

**STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

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

**CASE NUMBER 2005-ULP-05-0296**

**ORDER  
(OPINION ATTACHED)**

Before Chairman Mayton, Vice Chairman Gillmor, and Board Member Verich:  
November 29, 2007.

On May 25, 2005, Anna M. Davis filed an unfair labor practice charge against the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO (“Respondent” or “OCSEA”), alleging that Respondent had violated Ohio Revised Code (“O.R.C.”) § 4117.11(B)(6). On October 6, 2005, the State Employment Relations Board (“SERB” or “Complainant”) determined that probable cause existed for believing that Respondent had committed or was committing unfair labor practices, authorized the issuance of a complaint, and referred the matter to hearing. On March 9, 2006, a complaint was issued. On July 6, 2006, Ms. Davis, through her representative, filed a motion to intervene, which was granted.

On August 1 and 28, 2006, a hearing was held, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs. On March 20, 2007, the Administrative Law Judge issued a Proposed Order in which she recommended that the Board find that Respondent had violated O.R.C. § 4117.11(B)(6) by arbitrarily failing to timely process Ms. Davis’ grievance.

On April 12, 2007, Respondent filed timely exceptions to the Proposed Order. On April 20, 2007, Complainant filed a response to the exceptions.

After reviewing the complaint, answer, Proposed Order, exceptions, response to exceptions, and all other filings in this case, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Administrative Law Judge’s Proposed Order, finding that Respondent violated Ohio Revised Code § 4117.11(B)(6) when Respondent arbitrarily failed to timely process Ms. Davis’ grievance.

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

**A. CEASE AND DESIST FROM:**

- (1) Failing to fairly represent all employees in a bargaining unit by failing to timely process Anna M. Davis' grievance, and from otherwise violating Ohio Revised Code Section 4117.11(B)(6).

**B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:**

- (1) Pay Anna M. Davis the amount of \$89,067, plus \$124 for each week from October 19, 2006 to the date of the Board's Final Order in this matter;
- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO work, 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 within twenty calendar days from the date the **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.

/s/ \_\_\_\_\_  
CRAIG R. MAYTON, CHAIRMAN

### TIME AND METHOD TO PERFECT AN APPEAL

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 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, by filing in the court a notice of appeal setting forth the order appealed from and the grounds of appeal within fifteen days after the mailing of the State Employment Relations Board's order. A copy of the notice of appeal must also be filed with the State Employment Relations Board, at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, pursuant to Ohio Administrative Code Rule 4117-7-07.

### PROOF OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, this 30th day of November, 2007.

/s/ \_\_\_\_\_  
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 to Employees. We intend to carry out the order of the Board and to abide by the following:

### A. CEASE AND DESIST FROM:

- (1) Failing to fairly represent all employees in a bargaining unit by failing to timely process Anna M. Davis' grievance, and from otherwise violating Ohio Revised Code Section 4117.11(B)(6).

### B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Pay Anna M. Davis the amount of \$89,067, plus \$124 for each week from October 19, 2006 to the date of the Board's Final Order in this matter;
- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO work, 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 within twenty calendar days from the date the **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-U LP-05-0296***

\_\_\_\_\_  
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 NO. 05-ULP-05-0296**  
**Complainant,** :  
: :  
: :  
**v.** : **BETH A. JEWELL**  
: **Administrative Law Judge**  
**OHIO CIVIL SERVICE EMPLOYEES** :  
**ASSOCIATION, AFSCME LOCAL 11, AFL-CIO,** :  
: **PROPOSED ORDER**  
**Respondent.** :

**I. INTRODUCTION**

On May 25, 2005, Anna M. Davis filed an unfair labor practice charge against the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO (the "Union" or "OCSEA"), alleging that the Union violated Ohio Revised Code § 4117.11(B)(6).<sup>1</sup> On October 6, 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 March 9, 2006, a complaint was issued. On July 6, 2006, Ms. Davis, through her representative, filed a motion to intervene, which was granted in accordance with Ohio Administrative Code Rule 4117-1-07(A).

On August 1 and 28, 2006, a hearing was held, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs.

**II. ISSUES**

1. Did the Union timely raise a statute of limitations defense to the unfair labor practice charge and complaint?
2. Did the Union fail to timely process Ms. Davis' grievance?
3. Was the Union's conduct in processing Ms. Davis' grievance arbitrary, discriminatory, or in bad faith?

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<sup>1</sup>All 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.

