STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Pierce Township, Clermont County,

Respondent.

Case Nos. 2000-ULP-12-0741 & 2000-ULP-12-0742

ORDER
(OPINION ATTACHED)

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich: December 6, 2001.

On December 20, 2000, the Pierce Township Professional Fire Fighters, IAFF Local 4061 ("Local 4061") and Dene Riggenbach (collectively, Local 4061 and Mr. Riggenbach are referred to as "Charging Parties") filed unfair labor practice charges against Pierce Township, Clermont County ("Respondent") alleging that the Respondent violated Ohio Revised Code Sections 4117.11(A)(1), (A)(2), (A)(3), (A)(4), and (A)(7). On April 26, 2001, the State Employment Relations Board ("SERB" or "Complainant") consolidated the charges and determined that probable cause existed to believe that the Respondent had violated Ohio Revised Code Sections 4117.11(A)(1), (A)(2), and (A)(3).

A hearing was held on July 10 and 20, 2001. On September 24, 2001, the Proposed Order was issued. On October 24, 2001, the Respondent filed exceptions to the Proposed Order and a motion for oral argument. On November 6, 2001, the Charging Parties and the Complainant filed their responses to the Respondent's exceptions.

After reviewing the record and all filings, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Proposed Order, incorporated by reference. The motion to dismiss is denied as moot.

Pierce Township, Clermont County, is ordered to:

A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees by making numerous changes that interfered with, restrained, or coerced employees in the exercise of their guaranteed rights, and by terminating employees following the filing of a

representation petition and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1), 4117.11(A)(2), and 4117.11(A)(3).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) Post for 60 days in all of the usual and normal posting locations where bargaining-unit employees work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that Pierce Township, Clermont County shall cease and desist from the actions set forth in paragraph A and shall take the affirmative action set forth in paragraph B;

(2) Offer reinstatement to Dene Riggenbach, Faith Doty, and Joe Tvrdy to the same or to positions comparable to the positions they held immediately before December 12, 2000;

(3) Make Dene Riggenbach, Faith Doty, and Joe Tvrdy whole for all wages and benefits lost from December 12, 2000, to the date of reinstatement;

(4) Pay interest on the wage amounts in number (B)(3) above at the rate payable on such awards in the common pleas courts commencing from the date of the State Employment Relations Board's order in this case;

(5) Offer Mark McDowell the opportunity to return to the same or to a position comparable to the position he held immediately before December 12, 2000;

(6) Return to the status quo as it existed before August 10, 2000, by rescinding the changes enumerated in ¶¶ 8, 9, 10, and 11 of the complaint; and

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

The State Employment Relations Board also directs that the following actions are to be taken in Case No. 2000-REP-07-0150:

(1) The August 9, 2001 dismissal of the Petition for Representation Election is rescinded;

(2) The direction to hearing is reinstated;

(3) The matter is to be expedited; and

(4) The Respondent is directed to file with the State Employment Relations Board and serve upon the other party, pursuant to Ohio Administrative Code

Rule 4117-5-04(C), an alphabetized, numbered list of all employees in the proposed unit as of the pay period ending just prior to July 10, 2000 (the date that the petition was filed), in accordance with the Findings of Fact and Conclusions of Law in Case Nos. 2000-ULP-12-0741 and 2000-ULP-12-0742, including proof of service upon the other party.

It is so ordered.

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 12th day of December, 2001.

SALLY L. BARAILLOUX, EXECUTIVE SECRETARY

direct\12-06-01.13

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:

Interfering with, restraining, or coercing employees by making numerous changes that interfered with, restrained, or coerced employees in the exercise of their guaranteed rights, and by terminating employees following the filing of a representation petition and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1), 4117.11(A)(2), and 4117.11(A)(3).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) Post for 60 days in all of the usual and normal posting locations where bargaining-unit employees work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that Pierce Township, Clermont County shall cease and desist from the actions set forth in paragraph A and shall take the affirmative action set forth in paragraph B.

(2) Offer reinstatement to Dene Riggenbach, Faith Doty, and Joe Tvrdy to the same or to positions comparable to the positions they held immediately before December 12, 2000.

(3) Make Dene Riggenbach, Faith Doty, and Joe Tvrdy whole for all wages and benefits lost from December 12, 2000, to the date of reinstatement.

(4) Pay interest on the wage amounts in number (B)(3) above at the rate payable on such awards in the common pleas courts commencing from the date of the State Employment Relations Board's order in this case.

