

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO,

Respondent.

Case No. 2005-ULP-02-0089

ORDER
(OPINION ATTACHED)

Before Chairman Mayton, Vice Chairman Gillmor, and Board Member Verich:
June 22, 2006.

On February 9, 2005, Laura Davis, Karen Peck, Carrie Morgan, and Donna Runeric (collectively, "Charging Parties") filed an unfair labor practice charge against the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO ("the Respondent"), alleging that the Respondent violated Ohio Revised Code Sections 4117.11(B)(1) and (B)(6). On July 15, 2005, the State Employment Relations Board ("SERB" or "Complainant") determined that probable cause existed for believing that the Respondent had committed or was committing unfair labor practices, authorized the issuance of a complaint, and referred the matter to hearing. On December 29, 2005, a complaint was issued.

On February 9, 2006, the parties stipulated that the Union restrained and coerced Charging Parties in the exercise of their rights guaranteed by Ohio Revised Code Chapter 4117, in violation of Ohio Revised Code Section 4117.11(B)(1), and that it failed to fairly represent Charging Parties, in violation of Ohio Revised Code Section 4117.11(B)(6), by failing to adequately process their grievance. On February 9, 2006, a hearing was held, wherein testimonial and documentary evidence was presented.

On April 5, 2006, the Administrative Law Judge issued a Proposed Order, recommending that SERB find that the Respondent violated Ohio Revised Code Sections 4117.11(B)(1) and (B)(6) and that the Charging Parties' grievance had a reasonable likelihood of success on the merits. On April 25, 2006, the Respondent filed exceptions to the Proposed Order. On April 28, 2006, the Complainant filed a response to the exceptions.

After reviewing the record, the Proposed Order, the exceptions, the response to exceptions, and all other filings in this case, the second sentence of the second paragraph of Part B, "The Remedy," of the Analysis and Discussion in the Administrative Law Judge's Proposed Order is amended to add "with interest" so that it reads in part: "Therefore, the appropriate remedy in this case is to issue an order, pursuant to § 4117.12(B)(3), requiring the Union to pay, with interest, each Charging Party the respective amount of overtime compensation each would have earned if she had been included in the overtime available in the Processing Center from August 28 to September 28, 2004;" and the Findings of Fact, Analysis and Discussion, as amended, and Conclusions of Law in the Administrative Law Judge's Proposed Order are hereby adopted, finding that the Respondent violated Ohio Revised Code Sections 4117.11(B)(1) and (B)(6) when the Respondent failed to adequately process the Charging Parties' grievance.

The Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO is ordered to:

A. Cease and desist from:

Restraining or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117, and failing to fairly represent all employees in a bargaining unit, by failing to adequately process their grievance and from otherwise violating Ohio Revised Code Sections 4117.11(B)(1) and (B)(6).

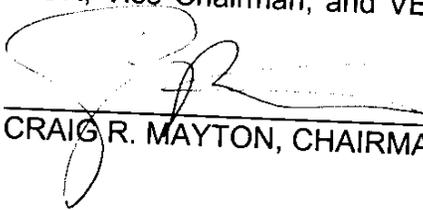
B. Take the following affirmative action:

1. Compensate each Charging Party as follows for the overtime compensation each would have received, as follows: Laura Davis, \$1,860.00; Carrie Morgan, \$1,920.00; Karen Peck, \$1,632.00; and Donna Runeric, \$1,934.30; plus interest at the rate payable on such awards in the common pleas courts commencing September 10, 2004, the date the grievance was filed;
2. Post for sixty days in all of the usual and normal locations where bargaining-unit employees represented by the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO worked at all relevant times herein, the Notice to Employees furnished by the State Employment Relations Board stating that the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and

3. Notify the State Employment Relations Board in writing twenty calendar days from the date that this Order becomes final of the steps that have been taken to comply therewith.

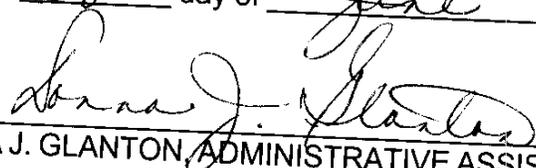
It is so ordered.

