

**STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Akron,

Respondent.

**Case No. 98-ULP-05-0224**

**ORDER  
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:  
June 17, 1999.

On May 11, 1998, the Fraternal Order of Police Akron Lodge No. 7 ("Charging Party") filed an unfair labor practice charge against the City of Akron ("Respondent"). On July 23, 1998, the State Employment Relations Board ("Board" or "Complainant") found probable cause to believe that the Respondent had violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5) by unilaterally transferring bargaining-unit work to nonbargaining-unit positions. A Complaint and Notice of Hearing were issued on August 21, 1998.

A hearing was held on October 9, 1998. On January 20, 1999, the Administrative Law Judge's Proposed Order was issued, recommending that the Board find violations of O.R.C. Sections 4117.11(A)(1) and (A)(5). On February 12, 1999, the Respondent filed its exceptions to the proposed order. On February 24, 1999, the Complainant and the Charging Party filed their responses to the exceptions.

After reviewing the record and all filings, the Board adopts the Findings of Fact and Conclusions of Law in the Proposed Order. The City of Akron is ordered to:

A. Cease and desist from:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code

Chapter 4117 in violation of Ohio Revised Code Section 4117.11(A)(1) by unilaterally transferring bargaining-unit work to nonbargaining-unit positions; and

- (2) Refusing to bargain collectively with Fraternal Order of Police, Akron Lodge No. 7 before transferring bargaining-unit work to nonbargaining-unit employees in violation of Ohio Revised Code Section 4117.11(A)(5).

B. Take the following affirmative action:

- (1) Post for sixty days 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 City of Akron 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 to the status quo regarding the staffing of sergeants and lieutenants in the Communications Center;
- (3) Bargain in good faith with Fraternal Order of Police, Akron Lodge No. 7 regarding the transferring out of bargaining-unit work in the Communications Center to nonbargaining-unit employees;
- (4) Comply with the contractual bidding process regarding the staffing of sergeants and lieutenants in the Communications Center;
- (5) Post for sixty days the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the City of Akron shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B) in all of the usual and normal posting locations where the bargaining-unit employees of the City of Akron, who are represented by Fraternal Order of Police, Akron Lodge No. 7 work; and
- (6) Notify the State Employment Relations Board in writing within twenty calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

It is so directed.

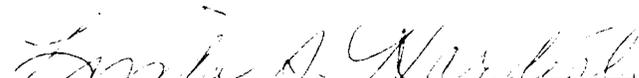
POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,  
concur.



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 days after the mailing of the State Employment Relations Board's order.

I certify that this document was filed and a copy served upon each party by certified mail, return receipt requested, on this 24<sup>th</sup> day of June, 1999.



LINDA S. HARDESTY, CERTIFIED 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 State Employment Relations Board and abide by the following:

The City of Akron is hereby ordered to:

A. Cease and desist from:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 in violation of Ohio Revised Code Section 4117.11(A)(1) by unilaterally transferring bargaining-unit work to nonbargaining-unit positions; and
- (2) Refusing to bargain collectively with Fraternal Order of Police, Akron Lodge No. 7 before transferring bargaining-unit work to nonbargaining-unit employees in violation of Ohio Revised Code Section 4117.11(A)(5).

B. Take the following affirmative action:

- (1) Post for sixty days 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 City of Akron 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 to the status quo regarding the staffing of sergeants and lieutenants in the Communications Center;
- (3) Bargain in good faith with Fraternal Order of Police, Akron Lodge No. 7 regarding the transferring out of bargaining-unit work in the Communications Center to nonbargaining-unit employees;
- (4) Comply with the contractual bidding process regarding the staffing of sergeants and lieutenants in the Communications Center;
- (5) Post for sixty days the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the City of Akron shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B) in all of the usual and normal posting locations where the bargaining-unit employees of the City of Akron, who are represented by Fraternal Order of Police, Akron Lodge No. 7 work; and
- (6) Notify the State Employment Relations Board in writing within twenty calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

**SERB v. City of Akron, Case No. 98-ULP-05-0224**

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BY

\_\_\_\_\_  
DATE

\_\_\_\_\_  
TITLE

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

**STATE OF OHIO  
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Akron,

Respondent.

Case No. 98-ULP-05-0224

**OPINION**

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") on the exceptions and responses to exceptions to the Administrative Law Judge's Proposed Order issued January 20, 1999. For the reasons below, we find that the City of Akron violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5) when it unilaterally transferred bargaining-unit work to nonbargaining-unit positions.