(5) Offer Mark McDowell the opportunity to return to the same or to a position comparable to the position he held immediately before December 12, 2000.

(6) Return to the status quo as it existed before August 10, 2000, by rescinding the changes enumerated in ¶¶ 8, 9, 10, and 11 of the complaint.

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

SERB v. PIERCE TOWNSHIP, CLERMONT COUNTY
CASE NOS. 2000-ULP-12-0741 & 2000-ULP-12-0742

_____ _____
BY DATE

_____
Title

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

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

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

STATE EMPLOYMENT RELATIONS BOARD,	:	
	:	**CASE NOS. 2000-ULP-12-0741**
Complainant,	:	**2000-ULP-12-0742**
	:	
v.	:	**BETH C. SHILLINGTON**
	:	**Administrative Law Judge**
PIERCE TOWNSHIP, CLERMONT COUNTY,	:	
	:	**PROPOSED ORDER**
Respondent.	:	

I. INTRODUCTION

On December 20, 2000, the Pierce Township Professional Fire Fighters, IAFF Local 4061 ("Local 4061") and Dene Riggenbach (collectively, Local 4061 and Mr. Riggenbach are referred to as "Charging Parties") filed unfair labor practice charges against Pierce Township, Clermont County ("Township") alleging that the Township violated §§ 4117.11(A)(1), (A)(2), (A)(3), (A)(4) and (A)(7).[1] On April 26, 2001, the State Employment Relations Board ("SERB" or "Complainant") consolidated the charges and determined that there was probable cause to believe that Respondent violated §§ 4117.11(A)(1), (A)(2), and (A)(3). SERB dismissed the §§ 4117.11(A)(4) and (A)(7) allegations for lack of probable cause. On June 5, 2001, a complaint was issued. On June 26, 2001, the Charging Parties filed a motion to intervene, which was granted in accordance with Rule 4117-1-07(A). A hearing was held on July 10 and 20, 2001, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs.

II. ISSUE

Whether the Township violated §§ 4117.11(A)(1), (A)(2), and (A)(3) by making numerous changes that interfered with, restrained, or coerced employees in the exercise of their guaranteed rights, and by terminating employees following the filing of a representation petition?

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[1]All references to statutes are to the Ohio Revised Code, Chapter 4117, and all references to administrative code rules are to the Ohio Administrative Code, Chapter 4117, unless otherwise indicated.

III. FINDINGS OF FACT[2]

Procedural History of Representation Petition:

1. On July 7, 2000, Local 4061 filed a Petition for Representation Election (the "petition"). Local 4061 sought to represent a proposed bargaining unit of captains, lieutenants, fire fighters, emergency medical technicians, and paramedics. Five employees were in the proposed bargaining unit: Dene Riggenbach, Faith Doty, Joe Tvrdy, Mark McDowell, and Scott Light (the "proposed bargaining-unit members"). (Answer, ¶ 5; T. 38-39)

2. The petition was assigned SERB Case No. 00-REP-07-0150. The petition was served upon the Township on July 7, 2000, and notice of the petition was posted on the Township bulletin board. The Township filed objections, asserting that the members of the proposed bargaining unit were not "public employees," and that the Township fire department consisted solely of volunteers. The SERB representation case eventually was directed to hearing. A prehearing was scheduled for December 11, 2000; it was continued to and held on December 20, 2000. The hearing was scheduled for January 8, 2001. (T. 40)

Facts Forming the Basis for the Unfair Labor Practice Charges and Complaint:

3. Before the petition was filed, the proposed bargaining-unit members wore a uniform consisting of blue pants, T-shirt, sweatshirt, and jacket. Printed on the uniforms were logos that read,"Pierce Township Fire Department, EMS." (T. 23-24)

4. The proposed bargaining-unit members worked full time. They were hired and referred to by various titles including "full-time fireman/EMT and maintenance worker," "Fireman, E.M.T. and Maintenance Department Employee," "full-time EMT/maintenance personnel," "EMT/maintenance worker/ground crew," "emergency medical technician/firefighter and service department employee," and "EMT/maintenance personnel." The proposed bargaining-unit members were paid hourly and accrued sick pay, vacation pay, and holiday pay. (T. 9, 25, 33-34, 35, 90; U. Exhs. 1, 21, 22)

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[2]All references to the transcript of the hearing are indicated parenthetically by "T.," followed by the page number(s). References to Complainant and Charging Parties' exhibits in the record are indicated parenthetically by "U. Exh.," followed by the exhibit number(s). References to Respondent's exhibits in the record are indicated parenthetically by "Twp. Exh.," followed by the exhibit number(s). 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 Finding of Fact.

