

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

St. Clairsville-Richland City School District Board of Education,

Respondent.

Case No. 2004-ULP-12-0680

**ORDER**  
**(OPINION ATTACHED)**

Before Chairman Mayton, Vice Chairman Gillmor, and Board Member Verich:  
August 15, 2006.

On December 10, 2004, the Ohio Association of Public School Employees, AFSCME Local 4, AFL-CIO and its Local 549 ("the Union") filed an unfair labor practice charge against the St. Clairsville-Richland City School District Board of Education ("the District"), alleging that the District violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5). On June 9, 2005, the State Employment Relations Board ("SERB" or "Complainant") found probable cause to believe that the District violated O.R.C. §§ 4117.11(A)(1) and (A)(5) by releasing documents pertaining to pending grievances to the public in the absence of a court order as required by the parties' agreement.

At hearing, the parties agreed to stipulate the case in its entirety. Stipulations were filed on November 14, 2005. Joint exhibits were filed on November 16, 2005. Briefs were filed on December 5, 2005. Reply briefs were filed on December 16, 2005. On March 16, 2006, the Administrative Law Judge issued a Proposed Order, recommending that SERB find that the District had not violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5). No exceptions were filed to the Proposed Order.

After reviewing the record, the Proposed Order, and all filings in this case, the Board adopts the Findings of Fact and Conclusions of Law in the Administrative Law Judge's Proposed Order, and finds, for the reasons set forth in the attached Opinion, incorporated by reference, that the District did not violate Ohio Revised Code Sections 4117.11(A)(1) and (A)(5) when it released documents pertaining to pending grievances to the public pursuant to the Ohio Public Records Act, but in the absence of a court order as required by

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the parties' collective bargaining agreement. As a result, the Board dismisses the complaint and dismisses with prejudice the unfair labor practice charge.

It is so ordered.

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

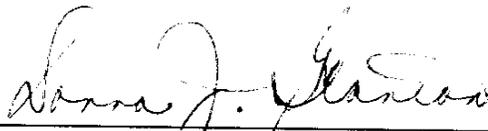


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CRAIG R. MAYTON, CHAIRMAN

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 16<sup>th</sup> day of August, 2006.



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DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT

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CASE NO. 2004-UJP-12-0680

**OPINION**

MAYTON, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") upon the issuance of a Proposed Order on March 16, 2006. No exceptions have been filed. For the reasons below, we find that the St. Clairsville-Richland City School District Board of Education ("the District") did not violate O.R.C. §§ 4117.11(A)(1) and (A)(5) when it released documents pertaining to pending grievances to the public pursuant to the Ohio Public Records Act ("OPRA"), but in the absence of a court order as required by the parties' collective bargaining agreement.

**I. BACKGROUND**

The Ohio Association of Public School Employees, AFSCME Local 4, AFL-CIO and its Local 549 ("OAPSE") is the deemed-certified exclusive representative for a bargaining unit of the District's non-teaching employees. The District and OAPSE were parties to a collective bargaining agreement effective from August 1, 2000 to July 31, 2003 ("CBA"), containing a grievance procedure that culminated in final and binding arbitration. Section 4.6 of the CBA provided in relevant part as follows: "Copies of the documents

pertaining to a grievance which has been filed shall be placed only in confidential files of the Treasurer of the Board and President of the Union. The Treasurer shall make these available only to the members of the Board, the Superintendent, legal counsel and by court order. All proceedings shall be destroyed after ten years." (Jt. Exh. 1)

At all relevant times, OAPSE and the District were in negotiations for a successor collective bargaining agreement. On September 14, 2004, a regular meeting of the District's board was conducted. Prior to that meeting, a member of the public made a public records request for copies of all current grievances in the District's possession.

The District released the public records that were requested prior to the District's regular meeting on September 14, 2004. Among the documents that the District released were copies of grievances filed by the Union's bargaining-unit employees. A court order necessitating the District's disclosure of the grievances had not been obtained prior to the release of the public records. The District also released a copy of a grievance filed by the employee organization that represents the District's teaching employees.

Two additional grievances and a pending unfair labor practice charge filed by or through OAPSE on behalf of a member of the bargaining unit were pending at the time of the September 14, 2004 request. These documents could not be located at the time of the public records request and were not provided. The documents that were provided pursuant to the public records request were those required to be filed and maintained by the District pursuant to the collective bargaining agreement and on a form required by the collective bargaining agreement with OAPSE.

