

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Ohio Federation of Teachers, AFT, AFL-CIO,

Respondent.

CASE NUMBER: 95-ULP-03-0102

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Pottenger, and Board Member Mason: June 6, 1996.

The Grand Valley Education Association/Ohio Education Association ("GVEA/OEA") filed an unfair labor practice charge against the Ohio Federation of Teachers, AFT, AFL-CIO ("Respondent") on March 9, 1995. Pursuant to Ohio Revised Code ("O.R.C.") § 4117.12, the Board conducted an investigation and found probable cause to believe that the Respondent had violated O.R.C. §§ 4117.11(B)(1), (B)(2), and (B)(5) by seeking and obtaining a purported disaffiliation of the local union, the GVEA, with the Ohio Education Association ("OEA"); causing the Employer to recognize the Respondent for representational purposes; and by seeking and receiving dues paid by local members intended for OEA. Subsequently a complaint was issued and the case was heard by a Board hearing officer. On December 29, 1995, the Hearing Officer's Proposed Order was issued.

The Board has reviewed the record, the Hearing Officer's Proposed Order, exceptions, and responses. For the reasons stated in the attached Opinion, incorporated by reference, the Board adopts the Findings of Fact and Conclusions of Law of the Hearing Officer's Proposed Order.

The Respondent is ordered to:

A. CEASE AND DESIST FROM:

Restraining or coercing employees in the exercise of their rights guaranteed in Chapter 4117 of the Ohio Revised Code by promoting, assisting and facilitating the mid-term change in affiliation of the GVEA, as well as continuing to assist and work with the GVEA subsequent to this illegal change in affiliation, and from otherwise violating O.R.C. § 4117.11(B)(1).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for thirty (30) days starting September 3, 1996, in all of the usual and normal posting locations where the bargaining unit employees represented by the GVEA work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the Ohio Federation of Teachers, AFT, AFL-CIO (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) Immediately return to the GVEA all union dues received to date.
- (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; POTTENGER, Vice Chairman; and MASON, Board Member, concur.



SUE POHLER, CHAIRMAN

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 State Employment Relations 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.

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I certify that this document was filed and a copy served upon each party on this
7th day of June, 1996.

Linda S. Hardesty
LINDA S. HARDESTY, LEGAL ASSISTANT

dir/96-06-06.11



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. WE WILL CEASE AND DESIST FROM:

- (1) Restraining or coercing employees in the exercise of their rights guaranteed in Chapter 4117 of the Ohio Revised Code by promoting, assisting and facilitating the mid-term change in affiliation of the GVEA, as well as continuing to assist and work with the GVEA subsequent to this illegal change in affiliation, and from otherwise violating § 4117.11(B)(1).

B. WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for thirty (30) days starting September 3, 1996, in all of the usual and normal posting locations where the bargaining unit employees work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the Ohio Federation of Teachers, AFT, AFL-CIO (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) Return immediately to the GVEA all union dues received to date.
- (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.

**OHIO FEDERATION OF TEACHERS, AFT, AFL-CIO
CASE NUMBER: 95-ULP-03-0102**

DATE

BY

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

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CASE NUMBER: 95-ULP-03-0102

OPINION

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB") on exceptions filed to the Hearing Officer's Proposed Order issued on December 29, 1995. For the reasons below, we find that the Ohio Federation of Teachers, AFT, AFL-CIO ("OFT" or "AFT/OFT") violated Ohio Revised Code ("O.R.C.") § 4117.11(B)(1) by seeking and changing the affiliation of the local from the Ohio Education Association/NEA ("OEA") to the OFT.

I. BACKGROUND

The Grand Valley Education Association ("GVEA"), affiliated with the OEA/NEA, has been the deemed-certified exclusive bargaining representative of teachers of the Grand Valley Local Board of Education ("Employer") since at least 1979. In October 1979, the GVEA and the OEA entered into a "Dues Transmittal Contract" providing that the OEA would receive and distribute dues and service fees to the National Education Association ("NEA") and the appropriate district association. The contract specifically provided that amendment or

modification to the schedule of dues payment can be achieved only in writing by *both* the OEA and the affiliated local association.¹

The collective bargaining agreement between the GVEA and the Employer, effective from July 1, 1992 through June 30, 1995 ("1992-1995 Agreement"), was signed by Suan L. Potts, OEA consultant, for the employee organization, and by the Superintendent for the Employer. The GVEA affiliation with OEA is recognized in Article I, § 1 of the GVEA's Constitution that provides: "The name of this organization shall be the Grand Valley Education Association, which shall maintain affiliation with the Ohio Education Association and the National Education Association." Article II, § 2 of the GVEA's Constitution states: "This Association shall cooperate with the purposes of the Ohio Education Association, the National Education Association and the North East Ohio Education Association." Under § 1.04.7 of the 1992-1995 Agreement, the GVEA's affiliation with the OEA is also recognized since it states that the GVEA represents itself, in addition to the OEA and the NEA, in its agreement to indemnify the Employer for cost or liability concerning fair share fees.²

