Respondent's desire to restructure its operations utilizing a "programmatic" approach to services as opposed to a "geographical" approach. Moreover, the Respondent points out that

---

<sup>8</sup>F.F. No. 3.

<sup>9</sup>F.F. Nos. 6, 9-11, 27-28.

it was Mr. Feters who requested the change in supervisors and he should have contemplated the potential for change in his job duties.

The preponderance of the evidence suggests that the Respondent's anti-union animus was its primary motivation in changing Mr. Feters' job duties. Support can be found for arriving at such a conclusion based upon the cumulative effect of the circumstantial evidence as it exists in this matter. As the Ohio Supreme Court stated in State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn., *supra* at 494, 495:

The motivation behind an employer's decision to take an action regarding an employee is the central question that must be resolved in a ULP case. R.C. Chapter 4117 makes it SERB's responsibility to evaluate the factual situation surrounding a ULP charge, and to determine whether a ULP has in fact occurred. Determining the motivation underlying an employer's decision almost always presents difficulties which are not easily overcome. Motivation is rarely clear. An employer charged with a ULP will almost always claim that the particular action was taken for sound business reasons, totally unrelated to the employee's participation in protected activities. The employee will almost always claim that the action was taken to retaliate for his or her exercise of protected rights. Since evidence of the employer's motivation is rarely direct, SERB must rely on a good deal of circumstantial evidence in arriving at its conclusion.

The federal courts share a similar view. In W.F. Bolin Company v. NLRB, 150 L.R.R.M. 2833, 2837 (6th Cir. 1995), the United States Sixth Circuit Court of Appeals held:

Improper employer motivation may be inferred from circumstantial as well as direct evidence. NLRB v. LinkBelt Co., 311 U.S. 584, 602 [7 L.R.R.M. 297] (1941); Birch Run Welding, 761 U.S. at 1179. Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's express hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees compared to other employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities and their discharge. Turnbull Cone Baking Co. v. NLRB, 778 F.2d 292, 297 [121 L.R.R.M. 2025] (6th Cir. 1985), *cert denied*, 476 U.S. 1159 [122 L.R.R.M. 2424] (1985) (citing NLRB v. E.I. DuPont De Nemours, 750 F.2d 524, 529 [118 L.R.R.M. 2014] (6th Cir. 1984).

The record is replete with circumstantial evidence suggesting a violation. First, there is the evidence that Mr. Feters' second-level supervisor, Dr. Ofoe, Assistant Director of Environmental Health, personally was opposed to the formation of a CMAGE unit at the Health Department. Dr. Ofoe's supervisor, Michael Pompili, Assistant Health Commissioner, was opposed to CMAGE's efforts as well. Indeed, four days prior to the January 25, 1994 CMAGE election, Mr. Pompili wrote an impassioned letter to all prospective bargaining unit members expressing his opposition to CMAGE and his views of the "problems" with unionization. Indeed, the Health Department administration was opposed to the formation of a CMAGE unit. In a suspicious incident occurring during the period of the election campaign in late 1993, Mr. Pompili abruptly questioned Dana Warner, a Health Department employee, regarding the content of a private conversation he was having with Mr. Feters next to his work area. Mr. Warner found Mr. Pompili's conduct in this instance to be surprising and out of character.<sup>10</sup>

Additional circumstantial evidence can be found in the form of advice from Mr. Feters' immediate supervisor, Dr. Gesel, delivered four days prior to the CMAGE election, that Mr. Feters should stay out of the office in the afternoons. More incriminating was Dr. Gesel's testimony that he felt caught in the middle between Mr. Feters and his own supervisors as to matters affecting Mr. Feters. Dr. Gesel testified that his assignments to Mr. Feters of dog bite investigations and trailer park inspections, as well as his instructions to Mr. Feters to not return to the office in the afternoons, were the result of what Dr. Gesel's supervisors had instructed him to do. Dr. Gesel's supervisors were Ted Strouth, Dr. Ofoe, and Assistant Health Commissioner Pompili. Curiously, Mr. Feters' personnel file contains all of his vacation requests beginning with the day immediately following the CMAGE election, and none before. Moreover, the Respondent filed objections to the election which SERB investigated and found to be without merit.<sup>11</sup>

The Respondents' attempts to justify the changes in Mr. Feters' job duties based upon the possibility of budget shortfalls, the need to restructure in the name of efficiency, and Mr. Feters' own request to change supervisors are not persuasive. In fact, no deficit materialized in 1993 or 1994. Interestingly, the restructuring had nowhere near the impact, negative or otherwise, on any other Health Department employee as it did on Mr. Feters, particularly not any other Sanitarian III. Finally, when Mr. Feters met with administrators Tom Horan and Dr. Ofoe in October 1993 to discuss his request to change supervisors, there was no discussion of the potential for a change in job duties at that meeting, and Mr. Feters did not make the request having contemplated such a result. Indeed, Dr. Gesel, whom Mr. Feters had requested to be supervised by, was not completely aware of any change in his own responsibilities until November 1993.<sup>12</sup>

---

<sup>10</sup>F.F. Nos. 12, 13, 22.