5. Historically, the Township maintained a volunteer fire department. However, during the 1990s, the proposed bargaining-unit members had been hired to provide daytime coverage, as it was difficult to obtain volunteer coverage during these hours. The proposed bargaining-unit members either had received EMT, advanced EMT, or fire-fighting training when they were hired or agreed to obtain EMT and advanced EMT certification as a condition of their continued employment. The Township paid for paramedic and fire fighter training for some of the proposed bargaining-unit members while they were employed by the Township. (T. 12-13, 14-15, 33-35, 65, 76, 90-91, 100-101, 262-263; U. Exhs. 11, 21)

6. The proposed bargaining-unit members' work days would begin at the Township fire department, checking the Township life squads to make sure they were stocked and in working order. While on standby for fire and EMS runs, the proposed bargaining-unit members performed other duties both inside and outside the fire department, including building and grounds cleaning and maintenance, lawn mowing, and cemetery work. The proposed bargaining-unit members made fire and EMS runs that included assisting injured persons at the scene of traffic and other accidents, assisting persons who had sustained weather-related injuries, and fighting structure and field fires. (T. 16, 18-19, 84, 88, 103)

7. In January 2000, the Township hired Thomas Behymer as Administrator. Previously, Mr. Behymer had served as Township Clerk for 20 years. (T. 208-209)

8. In February 2000, the Township hired David Coyle as Director of Planning, Zoning, and Engineering. Mr. Coyle was to work with Mr. Behymer to make the Township more efficient. Mr. Coyle and Mr. Behymer started looking at the workload of Township employees. (T. 125-127)

9. In the spring of 2000, Mr. Riggenbach met a member of the Ohio Association of Professional Fire Fighters ("OAPFF") while he was at a paramedic training in another township. The union member gave Mr. Riggenbach the business card of an OAPFF representative, and Mr. Riggenbach contacted the representative. When Mr. Riggenbach approached Mr. Light about the union, Mr. Riggenbach mentioned preserving the proposed bargaining-unit members' health insurance benefits and jobs as two reasons for forming a union. Subsequently, the proposed bargaining-unit members met with the representative and Local 4061 was formed. In July 2000, the petition was filed. (T. 38-40, 198-199)

10. In May 2000, Robert Connell, who was Chief of the fire department from July 1990 to September 2000, began a multi-year plan for the fire department, which he submitted to the Township Trustees. The plan called for the continued employment of the proposed bargaining-unit members to provide daytime coverage. (T. 181-184)

11. On August 10, 2000, the Township issued a memorandum informing the proposed bargaining-unit members that they were no longer to wear their fire department uniforms and instead were issued brown pants and orange shirts, the same uniform as the Township's road crew employees. Following the uniform change, the proposed bargaining-unit members continued to make fire and EMS runs. (T. 41-44, 165, 233-235)

12. Before the petition was filed, the proposed bargaining-unit members worked four ten-hour days each week, and had done so since December 1998. The four-day work week had been implemented to eliminate the need for the Township to pay overtime between the hours of 4 and 6 p.m. and to improve EMS response time. (T. 45-46, 230-231; U. Exh. 28)

13. On September 26, 2000, the Township posted a memorandum changing the work schedules of the proposed bargaining-unit members to five eight-hour days per week. (Answer, ¶ 6; T. 44-46; U. Exh. 27)

14. Before October 3, 2000, the proposed bargaining-unit members received paid half-hour lunch breaks because they were required to be available in the event of an EMS squad run. On October 3, 2000, the Township posted a memorandum informing the proposed bargaining-unit members that they would no longer be paid for lunch. (T. 46-47, 164; U. Exh. 28)

15. Before November 2000, the proposed bargaining-unit members received holiday pay and overtime pay at the rate of time and one-half if they worked on a holiday. In November 2000, the Township began paying the proposed bargaining-unit members holiday pay and straight-time pay instead of overtime pay when they worked holidays. (T. 48-49; 273)