On September 14, 2004, a Federal Mediation and Conciliation Service ("FMCS") mediator was facilitating the negotiations for a successor collective bargaining agreement. The negotiations session immediately prior to September 14, 2004, was held on August 23, 2004. During the negotiations session, the District submitted proposals with

respect to Article 6, Vacancies and Transfer, and Article 7, Reduction in Force. The negotiations session immediately subsequent to September 14, 2004, was held on January 20, 2005.

On September 17, 2004, OAPSE President Richard Holstein submitted a request to the District for a copy of the letter that requested copies of the grievances. The District timely complied with that request. The District had previously provided records of pending grievances filed by the St. Clairsville Education Association, along with other documents requested, pursuant to a public records request submitted March 23, 2004.

## II. DISCUSSION

### A. Jurisdiction

Complainant and the Union claim an unfair labor practice occurred when the District released copies of grievances in violation of Section 4.6 of the CBA, which provides in relevant part as follows: "Copies of the documents pertaining to a grievance which has been filed shall be placed only in confidential files of the Treasurer of the Board and President of the Union. The Treasurer shall make these available only to the members of the Board, the Superintendent, legal counsel and by court order." The District's defense is that it was required to release the documents because disclosure was pursuant to a public records request under O.R.C. Chapter 149, the Ohio Public Records Act.

Complainant and the Union argue that SERB lacks jurisdiction to entertain the District's defense that it was required by OPRA to release copies of the grievances requested. Complainant and Intervenor claim that SERB lacks jurisdiction because SERB would be required to apply or construe OPRA, which they state only a court can do. They conclude that if SERB cannot construe or apply OPRA, SERB also lacks jurisdiction over the facts that triggered the defense. The District then argues, by way of motion to dismiss the complaint, that if SERB lacks jurisdiction over the District's OPRA defense, it also lacks

jurisdiction over the complaint itself, and therefore the complaint should be dismissed.

Both Complainant's and the Union's argument in this regard and the District's motion to dismiss the complaint fail for the following reasons. SERB's jurisdiction is determined from all of the facts presented regardless of how they are presented, be it in the complaint, the answer, or motion. So long as the facts are encompassed by O.R.C. Chapter 4117, SERB's jurisdiction is apparent. The Ohio Supreme Court has held that SERB has "exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117." *Franklin Cty. Law Enforcement Ass'n v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 1991 SERB 4-55 (1991). Where the question of whether noncompliance with a clause in a CBA constitutes an unfair labor practice under O.R.C. §§ 4117.11(A)(1) and (A)(5) is at issue, SERB's subject matter jurisdiction is clearly invoked.

Any contention that SERB cannot apply OPRA to the CBA is incorrect. This situation is not one in which the constitutionality of OPRA is being challenged in a SERB proceeding, which would be beyond SERB's jurisdiction. At issue in this case is what occurs if the parties to a CBA agree to contract terms that conflict with the requirements of OPRA. Can OPRA be raised as a defense in an unfair labor practice proceeding before SERB? By necessity, an administrative agency (e.g., SERB) has the ability to apply, construe, or interpret a statute (e.g., OPRA) as a necessary precedent to its administrative action to determine if an unfair labor practice has been committed. *J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991); *Dean v. State*, 250 Kan. 417, 826 P.2d 1372 (1992).

The Union cited *Cleveland Police Patrolmen's Ass'n v. White*, 109 Ohio App.3d 329, 1996 SERB 4-7 (8<sup>th</sup> Dist Ct App, Cuyahoga, 2-1-96) ("CPPA") for the proposition that SERB lacks jurisdiction over a claim that asserts rights independent of the CBA and distinct from failure to bargain allegations in the unfair labor practice charge. CPPA involved a

union filing a complaint in mandamus on the heels of SERB dismissing two unfair labor practice charges, stating there was no probable cause to believe the charged party violated O.R.C. § 4117.11, and that an alleged violation of the city charter or codified ordinances is not within SERB's jurisdiction. The common pleas court dismissed the complaint stating that the Plaintiff's claims under the city charter and city ordinances arose from and were dependent on the rights created by O.R.C. Chapter 4117, and that Plaintiff could not frame its lawsuit as an action against the Defendant for improperly fulfilling its duties under the city charter and city ordinances, thereby avoiding SERB's jurisdiction. The court of appeals reversed the common pleas court's dismissal of the complaint in part because the complaint in mandamus asserted rights independent of the CBA and because the rights asserted by the Plaintiff in the mandamus complaint were wholly distinct from the failure to bargain allegations asserted in the unfair labor practice charges.