On August 26, 1994, the GVEA held a general membership meeting at which nearly all of the bargaining unit members signed OEA enrollment and dues deduction forms. The form set forth the "Annual Association Dues" for the GVEA, including the "OEA, NEA, NEOEA, Uniserv [sic]," as \$446.00. The form also stated: "I hereby direct my employer to deduct from my earning consistent with the method of payroll deduction authorized (annual or continuing) and local policy, ~~the~~ total annual dues of the organizations indicated hereon." The forms were submitted to the Employer and, beginning September 14, 1994, the Employer deducted a share of the annual dues from each teacher's pay approximately every two (2) weeks and transmitted those sums to the GVEA, which in turn deposited those sums in a

¹Finding of Fact ("F.F.") Nos. 3, 5, and 6.

²F.F. Nos. 3 - 4; Hearing Officer Exhibit ("H.O. Exh.") Nos. 1 - 3. [The "H.O. Exh." refers to documents on file with SERB of which the hearing officer took administrative notice during the hearing of this matter.]

GVEA account. The GVEA did not send copies of the enrollment forms to the OEA nor did the GVEA send any dues or fees to the OEA for the 1994 - 1995 school year.³

On or about August 24, 1994, GVEA President Shirley Kearney contacted Dr. Lois Miller, a Field Coordinator for the OFT, regarding affiliation with OFT. On August 31, 1994, the OFT Field Coordinator met with the GVEA's executive committee. Following this meeting the GVEA's executive committee recommended that the GVEA become affiliated with the OFT. On September 7, 1994, the OFT Field Coordinator attended a general membership meeting of the GVEA; she discussed the benefits of affiliation with the OFT and recommended the amount of the OFT's dues including the local's share. At this meeting, the general membership voted to pursue a change in affiliation from the OEA to the OFT.⁴

The OFT paid the lodging, food, and conference expenses for GVEA local President Shirley Kearney, GVEA Treasurer Sonya Holley, and GVEA building representatives Bonnie Guerine and Pat Neuberger for attending the OFT's Local Presidents' Conference in Worthington, Ohio on September 16 - 17, 1994. In a September 26, 1994 letter to GVEA members, Ms. Kearney described the "training session" they participated in and said the GVEA officers were "assured" that "SERB doesn't care with whom we affiliate," "we will be covered by OFT from the October 10th election," and "representation will be excellent." A memo from local officer Debbie McGowan to GVEA members was issued on September 11, 1994, explaining that the change in the constitution is needed to accommodate the AFT/OFT in the event they are chosen as "our new bargaining agent."⁵

The OFT Field Coordinator visited each of the district's five schools at various times and distributed information to the GVEA membership between September 20, 1994 and

³F.F. No. 9.

⁴F.F. Nos. 8, 10, and 11.

⁵F.F. No. 12; Joint Exhibit ("Jt. Exh.") No. 11.

October 10, 1994, which, in addition to touting the benefits of OFT membership, attempted to persuade members to change affiliation from the OEA to the OFT. On October 10, 1994, the GVEA membership voted by secret ballot to change the GVEA's affiliation from the OEA to the OFT, and the OFT sent an AFT/OFT charter to be signed by thirty (30) members of the GVEA.⁶

In October 1994, the OFT Field Coordinator sent to the GVEA the required changes to their constitution and by-laws necessary for affiliation with the AFT/OFT. After the October 10, 1994 GVEA election to change affiliations, the OFT Field Coordinator informed GVEA President Kearney of the following: the vote on constitutional changes would not be by secret ballot, a grievance chairperson was needed, the members should prepare for negotiations by formulating ideas, and a meeting with the OFT Field Coordinator would be held on October 26, 1994, to revise the GVEA's constitution.⁷

The OFT Field Coordinator participated in a GVEA executive committee meeting on October 26, 1994, where the GVEA wrote a \$1,348.88 check to the OFT for November 1994 dues, designated dates to distribute the new constitution and to conduct a "vote to accept it," and established a constitution revision committee, a grievance committee, and a negotiation survey committee. On November 1, 1994, the OFT Field Coordinator prepared and sent copies of the "revised constitution" to members of the GVEA constitution revision committee.⁸

The American Federation of Teachers ("AFT") issued a charter to the GVEA on November 1, 1994, officially recognizing it as an affiliate of the AFT. By a letter dated November 5, 1994, the president of the AFT informed GVEA local President Kearney that the

⁶F.F. Nos. 13 - 15.

⁷F.F. Nos. 16 - 17.

⁸F.F. Nos. 18 - 19.