16. In November 2000, a 2.9-mill Township fire/EMS levy was passed. The purpose of the levy, as described in campaign literature, was to "complement the services of the Township's volunteers" and to "upgrade the fire department's equipment." Trustee Bonnie Batchler actively campaigned in support of the levy. (T. 261-262; Twp. Exh. 2)

17. In the fall of 2000, the Township posted a notice and published a newspaper advertisement seeking to hire part-time paramedics. (T. 53-54)

18. On December 12, 2000, Mr. Coyle presented a "Report on Contracting For Services" ("report") at a meeting of the Township Trustees. At the meeting, the Township eliminated the positions of the proposed bargaining-unit members and terminated the employment of three of the proposed bargaining-unit members, including Mr. Riggenbach, President of Local 4061. Proposed bargaining-unit

member Mr. McDowell was transferred to the Township's road crew, and proposed bargaining-unit member Mr. Light was promoted to Manager of the Township's EMS Operations. The Township issued a press release stating that it had eliminated its Buildings and Grounds Department, resulting in the termination of four employees. (T. 49-51, 201-202; Twp. Exh. 1; U. Exh. 31)

19. On December 18, 2000, the Township filed a motion to dismiss the petition, asserting that the proposed bargaining unit consisted solely of volunteers and that the Township's decision to "outsource" rendered moot any determination regarding the appropriateness of the proposed bargaining unit or any other question concerning representation. The petition was dismissed without prejudice. (SERB Case No. 00-REP-07-0150)

20. In January 2001, after the proposed bargaining-unit members had been terminated, transferred, or promoted, the Township hired permanent part-time paramedics and compensated various individuals for work they had done as part-time paramedics/fire fighters during December 2000 and January 2001. (T. 53-56, 269-270)

IV. ANALYSIS AND DISCUSSION

Sections 4117.11(A)(1), (A)(2), and (A)(3) provide 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 their rights guaranteed in Chapter 4117. of the Revised Code[,]

(2) [D]ominate ... or interfere with the formation ... of any employee organization[,]

(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[.]

A. The Township Violated § 4117.11(A)(1) and § 4117.11(A)(3)

1. Section 4117.11(A)(1)

In In re Pickaway County Human Services Dept, SERB 93-001 (3-24-93) at 3-3, SERB explained as follows:

> When a violation of § 4117.11(A)(1) is alleged, the appropriate inquiry is an objective rather than a subjective one. That is, we must determine whether under all the facts and circumstances, one could reasonably conclude that employees were restrained or coerced, or that their rights under § 4117.03 had been interfered with, by the Respondent's conduct. This objective inquiry is used whether the alleged misconduct is a change in status quo, interrogation about union activity, or some other alleged interference with rights protected under Chapter 4117.
>
> Accordingly, proper consideration of any § 4117.11(A)(1) allegation must necessarily entail a thorough review of the circumstances under which the alleged misconduct occurred and its likely effect on the guaranteed rights of employees.

In examining the § 4117.11(A)(1) allegation, the Township asserts that Mr. Behymer was merely taking actions that were within his discretion and part of his mandate to improve efficiency. After two decades as Township Clerk, Mr. Behymer became Administrator in January 2000. No changes were made, however, until August 10, 2000, a month after the petition requesting an election for a proposed bargaining unit of fire fighters was filed. On August 10, 2000, the uniform of all five employees in the proposed bargaining unit was changed from blue pants and shirts bearing the words "Pierce Township Fire Department, EMS" to the brown pants and orange shirts worn by the employees in the Township's road crew. Subsequently, on September 26, 2000, the Township changed the work days and hours of the proposed bargaining-unit members to match the schedule worked by the road-crew employees. Simultaneously, the Township was objecting to the petition filed at SERB by asserting that the proposed bargaining-unit members were not employees of its fire department, but rather were serving only as volunteers when they performed fire or EMS duties.