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


CRAIG R. MAYTON, 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 a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 22nd day of June, 2006.


DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT



NOTICE TO EMPLOYEES

FROM THE
STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE STATE EMPLOYMENT
RELATIONS BOARD, AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and to abide by the following:

A. CEASE AND DESIST FROM:

Restraining or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117, and failing to fairly represent all employees in a bargaining unit, by failing to adequately process their grievance and from otherwise violating Ohio Revised Code Sections 4117.11(B)(1) and (B)(6).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Compensate each Charging Party as follows for the overtime compensation each would have received, as follows: Laura Davis, \$1,860.00; Carrie Morgan, \$1,920.00; Karen Peck, \$1,632.00; and Donna Runeric, \$1,934.30; plus interest at the rate payable on such awards in the common pleas courts commencing September 10, 2004, the date the grievance was filed;
2. Post for sixty days in all of the usual and normal locations where bargaining-unit employees represented by the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO worked at all relevant times herein, the Notice to Employees furnished by the State Employment Relations Board stating that the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
3. Notify the State Employment Relations Board in writing twenty calendar days from the date that this Order becomes final of the steps that have been taken to comply therewith.

SERB v. Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO
Case No. 2005-ULP-02-0089

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,	:	
Complainant,	:	CASE NO. 05-ULP-02-0089
	:	
v.	:	
	:	BETH A. JEWELL
OHIO CIVIL SERVICE EMPLOYEES	:	Administrative Law Judge
ASSOCIATION, AFSCME LOCAL 11, AFL-CIO,	:	
	:	
Respondent.	:	<u>PROPOSED ORDER</u>
	:	

I. INTRODUCTION

On February 9, 2005, Laura Davis, Karen Peck, Carrie Morgan, and Donna Runeric (collectively, "Charging Parties") filed an unfair labor practice charge against the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO ("the Union"), alleging that the Union violated Ohio Revised Code §§ 4117.11(B)(1) and (B)(6).¹ On July 15, 2005, the State Employment Relations Board ("SERB" or "Complainant") determined that probable cause existed for believing that the Union had committed or was committing unfair labor practices, authorized the issuance of a complaint, and referred the matter to hearing. On December 29, 2005, a complaint was issued. On February 9, 2006, the parties stipulated that the Union restrained and coerced Charging Parties in the exercise of their rights guaranteed by Chapter 4117, in violation of § 4117.11(B)(1), and that it failed to fairly represent Charging Parties, in violation of § 4117.11(B)(6), by failing to adequately process their grievance.

On February 9, 2006, a hearing was held, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs.

II. ISSUES

1. Did the grievance have a reasonable likelihood of succeeding on the merits?
2. What is the appropriate remedy for the Union's violation of §§ 4117.11(B)(1) and (B)(6)?

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

III. FINDINGS OF FACT²

1. The State of Ohio is a "public employer" as defined by § 4117.01(B). The Ohio Department of Job and Family Services ("ODJFS") is an agency of the State of Ohio. (S. 3)
2. The Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO is an "employee organization" as defined by § 4117.01(D). The Union is the SERB-certified exclusive representative for a bargaining unit that includes ODJFS employees. (S. 4)
3. Charging Parties are employed by ODJFS, are members of the bargaining unit represented by the Union, and are "public employees" as defined by § 4117.01(C). (S. 5)
4. ODJFS and the Union are parties to a collective bargaining agreement ("CBA") effective from March 1, 2003 through February 28, 2006, which contains a grievance procedure culminating in final and binding arbitration. (S. 8)
5. On September 28, 2004, the Akron ODJFS office became the Akron Call Center and moved to a new location in Akron, the Ocasek Building at 161 South High Street. Previously, the Akron ODJFS office was located at 150 East Market Street and was divided into sections. The top floor was the Call Center, and the bottom floor was the Processing Center. Within the Call Center, employees were assigned various duties, including processing and adjudicating claims as well as call intake. Within the Processing Center, employees were assigned the duties of claim processing or working in employment services or unemployment compensation. Bargaining-unit members working in the Call Center and in the Processing Center had the same job classification, Customer Service Representative ("CSR"). (S. 9, 16; T. 10-13, 113; C. Exh. 2)
6. In preparation for the move to the Ocasek Building, employee cross-training began in February 2004. During cross-training, various bargaining-unit employees moved back and forth between the Call Center and the Processing Center. All four Charging Parties attended a five-day training session on OJI Benefits System for