*CPPA* does not preclude SERB from having subject matter jurisdiction over the complaint or defenses. In *CPPA*, the court cites *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9*, *supra*, which states:

In our view, exclusive jurisdiction to resolve unfair labor practice cases is vested in SERB in two general areas: (1) where one... of the parties files charges with SERB alleging an unfair labor practice under R.C. 4117.11; or (2) a complaint brought before the court of common pleas alleges conduct that constitutes an unfair labor practice specifically enumerated in R.C. 4117.11, and the trial court therefore dismisses the complaint for lack of subject matter jurisdiction.

*CPPA*, as well as *State ex rel. Rootstown Local School Dist. Bd. of Edn. v. Portage Cty. Court of Common Pleas*, 78 Ohio St.3d 489 (1997), also cited by the Union, are distinguishable in that they involve determinations as to whether a claim of an unfair labor practice charge fell within SERB's exclusive jurisdiction, not whether a defense that does not arise from O.R.C. Chapter 4117 can be raised by the District once jurisdiction has been asserted by SERB.

The Union also cited a dismissal of an unfair labor charge in *Billey v. City of Lakewood*, SERB Case No. 97-ULP-05-0259 (8-25-97) ("*Billey*"). Mr. Billey filed an unfair labor practice charge against the city, alleging that the city failed to uphold the terms of a settlement agreement by not allowing him to investigate his own grievance. The dismissal directive stated that "it appears that the State Employment Relations Board does not have jurisdiction to determine whether the Charged Party violated the Charging Party's right to access public records." Since this directive was not a decision on the merits, it had no precedential value. Furthermore, *Billey* was a procedural dismissal without sufficient facts to determine the reason therefore. One could not determine whether the right to access public records was an essential component of Mr. Billey's charge and, thus, that his charge did not relate sufficiently to O.R.C. Chapter 4117 for SERB to have jurisdiction.

**B. The Documents Released by the District Were Public Records as Defined by O.R.C. §§ 149.011(G) and 149.43(A)**

O.R.C. § 149.43 provides in relevant part:

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, \* \* \* school district units[.]

O.R.C. § 149.011 provides in relevant part:

As used in this chapter:

\* \* \*

(G) "Records" means any document, device or item, regardless of physical form or characteristic, including an electronic record as defined in Section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivision, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

O.R.C. Chapter 149 provides for exemptions from its coverage. Certain public records are discretionally exempt. These records are subject to an exemption, but may be

released if the public office chooses to waive the exemption. The grievance forms released are records kept by the Treasurer of the Board for a ten-year period. Grievances are not listed as being discretionally exempt from OPRA.

Certain records are mandatorily exempt because the public disclosure of these records is prohibited by Ohio or federal law. As a result, such records cannot be released by a public office in response to a public records request. Grievances are not subject to this exemption. Exemptions to OPRA are to be narrowly construed. *State ex rel. National Broadcasting Co. v. Cleveland* (1988), 38 Ohio St.3d 79. Records not subject to any exemption, such as grievance records, must be released by law.

Unless OPRA provides an exemption, an attempt to make records confidential and exempt from disclosure under OPRA through the terms of an agreement fails. Parties to a public contract such as a settlement agreement or collective bargaining agreement cannot avoid OPRA by language in their agreement. For example, in *State ex rel. Findlay Pub. Co. v. Hancock County Bd. of Commrs.*, 80 Ohio St.3d 134, 1997-Ohio-353, a confidentiality provision in a settlement agreement did not preclude disclosure under OPRA because the county commissioners could not enter into enforceable promises of confidentiality regarding public records. If a collective bargaining agreement includes a destruction-of-documents provision that "conflicts with or fails to comport with all of the requirements of the Ohio Public Records Act, then the provision is invalid." *Keller v. Columbus*, 100 Ohio St. 3d 192, 195, 2003-Ohio-5599; *State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St.3d 382 ("*Dispatch I*"); *State ex rel. Dispatch Printing Co. v. Columbus*, 90 Ohio St.3d 39, 2000-Ohio-8 ("*Dispatch II*").

In *Toledo Police Patrolmen's Assn, Local 10, IUPA v. Toledo*, 94 Ohio App.3d 734, 1994 SERB 4-78 (5-6-94), the Court of Appeals for Lucas County found that the City did not breach a collective bargaining agreement provision requiring police officers to participate in internal affairs investigations, when the City released police department

internal affairs documents pursuant to OPRA. The Court found that the City's promise to maintain confidentiality of such records was rendered impossible by law thereby excusing non-performance by the City. Since OPRA did not provide an exemption for these records, the City was required to comply with the records request under O.R.C. § 149.43.