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GVEA was now AFT Local 4910 and included a dues transmittal agreement to be signed. Ms. Kearney and Ms. Holley signed the agreement on behalf of the GVEA on November 21, 1994. The GVEA sent no money to the OEA for the 1994 - 1995 school year, but sent monthly dues to the OFT beginning approximately October 26, 1994 through February 29, 1995.⁹ The OFT Field Coordinator assisted GVEA Treasurer Holley in completing an application to the Internal Revenue Service for an employer identification number. The document was signed by GVEA President Kearney on December 5, 1994. On or about December 6, 1994, the GVEA members voted to buy and become covered by AFT/OFT's accidental death insurance. On February 15, 1995, the GVEA, calling itself AFT Local 4910, met and conducted business. Two GVEA members were elected to attend as delegates to the OFT's annual convention in Cincinnati on March 2 - 4, 1995, at the OFT's expense. Annual dues were reduced from \$446.00 to \$336.00, the amount previously recommended by the OFT Field Coordinator.¹⁰

On February 16, 1995, GVEA President Kearney sent a letter advising the district's superintendent of "the affiliation change of the Grand Valley Education Association from NEA/OEA to AFT/OFT." That same day, GVEA Treasurer Holley sent a letter to the district's payroll officer advising her that GVEA dues have been reduced "due to the change in affiliation from NEA/OEA to AFT/OFT." On March 13, 1995, President Kearney filed a Notice to Negotiate with SERB. Also on March 13, 1995, Suan L. Zannelli, formerly Suan L. Potts, the OEA consultant, filed a Notice to Negotiate with SERB for the GVEA, OEA/NEA.¹¹

⁹On February 17, 1995, the OEA sued the GVEA, GVEA President Kearney, and GVEA Treasurer Holley in the Ashtabula County Court of Common Pleas over their failure to transmit deducted dues to the OEA. On February 28, 1995, the parties to that suit agreed the GVEA would deposit \$17,500.00 and any additional dues collected into an escrow account. On April 10, 1995, the Defendants filed an Answer and Counterclaim. The matter remains pending.

¹⁰F.F. Nos. 20 - 26.

¹¹F.F. Nos. 27 and 29.

II. DISCUSSION

The first issue to be determined in this case is whether the change in affiliation from the OEA to the OFT was an internal union affair, which has no impact on the identity of the bargaining representative, or an actual change in the bargaining representative, which can only be achieved through a SERB-conducted election. If the change in affiliation was an internal union affair, the OFT's active role in promoting, assisting and facilitating the GVEA's change of affiliation did not violate O.R.C. Chapter 4117. If, on the other hand, the change in affiliation was a change in the bargaining representative, then the second issue before us will be which actions of the OFT, if any, were in violation of O.R.C. § 4117(B)(1).

A. Whether the Change of Affiliation Was a Change of Bargaining Representative

There are three types of affiliation cases: original affiliation, disaffiliation, and change of affiliation. There are two competing concerns involved in affiliation cases. On one hand, affiliation is generally an internal union affair best left to the union membership decision. On the other hand, if affiliation results in a change in the bargaining representative, labor peace and stability may be disrupted. The law balances these competing concerns by authorizing the Board to conduct a representation election *only* where affiliation raises a question of representation. O.R.C. § 4117.07. Conversely, where affiliation does not raise a question of representation, the statute gives the Board no authority to act.

The Board has previously addressed these issues in an original affiliation case, *In re Montgomery County Joint Vocational School Dist Bd of Ed*, SERB 89-010 (5-11-89) [hereinafter "*Montgomery*"], and a disaffiliation case, *In re Cuyahoga County Sheriff's Dept.*, SERB 92-013 (9-1-92) [hereinafter "*Cuyahoga*"]. In both cases the Board adopted the "substantial continuity" test adhered to by the National Labor Relations Board ("NLRB") and

various public sector jurisdictions.¹² In both *Montgomery, supra* at 3-57 - 3-58, and *Cuyahoga, supra* at 3-42, the Board laid out the requirements of the "substantial continuity" test as follows:

1. The employee organization verifies in the course of the investigation pursuant to O.A.C. Rule 4117-5-04 that adequate internal affiliation election procedures were followed. Such procedures should provide that:
 - a. Union members are given reasonable notice of the upcoming vote on the question of affiliation;
 - b. Union members are given an opportunity to discuss the affiliation election; and
 - c. Steps are taken to protect the secrecy of the ballots used in the affiliation election.
2. There is substantial continuity between the employee organization before and after affiliation, thus eliminating the possibility of a question of representation arising from a change in identity of the union. Determination of this factual question will, of necessity, be made by the Board on a case-by-case basis.
3. Pursuant to O.A.C. Rule 4117-5-01(E), there is no other question of representation pending.