The proposed bargaining-unit members' duties were hybrid in nature. The evidence in the record plainly reveals that these employees were responsible both for providing daytime fire and EMS coverage and for performing maintenance work on the Township's buildings and grounds. Viewed objectively and under the totality of the circumstances, including the circumstantial evidence of anti-union animus discussed in parts 2 and 3 below, the Township's actions following the filing of the petition in July 2000 can be viewed only as actions undertaken by the Township to bolster its position in the administrative proceeding at SERB. The apparent intent of the Township was to align these employees with the employees in the road crew or "service department" rather than with the fire department, with the goals of either succeeding in demonstrating that the employees served the fire department only as volunteers, or of defeating the petition on the basis that it did not describe an appropriate unit. Indeed, and ironically, the Township's principal defense with regard to the changes it made to the proposed bargaining-unit members' uniforms, hours of work, holiday pay, and lunch breaks was that it made these changes to

bring the proposed bargaining-unit members' terms and conditions of employment in line with those of its "other service department" employees, the road crew. Viewed objectively, the Township's actions in making these changes interfered with, restrained, and coerced the proposed bargaining-unit members, who were engaged in the exercise the concerted, protected activity of seeking an exclusive representative, and constitute violations of § 4117.11(A)(1).

2. Section 4117.11(A)(3)

In State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn., 66 Ohio St. 3d 485, 498, 1993 SERB 4-43, 4-48, 4-50 (1993), the Ohio Supreme Court analyzed unfair labor practices under § 4117.11(A)(3) and 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):

> 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 undertaken for sound business reasons, totally unrelated to the employer'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. * * *
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> * * *
>
> [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 antiunion 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 the 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 antiunion 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, 1993 SERB at 4-50.

To make 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 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; and (3) that Respondent took adverse action against the employee under circumstances which could, if left unrebutted 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 SERB v. Fulton County Engineer, SERB 96-008 (6-24-96).[3]

The proposed bargaining-unit members were public employees of the Township, as is demonstrated by the minutes of various Township Trustees' meetings hiring them, by Township payroll records, and by the Township's own admissions at the hearing and in its post-hearing brief. Local 4061 asserts that the proposed bargaining-unit members were fire fighters, while the Township asserts they were building and grounds employees. The dispute about the proposed bargaining-unit members' duties, however, is not relevant to the initial determination that they were public employees of the Township. Second, the proposed bargaining-unit members obviously were engaged in the concerted, protected activity of attempting to organize a union at the Township, which was known to the Township no later than July 7, 2000, when it was served with the petition.

The culmination of the Township's response to the proposed bargaining-unit members' petition occurred on December 12, 2000, when it was able to halt the representation process entirely by decimating the proposed bargaining unit. The Township abruptly terminated, without notice, the employment of the President of Local 4061, Mr. Riggenbach, and the employment of Ms. Doty and Mr. Tvrdy. The Township never met with or provided a written or verbal explanation for their terminations to these individuals. The terminations of the employment of three of the five proposed bargaining-unit members within days of the dates SERB had scheduled for prehearing and hearing on the petition,

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[3]Section 4117.11(A)(1) represents an alleged derivative violation of § 4117.11(A)(3) in this instance. In re Amalgamated Transit Union, Local 268, SERB 93-013 (6-25-93) at n.14.

constitutes an adverse action against these employees under circumstances creating a reasonable inference that the Township's actions were related to the employees' exercise of activity protected under Chapter 4117. Similarly, the elimination of a paid lunch break in October 2000, and the elimination of holiday overtime pay for all five proposed bargaining-unit members in November 2000, constitute such adverse actions. Accordingly, the Complainant and Charging Parties have established a prima facie case of discrimination, which raises a presumption of anti-union animus.

3. The Township's Defense to the §§ 4117.11(A)(1) and (A)(3) Charges

Viewed under the totality of the circumstances, an analysis of the circumstantial evidence of employer motivation reveals, by a preponderance of the evidence, that the Township has not adequately rebutted the presumption of anti-union animus. A cursory review of the December 12, 2000 personnel changes reveals a clever strategy. The Township transferred Local 4061 Vice President McDowell to the road crew, and promoted Mr. Light to lead the "new" EMS department. Mr. McDowell and Mr. Light were the most senior members of the proposed bargaining unit. The Township claims that it undertook these actions to terminate as few employees as possible under its plan to "outsource" the buildings and grounds work. The Township also claims that it has rebutted any presumption of anti-union animus because after it eliminated the positions held by the five proposed bargaining-unit members, it transferred one proposed bargaining-unit member and promoted another.