**I. BACKGROUND**

The Fraternal Order of Police, Akron Lodge No. 7 ("FOP") is the exclusive representative for a bargaining unit of police officers, excluding the chief and deputy chiefs, of the City of Akron ("City"). The FOP and the City are parties to a collective bargaining agreement effective December 15, 1997 to December 31, 2000 ("Agreement"), containing a grievance procedure that culminates in final and binding arbitration.

Article XII ("Seniority"), Section B ("Bid Process") of the Agreement governs how positions within the bargaining unit are filled. Under this clause, when the Police Chief chooses to fill a vacancy, a notice is distributed in the Daily Bulletin stating that a vacancy exists. Any bargaining-unit member with appropriate rank can complete a bid sheet to apply for the position. The position is then awarded to the most senior person so long as the senior person is otherwise qualified by skill, ability, or work performance; otherwise, the next most senior person is awarded the bid. Bid positions include all positions within the Akron Police Division other than exempt positions, which are listed in Article XII, Section A ("Definitions") of the Agreement. If a position is exempt, the police chief has the right to place a bargaining-unit member into the vacancy without any reference to seniority. Article XII, Section B(1)(d)(1) of the Agreement provides that bargaining-unit members who successfully bid into one of the five positions listed in the Agreement are prohibited from bidding for another position for one year.

In 1992 and 1993, the City began to study the possibility of combining the police and fire dispatch operations into a joint communications center. In December 1992, the City received a report from the consulting firm of Deloitte & Touche regarding plans for a joint communications center. The Deloitte & Touche report recommended that the City replace the police officers in the Radio Room with civilian supervisors.

After the City received the Deloitte & Touche report, it formed a review committee to plan the creation of a joint communications center. The review committee included Sergeant Culp and Sergeant Thorton from the Police Department, who served as representatives of the Police Department, not as representatives of the FOP. From at least 1992 until the present, neither Sergeant Culp nor Sergeant Thorton held a leadership position with the FOP.

The City did not provide the FOP with a copy of the report. The FOP Presidents in 1994-1997 had never seen the Deloitte & Touche report and had never been advised by

the City that it intended to replace police officers in the Communications Center with civilian supervisors. The current FOP President had not been advised that the City intended to replace officers in the Communications Center with civilian supervisors until April 6, 1998, when he received the City's response to a grievance he filed.

On October 13, 1994, the City's Civil Service Commission held a meeting during which the parties discussed utilizing civilian supervisors in the Radio Room/Communications Center. Before this meeting, Sergeant and then-FOP President Westfall heard rumors that the City was considering replacing sergeants in the Radio Room/Communications Center with civilian supervisors. As FOP President, Sergeant Westfall did not object to creating a new civilian supervisor classification so long as any civilian supervisor worked along with a police officer.

Before 1995, the area receiving calls and dispatching police officers was called the Radio Room. In 1994 or 1995, the City decided to staff the Radio Room with only civilians. Before civilian supervisors were assigned to the Radio Room, only sergeants and police officers who were bargaining-unit members served as supervisors in the Radio Room/Communications Center. After the City combined the dispatch operations from the police and fire departments in November 1995, the Radio Room was called the Communications Center.

A Safety Communications Technician I ("call-taker") answers emergency calls for the Akron Police Department. A Safety Communications Technician II ("dispatcher") dispatches police and other emergency vehicles. Occasionally, police officers on light duty are assigned to perform call-taker or dispatcher duties. Since at least 1991, sergeants responsible for supervising the call-takers and dispatchers have been assigned to the Communications Center. These sergeants have held bid positions.

In 1995, David Culp retired from serving as a day-shift sergeant in the Communications Center. The City did not post the bid position vacated by Sergeant Culp. This occasion was the first and only time between 1991 and 1998 that the City did not post a bid position to replace a sergeant who had retired from the Communications Center. When the FOP inquired as to when Sergeant Culp would be replaced, the City responded that Sergeant Culp would not be replaced because the one lieutenant and one sergeant already assigned to the day shift were capable of handling the duties. To avert a grievance being filed by the FOP, the parties negotiated and agreed to transfer a sergeant to the C.O.P.S. unit, which previously did not have a sergeant assigned.