We believe this test is equally applicable to change of affiliation cases and is not incompatible with the outcome of the Board's decision in its only prior change of affiliation case, *In re Mad River-Green Local Bd of Ed*, SERB 86-029 (7-31-86) [hereinafter "*Mad River-Green*"]. Although it can be argued that *Mad River-Green* established a *per se* rule requiring an election in every instance, we do not adopt such an inflexible interpretation. In the case at issue and in the future, the "substantial continuity" test will apply to change of affiliation cases, as well as original affiliation and disaffiliation cases.

¹²See, e.g., *Representative, and California Teachers Association/NEA, Employee Organization*, 14 PERC ¶ 21202 (CA 10-26-90); *In re Federation of Public Employees*, 21 FPER ¶ 26012 (FL 11-14-94); *In the Matter of Parsippany-Troy Hills Township*, 20 NJPER ¶ 25141 (NJ 6-30-94).

This test is applicable to both deemed-certified bargaining representatives and Board-certified representatives. Section 4(A) of Am.Sub.S.B. No. 133 provides in relevant part: "Notwithstanding any other provision of this act, an employee organization recognized as the exclusive representative shall be deemed certified until challenged by another employee organization under the provisions of this act and the State Employment Relations Board has certified an exclusive representative." 140 Ohio Laws, Part I, 336, 367. This provision expressly protects the deemed-certified status of the *exclusive representative* until it is challenged by another employee organization. *Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Emp., AFL-CIO v. Cincinnati* (1994), 69 Ohio St.3d 677, 1994 SERB 4-37. The "substantial continuity" test contemplates small organizational, personnel and structural changes within an employee organization to reflect the reality that in a twelve (12) year period employee organizations do not remain static, and, at the same time, provides the necessary safeguards to protect the deemed-certified status of the exclusive representative. This comports with the direction and spirit of the Ohio Supreme Court decision in *State ex rel. Brecksville Edn. Assn. v. State Emp. Relations Bd.* (1996), 74 Ohio St.3d 665, where the Court held that SERB has jurisdiction to amend the composition of a deemed-certified unit when a joint petition to amend is filed. Thus, where there is "substantial continuity" there is no change in the exclusive representative.¹³

In the case at issue, we are not addressing the procedural due process requirements in *Montgomery* as they were not at issue by the parties. Neither is there another representation matter pending. The sole issue we must determine is whether there is "substantial continuity" before and after the change of affiliation.

¹³While *Brecksville* specifically involved the addition of employees to a deemed-certified unit, we believe that a change in affiliation which meets the "substantial continuity" test is permissible under *Brecksville* when it is, in effect, a change in name only and not in the bargaining representative. As the Court stated in *Brecksville, supra* at 670: "There is no indication, however, either in our opinions or in the legislative history of Am. Sub.S.B. No. 133, that the intent of the legislature was slavish adherence to the 1983 *status quo*."

In making the substantial continuity determination, the pre-affiliation and post-affiliation entities are compared in light of a number of factors, including, but not limited to, structure, administration, officers, assets, membership, autonomy, constitution and by-laws, size, and territorial jurisdiction.¹⁴ Under such a comparison, we will examine if there is a change in the rights and obligations of the union's leadership and membership, and in the relationships between the putative bargaining representative, its affiliate, and the employer.¹⁵ To determine continuity, no strict checklist is used, but rather the Board will look to the totality of the situation.¹⁶ In *NLRB v. Financial Institution Employees of America, Local 1182 (Seattle-First National Bank)* 475 U.S. 192, 206, 121 L.R.R.M. 2741 (1986) the Supreme Court highlighted the importance of continuity by equating the "question concerning representation" inquiry with a concern for "changes [that] are sufficiently dramatic to alter the union's identity."

A review of the cases indicates that, in considering the issue of continuity of representation, the primary concern is whether there is essentially the same bargaining representative before and after the change in affiliation. In a situation where disaffiliation or change of affiliation occurs, rather than affiliation of an independent union, the NLRB also examines whether the original affiliate relinquished its role as the joint representative of the unit employees. See also *In re General Motors Corp.*, Case 9-RM-1009 (November 1, 1995).

In the case at issue, the OFT argued that the change in affiliation was proper because no change in the identity of the bargaining representative took place. The facts do not support such an argument. On the contrary, the record shows that the change of affiliation was actually a change in bargaining representative.

¹⁴*NLRB v. Pearl Bookbinding Co., Inc.*, 517 F.2d 1108, 1111 - 1112, 89 L.R.R.M. 2614 (1st Cir. 1975).

¹⁵*J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 857, 98 L.R.R.M. 2191 (5th Cir.) cert. denied, 439 U.S. 893, 99 L.R.R.M. 2657 (1978).

¹⁶*Yates Industries, Inc.*, 264 NLRB 1237, 1250, 112 L.R.R.M. 1231 (1982).