A close examination of the facts of record reveals the fallacies of the Township's argument. First, the transfer and promotion effectively eliminated the existence of the proposed bargaining unit. Mr. McDowell, as a member of the road crew, would no longer be doing fire or EMS work, nor would he be working in the same department as Mr. Light. Mr. Light, as a supervisor, arguably would no longer be a "public employee" entitled to the protections of Chapter 4117. Second, the Township terminated the employment of the three remaining proposed bargaining-unit members, each of whom performed EMS work, *while simultaneously seeking part-time EMS employees* for its "new" EMS program. (T. 53-56). In light of the fact that Mr. Riggenbach, Ms. Doty, and Mr. Tvrdy all had been hired to perform fire and EMS duties, had actually performed such duties, and had been required as part of their employment with the Township to obtain further fire and EMS training, no conclusion can be drawn other than that they were terminated by the Township with the goal of eliminating any possibility of a successful union organizing campaign in its fire and EMS operations. The Township's terminations of Mr. Riggenbach, Ms. Doty, and Mr. Tvrdy constitute violations of §§ 4117.11(A)(1) and (A)(3).

The Township's defense to the §§ 4117.11(A)(1) and (A)(3) violations is devoid of merit and credibility. The Township claims that the numerous changes it made to the proposed bargaining-unit members' terms and conditions of employment were a result of its desire to streamline and enhance the efficiency of its service department, and that the

position eliminations, terminations, transfer, and promotion were a result of its decision to "outsource" the buildings and grounds work that previously constituted part of the proposed bargaining-unit members' duties. The only truth to be found in the theory of the case advanced by the Township is that in the spring of 2000 it had begun examining the processes it used to accomplish needed buildings and grounds work.

In NLRB v. Kentucky May Coal Co., 89 F.3d 1235, 152 L.R.R.M. 2821 (6th Cir. 1996) ("Kentucky May"), the employer terminated employees who had sought union recognition by contracting out their work. The employer argued that it could avoid liability because the issue of contracting out had been raised before the union organizing effort. Rejecting that argument, the U.S. Sixth Circuit Court of Appeals stated:

> Although there is evidence [sic] that David Carter, Electric Fuels' senior vice president of operations, first raised the possibility of contracting out mining operations in October of 1993 [sic], a reasonable inference can be drawn from the record as a whole that little, if any, action was taken on this recommendation until the Company became aware that its employees were beginning a union organizing campaign.

Id., 152 L.R.R.M. at 2826.

As in Kentucky May, the evidence of record reveals that it was the filing of the petition that led to changes made during the following four months, and ultimately to the December 2000 "outsourcing" decision, the elimination of the positions in the proposed bargaining unit, and the termination of three employees. The Township was unable to provide any documentation to show that contracting out was a serious possibility or under serious consideration before the petition was filed. The minutes of the trustees' meetings before December 2000 lack any reference to the issue, and no reports, working papers, or other documents exist to show that the Township was working on an outsourcing study at any time before December 12, 2000, when Mr. Coyle made a presentation to the trustees and the trustees voted to eliminate the proposed bargaining-unit members' positions that same day.

Notably, at hearing, the Township put forth no documentation other than the undated, computer-generated Power Point "report" that Mr. Coyle presented at the December 12, 2000 trustees' meeting as the basis for the trustees voting to make the aforementioned personnel changes. The "report" is little more than a brief outline. It is completely lacking in footnotes or other verifiable sources of the alleged cost-savings claimed by the Township to have been realized by "outsourcing" the buildings and grounds work. Moreover, neither Mr. Coyle nor any other Township witness presented any other evidence, testimonial or documentary, of the calculations, estimates, or processes used to undertake and complete the "report." No invoices or reports from the outside consultant the Township allegedly used to observe and evaluate buildings and grounds work were

presented, nor were any estimates or invoices from the alleged providers of the "outsourced" work.

Only one meeting about the outsourcing was recounted by the Township at hearing. Mr. Coyle and Mr. Behymer asserted that they held a May 2000 meeting with Mr. Light and the road crew supervisor at which they announced that the Township would not be hiring summer help and was looking into outsourcing. Obviously, this testimony was a significant part of the Township's defense that it was contemplating outsourcing before the petition was filed. At hearing, the Township called Mr. Light, who was promoted by the Township on December 12, 2000, as one of its witnesses. However, the Township *did not ask him one question to confirm that the May 2000 meeting took place or that outsourcing was discussed.* This omission weakens the credibility of Mr. Coyle and Mr. Behymer's assertions and further weakens the Township's defense.