4. Did the grievance have a reasonable likelihood of success on the merits?

### **III. FINDINGS OF FACT<sup>2</sup>**

#### **Background**

1. The State of Ohio ("State") is a "public employer" as defined by § 4117.01(B). The Ohio Department of Rehabilitation and Correction ("DRC") is a state agency. The Richland Correctional Institution ("RCI") is an institution within DRC. (S. 1)
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 of certain State employees, including Correction Officers. (S. 2)
3. The State 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. The State and the Union also were parties to a previous CBA effective from 2000 to 2003. (S. 5)
4. Ms. Davis was employed by DRC as a Correction Officer at RCI. While so employed, she was a member of the Union. (S. 7)

#### **DRC Policies**

5. DRC Policy No. 404-03, "Unauthorized Relationships," effective March 2, 1998 to December 17, 2001, defined "Unauthorized Relationship," in relevant part, as follows:

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<sup>2</sup>All references to the Stipulations of Fact are indicated parenthetically by "S." All references to the Complainant and Intervenor's joint exhibits in the record are indicated parenthetically by "C&I Exh.," followed by the exhibit number. All references to the Intervenor's exhibits in the record are indicated parenthetically by "I. Exh.," followed by the exhibit number. All references to the Union's exhibits in the record are indicated parenthetically by "R. Exh.," followed by the exhibit letter. 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.

A relationship with any individual under the supervision of the Department, an ex-inmate, or anyone under the jurisdiction of a criminal court, which has not been approved by the Appointing Authority. Prohibited activities include, but are not limited to:

- The exchange of personal letters, pictures, phone calls, or information with any individual under the supervision of the Department/criminal court or friends or family of same;
- Engaging in any other unauthorized personal or business relationship(s) with any current or former individual under the supervision of the Department/criminal court or friends or family of same;
- Visiting with any individual under the supervision of the Department or under the jurisdiction of a criminal court[.]...

DRC Policy No. 404-03 provided in section V as follows:

It is the policy of the Ohio Department of Rehabilitation and Correction to prohibit any type of unauthorized relationship between its employees and any person under the supervision of the Department or under the jurisdiction of a criminal court without approval. All employees are expected to have a clear understanding that the Department considers any type of unauthorized relationship with an individual under its supervision or under the supervision of a criminal court to be a serious breach of security and these relationships will not be tolerated.

6. The Unauthorized Relationships Policy was amended effective December 18, 2001, but the substance of the above-quoted provisions did not change. The policy was subsequently amended effective October 17, 2004, and no longer prohibits relationships with family or friends of inmates. (C&I Exhs. 2, 3, 28; R. Exh. B)
7. When a DRC employee has an "inmate nexus," the employee is required to report the relationship by completing an Inmate Nexus form. The form provides as follows: "Examples of an inmate nexus are: A relative by blood or marriage, a neighbor, a friend, an ex-spouse, a close family friend, an ex-boyfriend or girlfriend, or any individual with whom you have or had a personal or business relationship." On the form, the employee may also request authorization from DRC to continue the relationship. (T. 23-28, 50-51, 165-169; C&I Exhs. 7, 28)

8. DRC conducts yearly in-service training on employee policies. Ms. Davis received training on the Standards of Employee Conduct and on the Unauthorized Relationships Policy. (T. 168-169, 194; R. Exhs. A, B)

### **The Discharge of Ms. Davis**

9. In January and March 2002, DRC Investigator Russ Albright conducted investigatory interviews of Ms. Davis. A predisciplinary hearing was held on March 26, 2002. In April 2002, DRC terminated Ms. Davis from her Correction Officer position for violating Rules 36 and 46(A) of the DRC Standards of Employee Conduct. Rule 36 reads "Actions that could harm or potentially harm the employee, fellow employee(s) or a member of the general public." Rule 46(A) reads "The exchange of personal letters, pictures, phone calls, or information with any individual under the supervision of the Department or friends or family of same, without express authorization of the Department." (S. 8; C&I Exh. 4, at pp. 16-18; C&I Exh. 5, 6; R. Exhs. A, B)
10. The investigatory interviews revealed that Ms. Davis had a personal relationship with Dewayne Larkins. Mr. Larkins was incarcerated in the Ashland County jail in April 2001. Ms. Davis visited him about five times and wrote letters to him while he was in the county jail. Mr. Larkins was transferred from the county jail to Lorain Correctional Institution on September 26, 2001, and then to RCI on October 22, 2001. On November 11, 2001, Ms. Davis completed an Inmate Nexus form for Inmate Larkins, in which she described him as a friend and wrote that she did not think it would be a problem for him to remain at RCI. She did not request permission to continue the relationship with him. After Mr. Larkins became a prisoner at RCI, Ms. Davis' interactions with him were incidental, consisting of saying hello. (C&I Exh. 7; R. Exh. B)
11. The investigatory interviews revealed that from May 21, 2001 to January 18, 2002, Ms. Davis made frequent telephone calls to her ex-boyfriend Robert Dillon, with whom she remained close. During this time period, Mr. Dillon's brother was incarcerated at RCI. (R. Exh. A)
12. The investigatory interviews revealed that from May 21, 2001 to January 18, 2002, Ms. Davis made frequent telephone calls to Katrisa Powell, her best friend. During this time period, Ms. Powell's fiancée was incarcerated at RCI. (R. Exh. B)
13. Joe LeMaster was a Correction Officer and Union member at Mansfield Correctional Institution ("MANCI"). In February 2000, he was given a ten-day suspension for violating Rule 46 and 7 when he harbored his cousin, Arthur J. Riggs, a paroled fugitive with a warrant from the Adult Parole Authority and another for domestic

violence charges for allegedly assaulting his girlfriend. When Mr. Riggs was arrested at Mr. LeMaster's place of residence, drug paraphernalia was found and Mr. Riggs admitted that he was using drugs in the residence just prior to his arrest. (T. 263-265; C&I Exh. 22)