During 1996 and 1997, the City promoted seven Communications Technicians to Communications Supervisors and maintained the staffing level of two sergeants or lieutenants per shift in the Communications Center. When the civilian supervisors were promoted, they completed two weeks of formal training and then shadowed the sergeants in the Communications Center to learn their job. On October 22, 1996, a meeting was held to address some problems with the new Communications Center. The Presidents of the three affected unions, including the FOP, requested the meeting. The FOP was represented by Sergeant Hoover. During this meeting, the parties did not discuss the City's decision to replace sergeants in the Communications Center with civilian supervisors.

On July 14, 1997, Lieutenant Michael Woody bid out of the Communications Center. The vacancy was not immediately posted for bid. FOP President Hlynsky agreed with the Police Chief's request to place a hold on all bids for lieutenants in the police department, including the Communications Center position. Between July 14, 1997 and February 16, 1998, a civilian supervisor never replaced a sergeant on the day shift in the Communications Center. At present, no lieutenant has officially replaced Lieutenant Woody; unofficially, however, Lieutenant Harris has been performing the work of

Lieutenant Woody in the Communications Center. Sergeants in the Communications Center report to Lieutenant Woody regarding scheduling days off and other concerns.

On July 30, 1997, at the request of the Presidents of the three affected unions, a meeting was held to discuss staffing concerns at the Communications Center. The FOP was again represented by Sergeant Hoover. At this meeting, an agreement was reached that the City would increase the number of civilian employees in the Communications Center to alleviate the need for excessive overtime. The parties did not discuss the City's decision to replace sergeants and lieutenants in the Communications Center with civilian supervisors.

During the 1997 contract negotiations, the FOP discussed rumors about the City replacing sergeants and lieutenants in the Communications Center with civilian supervisors. At that time, the FOP still had not received any notice from the City that it intended to replace the sergeants in the Communications Center with civilian supervisors. Even after discussing the issue at the bargaining table, the FOP did not receive any formal proposals from the City. On October 27, 1997, the FOP presented the City with a copy of its proposals. The proposals did not contain any language with respect to Communications Center staffing because the FOP's stance did not require any contract language changes. The FOP's proposals did contain language restricting the City's assignment of reserve police officers to perform bargaining-unit work. After discussing the issue, the City agreed to provide the FOP with a letter assuring it that reserve police officers would not perform bargaining-unit work. This offer was accepted by the FOP, and it withdrew its proposal on this issue.

In 1996 and 1997, ten sergeants left the Communications Center. Each vacancy was posted according to the bidding procedure in the Agreement, and each vacancy was filled by another sergeant. The civilian supervisors were not able to perform the work of the

sergeants until the end of 1997, which is approximately the time that the City stopped replacing sergeants in the Communications Center with other sergeants. Until February 16, 1998, the City required a sergeant or lieutenant on each shift in the Communications Center.

On February 16, 1998, Sergeant Dennis Johnson bid out of the Communications Center. The City then stopped assigning overtime in the Communications Center to sergeants and lieutenants and began replacing sergeants and lieutenants in the Communications Center with civilian supervisors. Sergeant Johnson had been working the day shift. His departure left two sergeants on the midnight shift, two sergeants on the afternoon shift, and no sergeants or lieutenants on day shift, other than Lieutenant Harris who served unofficially as the day-shift lieutenant. Thereafter, Sergeant Aylward was moved from the afternoon shift to the day shift.

On April 3, 1998, the FOP filed a grievance regarding the City's reassignment of Sergeant Aylward from the afternoon shift to the day shift without using the bid process in the Agreement. On April 6, 1998, Captain Gus Hall responded to the grievance, stating that due to the January 1998 decision to civilianize the supervision of the Communications Center, when police supervisors bid out of the Communications Center, no vacancies would be filled by FOP bargaining-unit employees. Instead, civilians were to be phased into supervisory positions in the Communications Center. The FOP appealed the grievance to Police Chief Irvine. Chief Irvine responded that, from the beginning of the Communications Center reorganization, it was the City's objective to staff the Communications Center with only civilians. Chief Irvine also stated that as police officers and supervisors retired or bid out of the Communications Center, they would not be replaced. Based on Chief Irvine's response, the FOP filed the unfair labor practice charge herein and appealed the grievance to Step Four. On August 31, 1998, Safety Officer James Masturzo sustained the grievance and transferred Sergeant Aylward back to the afternoon shift from the day shift.