**C. Refusal to Bargain**

O.R.C. §§ 4117.11(A)(1) and (A)(5) provide as follows:

(A) It is unfair labor practice for a public employer, its agents, or representatives to:

(1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code[;]  
\* \* \*

(5) Refuse to bargain collectively with the representative of its employees recognized as the exclusive representative \* \* \* pursuant to Chapter 4117. of the Revised Code[.]

The key issue is whether the District engaged in bad-faith bargaining in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) when it released documents pertaining to pending grievances in the absence of a court order as requested by the parties' agreements. Good-faith bargaining is determined by the totality of the circumstances. *In re Dist 1199/HCSSU/SEIU*, SERB 96-004 (4-8-96). A circumvention of the duty to bargain, regardless of subjective good faith, is unlawful. *In re Mayfield City School Dist Bd of Ed*, SERB 89-033 (12-20-89).

The duty to bargain in good faith extends to grievance proceedings; such proceedings are "both an extension and an inherent part of the collective bargaining process." *In re Bryan City Bd of Ed*, SERB 97-003 (3-14-97) ("*Bryan*"). The essence of the issue in this case is whether the District violated O.R.C. §§ 4117.11(A)(1) and (A)(5) by disregarding the terms of the parties CBA and releasing grievances in response to a public records request. The charge and complaint do not allege that the District was under an

obligation to provide notice and an opportunity to bargain to the Union prior to honoring the public records request. To this extent, analysis of the case under *In re Toledo City School Dist Bd of Ed*, SERB 2001-005 (10-1-01), is unnecessary.

**D. O.R.C. § 4117.10(A) Does Not Prevail over OPRA**

Complainant and the Union argue that O.R.C. § 4117.21 required the District to maintain the confidentiality of pending grievances. O.R.C. § 4117.21 provides as follows: “Collective bargaining meetings between public employers and employee organizations are private, and are not subject to section 121.22 of the Revised Code.” The argument by Complainant and the Union that O.R.C. § 4117.10(A) somehow prevails over OPRA is also laid to rest by the Ohio Supreme Court in the *Dispatch* cases.

Various courts have concluded that O.R.C. § 4117.21 is limited to collective bargaining meetings. In *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 233, 2000-Ohio-142, 2000 SERB 4-15, 4-17, the Ohio Supreme Court holds:

The manifest language R.C. 4117.21 exempts only collective bargaining *meetings* from public disclosure. R.C. 4117.21 authorizes the closure of collective bargaining meetings between public employers and employee organizations and precludes the disclosure of minutes of those meetings under R.C. 149.43. But collective bargaining agreements, tentative or otherwise, resulting from the negotiations are *not* shielded from disclosure. (Citations omitted; emphasis in original)

SERB was equally clear in *In re South Euclid-Lyndhurst City School Dist Bd of Ed*, SERB 92-005 (4-21-92) at p. 3-15:<sup>1</sup>

As the Board observed about this provision [O.R.C. § 4117.21] in *In re City of Dayton*, SERB 85-006 (3-14-85): “The command could hardly be more plainly stated in English.” Collective bargaining *meetings* are private

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<sup>1</sup> SERB made specific note of the Hearing Officer's erroneous conclusion while interpreting *In re Mentor Village School District Board of Education*, SERB 89-011 (5-16-89), that the Board found it reasonable to construe O.R.C. § 4117.21 to include communications concerning negotiations as well as the actual negotiations process.

and are not subject to the public meetings requirement of the Sunshine Law. That is all that 4117.21 says and intends to say. The wisdom of this section is evident. Negotiation sessions need to be conducted away from the public eye. \* \* \* (emphasis in original)

Trying to apply O.R.C. § 4117.21 to the production of grievances under an OPRA request stretches the statutory section beyond any rational reading. *Bryan* involves an employer's commission of an unfair labor practice by unilaterally conditioning its participation in grievance meetings on the union's consent to having the meetings tape recorded. "The tape recording of grievance meetings, or contractual negotiations, may have a chilling effect on the free exchange of proposals and ideas and the give-and-take process that is encouraged during those meetings." *Id* at 3-13. While *Bryan* extends the duty to bargain in good faith from collective bargaining to the grievance procedure, it does not extend the privacy component of O.R.C. § 4117.21 to grievances. In the instant case, it is the disclosure only of the grievance form itself that is involved. The same logic that applies in the case of either disclosure of collective bargaining meetings or grievance meetings in terms of any "chilling effect" does not apply to a disclosure of the completed grievance form itself.