²All references to the Stipulations of Fact are indicated parenthetically by "S." All references to the Complainant's Exhibits in the record are indicated parenthetically by "C. Exh.," followed by the exhibit number. All references to the transcript of hearing are indicated parenthetically by "T.," followed by the page number. References to the stipulations and 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 that related finding of fact.

unemployment compensation claim processing. The five-day training was the most extensive training available. Other CSRs not doing claim processing work were sent to a less-extensive, three-day OJI training course. On August 9, 2004, ODJFS also began transitioning to the OJI Benefits System. Immediately prior to the transition to OJI Benefits System, Charging Parties were doing claim processing work. Effective August 9, 2004, Manager Trucell Johnson assigned Charging Parties to be cross-trained in the Call Center. At a meeting held on August 6, 2004, Charging Parties Davis, Peck, and Morgan were informed that during the transition, all employees were going to be asked to perform duties they did not normally perform, and to be flexible. When Charging Party Peck inquired, Manager Johnson informed her that overtime would not be affected and would continue to be offered by seniority. Charging Party Runeric was not at work on August 6 and was informed when she arrived at work on August 9 that she would be working in the Call Center. (S. 10, 11, 12; T. 21-22, 26-27, 58, 61, 62, 63-64, 65, 116, 140-141, 150-151)

7. Before September 2004, bargaining-unit member Kai Vang was assigned to the Processing Center but worked in employment services, and did very little claim processing work. Employment services work involves helping people become re-employed in the community. (T. 31-32, 77)
8. During the period from August 28, 2004 to September 28, 2004, emergency unlimited overtime work involving claim processing was available in the Processing Center because of the conversion to the OJI system. Charging Parties were available to work overtime during this time period but were denied the opportunity to work overtime in the Processing Center. During this time period, the ODJFS computer "tree" log-in system continued to reflect that Charging Parties were assigned to the Processing Center. Each morning during this time period, each Charging Party had to manually change her log-in information so that she could access the computer system while cross-training in the Call Center. Charging Parties had not been formally transferred to Call Center positions. For a formal transfer to occur, a position must be posted and bid on through ODJFS's Columbus office. Previously, Charging Party Peck had bid on and been awarded an open Call Center position, but was asked by Manager Johnson to decline this transfer so that Manager Johnson could elevate an intermittent employee to full-time status. (S. 13, 14; T. 58, 65, 77-78, 85, 152)
9. During September 2004, when Charging Party Davis herself was cross-training bargaining-unit member Vang on call intake in the Call Center, bargaining-unit member Vang was offered the opportunity to work overtime in the Processing Center. Employees working in the Benefits Accuracy Measurement ("BAM") unit were also offered overtime opportunities in the Processing Center. Cheryl Vires, an Investigator, was offered overtime in the Processing Center. Intermittent employees

with lower seniority than Charging Parties were offered overtime opportunities in the Processing Center. (T. 74, 77, 120, 143, 156, 164; C. Exh. 11)