On May 25, 1998, Sergeant Thomas Kostich bid out of his position on the midnight shift in the Communications Center. He was not replaced. A sergeant does not currently perform any duties in the Communications Center that a civilian supervisor would not do in the sergeant's absence. The only tasks civilian supervisors perform that sergeants do not perform are evaluating call-takers and dispatchers and answering questions about staffing. Management has specifically assigned these responsibilities to the civilian supervisors. The work rules for the Communications Center apply equally to the sergeants and civilian supervisors on duty. Currently, a civilian supervisor is put in charge of the Communications Center in the sergeant's absence. But if a civilian supervisor is on duty at the same time as a sergeant, the sergeant is responsible for police business while the civilian supervisor carries out duties relating only to the Fire Department.

## II. DISCUSSION

The issue in this case is whether the City's unilateral transfer of bargaining-unit work to nonbargaining-unit positions violates O.R.C. §§ 4117.11(A)(1) and (A)(5). These sections provide in relevant part:

(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 rights guaranteed in Chapter 4117. of the Revised Code . . .

\* \* \*

(5) Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117. of the Revised Code[.]

It is the Complainant's burden to demonstrate by a preponderance of the evidence that an unfair labor practice has been committed. O.R.C. § 4117.12(B)(3). Based upon the testimony and evidence presented, we find that the Complainant has met its burden and that the City committed an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).

### **A. The Unfair Labor Practice Charge Was Timely Filed**

The City argued that the unfair labor practice charge was not timely filed. In *In re City of Barberton*, SERB 88-008 (7-5-88), *aff'd sub nom. SERB v. City of Barberton*, 1990 SERB 4-46 (CP, Summit, 7-31-90), we set forth the standard for determining whether an unfair labor practice has been timely filed:

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.

It is unclear exactly when the FOP became aware of the City's acts that are at issue herein. The actual damage to the FOP did not occur until February 16, 1998, when the City stopped assigning overtime and first began replacing Sergeants with civilian supervisors in the Communications Center. As the actual damage occurred on February 16, 1998, the unfair labor practice charge was timely filed on May 11, 1998, within the required ninety-day period. Therefore, the City's argument has no merit.

### **B. The City's Motion to Dismiss Was Properly Denied**

The City moved to dismiss the complaint as facially deficient at several times after it was issued. The City renewed its motion after the hearing, but the Administrative Law Judge denied the motion. The City filed an exception to this ruling, contending that the complaint "did not clearly state when or how the alleged transfer of bargaining unit work to non-bargaining unit members occurred; made no claim that the City's alleged decision to transfer work was implemented; and made no claim that the FOP, Lodge #7 ever requested bargaining over the matter."

The complaint in this matter included the following paragraphs:

7. On April 6, 1998, via a memo from Captain Gus Hall to FOP President Paul Hylnsky, the City informed the FOP that in January 1998, the City decided to civilianize the Radio Room. The City had decided unilaterally that when sergeant positions in the Radio Room become available, the City would assign non-bargaining-unit members to perform bargaining-unit work and replace these sergeants with civilian supervisors.

8. On April 6, 1998, via a memo from Police Chief Edward Irvine to FOP President Hlynsky, the City informed the FOP that from the beginning of the reorganization of the Radio Room in 1993, the City intended to civilianize the Radio Room by replacing bargaining-unit positions with non-bargaining-unit employees. This information had not been presented to the FOP before this date, and the City never offered to bargain the issue.

Ohio Administrative Code Rule 4117-7-03(A) provides that a complaint that an unfair labor practice has been or is being committed shall contain a "clear and concise description of the acts which are claimed to constitute unfair labor practices, including the approximate dates, times, and places of such acts and the names of the persons by whom committed," along with a notice of hearing and the name of the hearing officer assigned to the case. In *In re Amalgamated Transit Union, Local 268*, SERB 93-013 (6-25-93) ("ATU"), we held that a complaint was deficient because it contained no allegations regarding the failure to waive the meetings requirement and it also contained "false facts." Unlike the complaint in *ATU*, the complaint in this case complies with notice pleading by providing the approximate dates, times, and places of the acts complained of and the names of the individuals who may have committed those acts. This complaint identifies the memoranda through which the FOP was notified by the City of its actions. Consequently, the City has been provided notice of the allegations against it, and the motion to dismiss has been properly denied.