The Township's defense lacks merit for other reasons as well. The Township failed to adequately explain the timing of the numerous changes it made to the terms and conditions of employment of the five proposed bargaining-unit members. The Township states that the changes were made as a result of the hiring of Mr. Coyle and Mr. Behymer, with the mandate to revitalize and make efficient the "service department," and not in response to the filing of the petition. But no changes were made until after the petition was filed, at which time they came in rapid succession, affecting each time only the five proposed bargaining-unit members. Moreover, no changes were made affecting the road crew, which comprises the remainder of the "service department."

Perhaps most telling, however, is the Township's continuous failure to acknowledge and address the obvious: the overwhelming weight of the evidence reveals that the proposed bargaining-unit members were more than maintenance workers. "Outsourcing" maintenance work – even if the Township had offered credible evidence that it actually did do so – did not eliminate all of the work the proposed bargaining members were hired to perform, and did perform, for the Township. The proposed bargaining-unit members did not simply "volunteer" in the fire department: the documentary evidence in addition to the testimony of the proposed bargaining-unit members confirms that they were hired and paid to perform fire and EMS duties as well. The proposed bargaining-unit members either had received EMT, advanced EMT, or fire-fighting training when they were hired or agreed to obtain EMT and advanced EMT certification as a condition of their continued employment; in addition, the Township paid for paramedic and fire fighter training for some of the proposed bargaining-unit members while they were employed by the Township. (Finding of Fact 5). Thus, any determination by the Township to "outsource" service department work does not rebut the inference that anti-union animus led to the termination of three of the proposed bargaining-unit members, particularly in this case when the Township was simultaneously expanding its fire and EMS operations and actively seeking and paying other individuals to perform fire and EMS duties. Accordingly, the Township has violated §§ 4117.11(A)(1) and (A)(3).

B. The Township Violated § 4117.11(A)(2)

In In re Springfield Local School Dist Bd of Ed, SERB 97-007 (5-1-97) at 3-48, the Board suggested that interference with the continued existence of an employee organization might constitute a violation of § 4117.11(A)(2). Eliminating the positions of all proposed bargaining-unit members, terminating the employment of three of them, transferring one to another work area, and promoting another individual interfered with the continued existence of Local 4061. Under the circumstances of this case, in which a representation petition to determine the status of Local 4061 was pending, the hearing date was imminent, and no legitimate nondiscriminatory business reason for the personnel actions affecting the proposed bargaining unit has been proven, the Township's actions also constitute a violation of § 4117.11(A)(2).

V. CONCLUSIONS OF LAW

1. Pierce Township Professional Fire Fighters, IAFF Local 4061 is an "employee organization" within the meaning of § 4117.01(D).

2. Pierce Township, Clermont County is a "public employer" within the meaning of § 4117.01(B).

3. Dene Riggenbach, Faith Doty, Joe Tvrdy, Mark McDowell, and Scott Light, at all relevant times, were employed by the Township and were "public employees" within the meaning of § 4117.01(C).

4. The Township violated § 4117.11(A)(1), (A)(2), and (A)(3) by making numerous changes that interfered with, restrained, or coerced employees in the exercise of their guaranteed rights, and by terminating employees following, and in retaliation for, the filing of a representation petition.

V. RECOMMENDATIONS

Based upon the foregoing, the following is respectfully 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 Ohio Revised Code Section 4117.12(B)(3), requiring the Township to do the following:

A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees by making numerous changes that interfered with, restrained, or coerced employees in the exercise of their guaranteed rights, and by terminating employees following the filing of a representation petition and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1), 4117.11(A)(2), and 4117.11(A)(3).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) Post for 60 days in all of the usual and normal posting locations where bargaining-unit employees work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that Pierce Township, Clermont County shall cease and desist from the actions set forth in paragraph A and shall take the affirmative action set forth in paragraph B.

(2) Offer reinstatement to Dene Riggenbach, Faith Doty, and Joe Tvrdy to the same or to positions comparable to the positions they held immediately before December 12, 2000.

(3) Make Dene Riggenbach, Faith Doty, and Joe Tvrdy whole for all wages and benefits lost from December 12, 2000, to the date of reinstatement.

(4) Pay interest on the wage amounts in number (B)(3) above at the rate payable on such awards in the common pleas courts commencing from the date of the State Employment Relations Board's order in this case.

(5) Offer Mark McDowell the opportunity to return to the same or to a position comparable to the position he held immediately before December 12, 2000.

(6) Return to the status quo as it existed before August 10, 2000, by rescinding the changes enumerated in ¶¶ 8, 9, 10, and 11 of the complaint.

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