<sup>11</sup>F.F. Nos. 23, 25, 26, 35.

<sup>12</sup>F.F. Nos. 16-19.

In spite of the announced restructuring changes becoming effective January 3, 1994, Mr. Fetters continued to perform his enforcement work as before and was not performing any "field work." Lower level Sanitarians and Sanitarians-In-Training continued to conduct the "field work," as it was considered an entry-level responsibility. Then, suddenly, on February 8, 1994, within two weeks after the election at which CMAGE prevailed, Mr. Fetters' job duties significantly changed when he was assigned the responsibility of conducting dog bite investigations. Conducting dog bite investigations is considered undesirable and entry-level work traditionally performed by Sanitarians Is, Sanitarian-In-Training, or even seasonal interns. Others previously specifically had shunned this type of work. Less than a month later, Mr. Fetters was assigned the additional responsibility for trailer park inspections, work previously performed by a Sanitarian I. These changes were in spite of Dr. Gesel's testimony that there was no reason that Mr. Fetters could not continue to perform the enforcement work under Dr. Gesel's supervision as he had from January 3, 1994, through February 7, 1994.<sup>13</sup> The federal courts have found that anti-union motivation reasonably may be inferred from factors such as proximity in time between the employee's union activity or a significant event such as an election and the employer's subsequent discharge, constructive discharge, or other negative treatment of the employee. NLRB v. E.I. DuPont De Nemours, 118 L.R.R.M. 2014 (6th Cir. 1984); Jim Causley Pontiac v. NLRB, 104 L.R.R.M. 2190 (6th Cir. 1980).

Finally, it is alleged that the Respondent's March 1994 assignment of the trailer park inspections to Mr. Fetters and the denial of his May 1994 request for a city vehicle were in retaliation for the filing of his initial charge in this matter in violation of § 4117.11(A)(4). The evidence in the record suggests otherwise. The assignment of the trailer park inspections is more reasonably and logically found to be an extension and continuation of Respondent's conduct and actions hereinabove found violative of § 4117.11(A)(3). With respect to Mr. Fetters' request for the use of a city vehicle, the Respondent's denial is entirely consistent with its previously applied policy regarding the assignment of city vehicles.<sup>14</sup>

Based upon a preponderance of the evidence in the record and the discussion hereinabove, the Respondent's modification of John Fetters' job duties constitutes a violation of §§ 4117.11(A)(1) and (A)(3). Conversely, due to a lack of a preponderance of evidence in the record, the Respondent's actions do not constitute a violation of § 4117.11(A)(4).

#### V. CONCLUSIONS OF LAW

1. The Columbus Board of Health, City of Columbus (Respondent) is a "public employer" within the meaning of § 4117.01(B).

---

<sup>13</sup>F.F. Nos. 20-21, 29-30, 32-33; T. 439.

<sup>14</sup>F.F. No. 37.

2. The Columbus Municipal Association of Government Employees (CMAGE) is an "employee organization" within the meaning of § 4117.01(D).
3. John Fetters is a "public employee" within the meaning of § 4117.01(C).
4. The instant Unfair Labor Practice Charges were filed in a timely fashion in accordance with § 4117.12(B) and Rule 4117-7-01(A).
5. The Respondent's modification of John Fetters' job duties constitutes a violation of §§ 4117.11(A)(1) and (A)(3).
6. The Respondent's conduct and actions alleged in Case No. 94-ULP-05-0275 do not constitute a violation of § 4117.11(A)(4).

#### **VI. RECOMMENDATIONS**

Based upon the foregoing, it is recommended:

1. The State Employment Relations Board adopt the Findings Of Fact and Conclusions Of Law set forth above.
2. The State Employment Relations Board issue an ORDER, pursuant to § 4117.12(B)(3), requiring the Columbus Board of Health, City of Columbus (Respondent) to:

**A. CEASE AND DESIST FROM:**

- (1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117, or discriminating in regard to hire or 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, and from otherwise violating § 4117.11(A)(1) and § 411.7.11(A)(3).

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

- (1) Post for sixty (60) days in all of the usual and normal posting locations where the bargaining unit employees work, the NOTICE TO EMPLOYEES furnished by the Board stating that the Columbus Board of Health, City of Columbus (Respondent) shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B).

- (2) The Respondent immediately shall restore John Fetters to the status quo ante, specifically his job assignments under the supervision of Dr. Gesel as they existed prior to February 8, 1994.
- (3) 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.