The Ohio General Assembly states the overarching mission of SERB as "promoting orderly and constructive relationships between all public employers and employees." O.R.C. § 4117.22. In order to achieve this purpose, the law governing SERB (O.R.C. Chapter 4117) accords great deference to the agreements of public employers and employees that are formalized as collective bargaining agreements. For example, the parties to a collective bargaining agreement (CBA) are free to include a dispute settlement provision in the CBA that actually supersedes the considerable mediation processes – including fact-finding and, if applicable, conciliation – otherwise required by O.R.C. § 4117.14(C).

The most sweeping expression of this intent, however, is found in O.R.C. § 4117.10(A), which provides that O.R.C. Chapter 4117 "prevails over any and all other

conflicting laws, resolutions, provisions, present or future, except as otherwise specified in this chapter or as otherwise specified by the general assembly.” This statutory principle has been held by the Ohio Supreme Court to extend to the collective bargaining agreement itself. “Except for laws specifically exempted, the provisions of a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 prevail over conflicting laws.” *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 513, 1994-Ohio-172 (citing favorably to *Cincinnati v. Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Emp., AFL-CIO* (1991), 61 Ohio St.3d 658, paragraph one of the Syllabus).

Prior to the enactment of O.R.C. Chapter 4117 in 1984, a collective bargaining agreement in the public sector context in Ohio was only enforceable to the extent that it was not contrary to law. See *Struthers City Schools Bd. of Edn. v. Struthers Edn. Assn.* (1983), 6 Ohio St.3d 308. Confusion over what constituted “contrary to law” sometimes led to protracted litigation. The General Assembly brought order to this confusion by changing this rule via O.R.C. § 4117.10(A).

The instant case presents a direct conflict between the provisions of a collective bargaining agreement and O.R.C. § 149.43. Specifically, Complainant and the Union call upon SERB to find that the Respondent committed an unfair labor practice by releasing records pertaining to pending grievances contrary to express prohibitions contained in the parties’ CBA. These grievance-related documents are public records as that term is defined in O.R.C. §§ 149.43(A)(1) and (G).

In a government “of the people, by the people, and for the people”, the electorate must have broad access to its records if it is to make intelligent and informed decisions. Therefore, the Ohio Supreme Court has stated that the guiding principle in deciding public records questions is that the public records law should be interpreted liberally in favor of disclosure. *State ex rel. Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619.

In the specific context of a conflict between a CBA and OPRA, the Ohio Supreme Court has already held as follows: "R.C. 4117.10(A) was designed to free public employees from conflicting laws which may act to interfere with the \* \* \* right to collectively bargain. If respondent's construction of this provision were accepted, private citizens would be empowered to alter legal relationships between a government and the public at large via collective bargaining agreements." *Dispatch II*, supra at 42 (citing favorably to and quoting from *Dispatch I*, 18 Ohio St.3d at 384). "Such a result was beyond the General Assembly's contemplation in enacting R.C. 4117.10(A)." *Dispatch II*, supra.

Stated another way, parties to a collective bargaining agreement should be able, under O.R.C. § 4117.10(A), to waive their own statutory rights. They should not, however, be able to waive the substantial rights of others who are not party to the CBA. Chief Justice Moyer took this concept a step further when he dryly observed that the notion that CBAs prevail over all other laws without exception would allow parties to a CBA to "include a provision that all disputes between labor and management would be settled by a duel." *Dispatch II*, supra.

Lest there be any remaining doubt, the Ohio Supreme Court confirmed these principles in *Keller v. Columbus*, supra. In that case, the Court expressed the following proposition of law in its Syllabus: "Any provision in a collective bargaining agreement that establishes a schedule for the destruction of public records is unenforceable if it conflicts with or fails to comport with all of the dictates of the Public Records Act."

Thus, where a conflict exists between OPRA and § 4.6 of the CBA, OPRA prevails over the CBA. None of Complainant's and the Union's arguments support a finding of a violation of O.R.C. §§ 4117.11(A)(1) and (A)(5). The District did not violate O.R.C. §§ 4117.11(A)(1) and (A)(5) when it released grievance documents in response to a public records request despite the restrictions in § 4.6 of the CBA.

### **III. CONCLUSION**

For the reasons set forth above, we find that the St. Clairsville-Richard City School District Board of Education did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it released documents pertaining to pending grievances to the public pursuant to the Ohio Public Records Act, but in the absence of a court order as required by the parties' collective bargaining agreement. Therefore, the complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

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