10. On September 10, 2004, the Union presented a grievance on behalf of the Charging Parties to Manager Johnson. The grievance contested Charging Parties' exclusion from the overtime roster for the overtime work in the Processing Center. At some point after the grievance was filed, it was altered without Charging Parties' permission by deleting language that made the grievance open-ended to include future dates of overtime that were not offered to Charging Parties. On September 15, 2004, Manager Johnson denied the grievance. Thereafter, the Union failed to further process the grievance. (S. 15; T. 46, 72-73, 103, 142; C. Exh. 4)
11. Had Charging Parties been offered the opportunity to work overtime during the period from August 28 to September 28, 2004, they would have earned the following gross wages, respectively: Charging Party Davis, \$1,860.00; Charging Party Peck, \$1,632.00; Charging Party Runeric, \$1,934.30; Charging Party Morgan, \$1,920.00. (T. 83, 129, 145-147, 167; C. Exhs. 10, 15-17)
12. Section 13.07 of the CBA provides in relevant part as follows: "Insofar as practicable, overtime shall be equitably distributed on a rotating basis by seniority among those who normally perform the work." Section 25.01(A) of the CBA provides in relevant part as follows: "A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement." (C. Exh. 1)
13. Effective September 28, 2004, the Akron Call Center and Processing Center were consolidated into one office, the Akron Call Center, and relocated to the Ocasek Building. (S. 17; T. 10-13; C. Exh. 8)

IV. ANALYSIS AND DISCUSSION

A. The Grievance Had a Reasonable Likelihood of Success on the Merits

Section 4117.11 provides in relevant part as follows:

- (B) It is an unfair labor practice for an employee organization, its agents or representatives, or public employees to:
 - (1) Restrain or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code....

- (6) Fail to fairly represent all public employees in a bargaining unit[.]

Where the failure to process a grievance was not based on a decision that the grievance lacked merit, but instead results from bad faith, discriminatory conduct, or arbitrary behavior, a violation will be found regardless of the merit of the grievance. The parties have stipulated that in failing to process Charging Parties' grievance, the Union violated §§ 4117.11(B)(1) and (B)(6). Where improper handling of a grievance is the basis of a § 4117.11(B)(6) charge, the merit of that grievance is not relevant to the finding of a violation. The grievance's merit is relevant only for purposes of determining a remedy after a violation is found. In re OCSEA, AFSCME, Local 11, SERB 99-009 (5-21-99); In re Ohio Health Care Employees Union, Dist. 1199, SERB 93-020 (12-20-93); In re Ohio Civil Service Employees Association, SERB 93-019 (12-20-93). Consequently, the next question is whether Charging Parties' grievance, had it been processed properly, would have likely been meritorious. No damage award will be issued without a finding that the grievance was likely to be meritorious since to act otherwise will reward an individual who had no contractual right to the remedy sought. In re Ohio Civil Service Employees Assn, Local 11, SERB 95-020 (11-8-95).

A preponderance of the evidence presented supports a finding that Charging Parties' grievance had a reasonable likelihood of succeeding on the merits. Under Section 13.07 of the CBA, Charging Parties should have been offered overtime in the Processing Center because they were among those who normally performed the claim processing work in question. The failure to offer them overtime clearly violated the contract and was grievable under Section 25.01(A) of the CBA. The parties stipulated to the fact that immediately before the transition to OJI Benefits System, Charging Parties were doing processing work. During the relevant time period, August 28 to September 28, 2004, the Charging Parties had not been permanently transferred to the Call Center, but rather were being cross-trained in the Call Center. Their normal work remained Processing Center work. The mere fact that Charging Parties were "cross-training" in another department does not change the fact that the work they normally performed was processing work. Evidence at the hearing supports this proposition. Ms. Johnson maintained throughout her testimony that the Charging Parties were being cross-trained. During the meeting the Friday before the cross-training began, Charging Parties were told they were going to be asked to do work they did not normally do, were asked to be flexible, and were told that overtime opportunities would not be affected. Had their Call Center assignments been permanent, the computers for the Charging Parties would have been switched over to the Call Center "tree" so they would no longer have to switch over to that area manually, and the documentation showing them as Processing Center employees would have been updated to reflect the transfer. A transfer is permanent in nature, and requires ODJFS to follow the posting and bidding process outlined in the CBA. Manager Johnson's argument at hearing that all employees who remained in the Akron ODJFS office were eventually going to be doing Call Center work

rather than processing work does not change this analysis. If this argument were followed to its logical conclusion, then no employee within the Akron office would have been eligible for the Processing Center overtime on the dates in question.