**C. The City Violated O.R.C. §§ 4117.11(A)(1) and (5) by Unilaterally Transferring Bargaining-Unit Work to Nonbargaining-Unit Positions**

Since 1991, sergeants were responsible for supervising the call-takers and dispatchers. By the end of 1997, the civilian supervisors could perform all duties done by sergeants in the Communications Center. In addition, the civilian supervisors evaluated call-takers and answered staffing questions, duties that sergeants did not perform. In 1998, two bargaining-unit members bid out of the Communications Center. The City did not post these positions or replace these employees. Instead, the City moved another sergeant from his current shift for coverage, prompting a grievance. Responding to the grievance, the City stated the vacancies were not being filled by bargaining-unit employees because civilian supervisors were to be “phased” into these positions. Thus, the City tried to put a vehicle into place through which it could unilaterally transfer bargaining-unit work to nonbargaining-unit employees; the City began implementing its plan to hire nonbargaining-unit employees to perform bargaining-unit work.

The reassignment of bargaining-unit work to nonbargaining-unit positions is a mandatory subject of bargaining. *Lorain City School Dist Bd of Ed v SERB*, 40 Ohio St.3d 257, 1989 SERB 4-2 (12-30-88). In the present case, the City’s unilateral assignment of bargaining-unit work to nonbargaining-unit employees violates O.R.C. §§ 4117.11(A)(1) and (A)(5).

The City claims that Article XII, Section B of the Agreement releases the City from any obligation to bargain collectively over its transfer of bargaining-unit work to nonbargaining-unit employees and establishes a waiver on the part of the FOP. The clause cited by the City governs how positions within the bargaining unit are filled and confers upon the Police Chief the discretion as to when a vacancy will be filled. The clause does not specifically address, and therefore does not release the City from the obligation to bargain collectively, the transfer of bargaining-unit work out of the unit.

The clause cited by the City also does not create a waiver of the FOP's right to bargain this issue. Only a "clear and unmistakable action by the waiving party" will waive a statutory right to bargain over a mandatory subject. *In re City of Akron*, SERB 97-006 (5-1-97). The FOP did not take any clear and unmistakable act that would waive its right to bargain in this case. During the 1997 contract negotiations, the subject of staffing the Communications Center with civilians was not addressed in the parties' proposals. In 1996 and 1997, ten sergeants left the Communications Center, and each vacancy was filled by another sergeant. On February 16, 1998, the City began replacing sergeants in the Communications Center with civilian supervisors. In April 1998, a grievance response from the City informed the FOP that when police supervisors bid out of the Communications Center, the vacancies would not be filled by bargaining-unit employees; further, it was the City's objective to staff the Communications Center with only civilians. Clear and unmistakable action by the FOP is not present in this case, as no such acts or contract clauses exist. Likewise, no waiver exists from the FOP's conduct.

The City believes that since no bargaining-unit positions have been eliminated, it may reassign the work performed by bargaining-unit members in the Communications Center to nonbargaining-unit members without committing a violation. This assertion is not well taken. The Ohio Supreme Court held in *Lorain* that it is the unilateral "*reassignment* of work previously performed by members of a bargaining unit," not the erosion of the bargaining unit, that violates O.R.C. §§ 4117.11(A)(1) and (A)(5). (emphasis added). Thus, removing work historically done by bargaining-unit members while maintaining the total number of members in the bargaining unit does not excuse the City from bargaining with the exclusive representative of its employees on this issue. Therefore, after weighing the entire record in this matter, we find by a preponderance of the evidence that the City committed an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) by unilaterally transferring bargaining-unit work to nonbargaining-unit employees.

### **III. CONCLUSION**

For the above reasons, we find that Complainant has met its burden, per Ohio Revised Code § 4117.12(B)(3), of demonstrating by a preponderance of the evidence that an unfair labor practice has been committed. The facts warrant a finding that the City of Akron has violated O.R.C. §§ 4117.11(A)(1) and (A)(5) by unilaterally transferring bargaining unit work to nonbargaining-unit positions. The City is ordered to return to the status quo in the Communications Center regarding the staffing of the Communications Center by sergeants and lieutenants in effect before February 16, 1998; to bargain in good faith with the FOP regarding the transfer of bargaining-unit work in the Communications Center to nonbargaining-unit employees; and to comply with the contractual bidding process for staffing the Communications Center with sergeants and lieutenants. In addition, a cease-and-desist order with a Notice to Employees shall be posted by the City for 60 days in the usual and normal posting locations where bargaining-unit employees represented by the FOP work.

Gillmor, Vice Chairman, and Verich, Board Member, concur.