Another ground for sustaining Charging Parties' grievance is disparate treatment. Charging Parties were treated disparately when they were not offered overtime in the Processing Center. The record contains substantial evidence that numerous ODJFS employees not doing claim processing work were offered overtime during the time period in question. Kai Vang, an employment services employee, was offered the overtime while he was being cross-trained in the Call Center. Cheryl Vires, an Adjudicator and later an Investigator, was offered the overtime. Members of the BAM Unit were called in for overtime, as well as other investigators and supervisors. This disparate treatment and selective application of the contract to the detriment of Charging Parties is another basis on which Charging Parties' grievance was reasonably likely to have succeeded on the merits.

The Union's arguments that the grievance did not have a reasonable likelihood of success on the merits are themselves without merit. In its post-hearing brief, the Union relies upon the testimony of Union Steward Stephanie Uhall, a CSR in the Call Center. During the winter of 2003-2004, Union Steward Uhall was told by a more experienced Union Steward that she was not eligible for Processing Center overtime work because she did not normally perform the work. Union Steward Uhall did not assert, however, that she normally performed processing work — only that she knew how to do it and had helped out with such work in the past. Union Steward Uhall acknowledged at hearing that a cross-training assignment differed from a permanent move and would not affect the analysis of what work a bargaining-unit member normally performed. (T. 193-195) The Union also argues in its brief that ODJFS has the unfettered right to assign CSRs to whatever work management wants the CSRs to do. This argument is in direct conflict with Charging Party Peck's testimony that Call Center CSR openings were filled through a posting and bidding process. Finally, the Union makes the argument that arbitrators should be consistent in their decisions on contract interpretation — but offers no previous arbitration decision interpreting the CBA provisions in question.

B. The Remedy

Complainant provided ample evidence to quantify Charging Parties' losses. Charging Parties clearly identified in their testimony and documentary evidence the amount of pay lost from not being offered the overtime to which they were entitled. Each Charging Party factored in days she was sick or could not take overtime, and further calculated hours of overtime at straight time when their regular workweek did not amount to forty hours. Any confusion as to overtime dates and availability or disparity in calculations was explained clearly and concisely. Finally, the Union provided no evidence to dispute Charging Parties' testimony that they rarely, if ever, refused overtime.

If the matter had been properly pursued, the grievance would have had a reasonable likelihood of success on the merits. Therefore, the appropriate remedy in this case is to issue an order, pursuant to § 4117.12(B)(3), requiring the Union to pay, with interest, each Charging Party the respective amount of overtime compensation each would have earned if she had been included in the overtime available in the Processing Center from August 28 to September 28, 2004; to cease and desist from restraining and coercing Charging Parties in their exercise of rights guaranteed in Chapter 4117, and from otherwise violating § 4117.11(B)(1); to cease and desist from failing to fairly represent all public employees in a bargaining unit and from otherwise violating § 4117.11(B)(6); and to post the attached Notice to Employees for sixty days in all of the usual and normal posting locations where bargaining-unit employees who are represented by the Union work.

V. CONCLUSIONS OF LAW

Based upon the entire record herein, this Administrative Law Judge recommends the following Conclusions of Law:

1. Charging Parties Laura Davis, Karen Peck, Carrie Morgan, and Donna Runeric are "public employees" as defined by § 4117.01(C).
2. The State of Ohio is a "public employer" as defined by § 4117.01(B). ODJFS is an agency of the State of Ohio.
3. The Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO is an "employee organization" as defined by § 4117.01(D).
4. The Union restrained and coerced Charging Parties in the exercise of their rights guaranteed by Chapter 4117, in violation of § 4117.11(B)(1), and failed to fairly represent Charging Parties, in violation of § 4117.11(B)(6), by failing to adequately process their grievance.
5. Charging Parties' grievance had a reasonable likelihood of success on the merits.