14. Donald Lucas was a Correction Officer and Union member at MANCI. In July 2000, he was removed for violating Rule 46(B) when it was discovered that he was having an inmate do his homework. Pursuant to a grievance settlement agreement in late December 2000, Mr. Lucas was given his job back, and his removal was converted to a time-served suspension. The third paragraph of the second page of the settlement agreement provides as follows: "All parties to this Agreement hereby acknowledge and agree that this Agreement is in no way precedent setting. This Agreement shall not be introduced, referred to, or in any other way utilized in any subsequent arbitration, litigation, or administrative hearing except as may be necessary to enforce its provisions and terms." (T. 266-268; C&I Exh. 24)
15. Sharon Shoemaker was a Correction Officer and Union member at North Central Correctional Institution. In December 1999, she was given a ten-day suspension for violating Rule 46(A) and (F) when it was discovered that she had developed a personal relationship with an inmate. Ms. Shoemaker admitted that she discussed personal problems with the inmate, was getting close to him, and had kissed him. (T. 109-110; C&I Exh. 23)

### **The Grievance Process**

16. Under the heading, "Discharge Grievances," section 25.02 of the 2000-2003 CBA provides in part as follows:

The Agency shall forward a copy of the grievance with the grievance number to the Office of Collective Bargaining at the time the grievance is filed at Step Three (3). The Agency shall conduct a meeting and respond within sixty (60) days of the date the grievance was filed at Step Three (3). If the grievance is not resolved at Step Three (3), the parties shall conduct a mediation within sixty (60) days of the due date of the Step Three (3) response. Nothing in this Section precludes either party from waiving mediation and proceeding directly to arbitration. The Union may request arbitration of the grievance within sixty (60) days of the date of the mediation, but no more than one hundred eighty (180) days from the filing of the grievance.

(C&I Exh. 1, p. 69)

17. Roy Steward, an RCI employee, has been the Chief Union Steward at RCI since 1998. Mr. Steward handles grievances at Step 3. After Step 3, Mr. Steward is responsible for processing the paperwork to advance the grievance to Step 4. A Union Staff Representative, who is a full-time employee of the Union, is responsible for handling the grievance at Steps 4 and 5. Mr. Steward assists the Union Staff Representative at Step 4, mediation, and Step 5, arbitration. When Mr. Steward first became a Union Steward, the Union provided eight hours of training on the collective bargaining agreement, grievance processing, time frames, and related matters. (T. 155-156, 171-172, 177-178)
18. Discharge grievances are automatically started at Step 3. At Step 3, grievances are filed with DRC Labor Relations, Central Office, in Columbus, Ohio. (T. 156)
19. Mr. Steward's normal practice is to process a grievance to Step 4 immediately upon his receipt of management's Step 3 response. After he receives management's Step 3 response, Mr. Steward completes an "Appeal and Prep Sheet." The Appeal and Prep Sheet is a Union form that is mailed to the State's Office of Collective Bargaining ("OCB") and to the Union's central office in Columbus, Ohio (T. 157, 179-181)
20. On May 7, 2002, the Union filed a discharge grievance with the State on behalf of Ms. Davis. Under the CBA, the Union had 180 days from May 7, 2002, to request arbitration of the grievance. (S. 9; T. 173-174; C&I Exh. 1, p. 69)
21. A Step 3 hearing was held for Ms. Davis' grievance on June 6, 2002. By a response dated June 26, 2002, the State denied the grievance at Step 3. Mr. Steward prepared and mailed an "Appeal and Prep Sheet." (S. 10; T. 159; C&I Exh. 9)
22. At the Union's central office, upon receipt of an Appeal and Prep Sheet, the Union's Grievance Coordinator enters the information from the Appeal and Prep Sheet into the Union's computer system, and a mail merge program automatically generates a letter demanding arbitration. By letter dated April 5, 2004, the Union notified the State that the Union was appealing Ms. Davis' grievance to arbitration. (S. 12; T. 307-308, 354; C&I Exh. 10; R. Exhs. D, E)
23. All arbitration requests and Union approvals of grievances for arbitration are "conditional" and subject to the Union's further review of the totality of the circumstances of the grievance. The demand for arbitration letter stays in effect once it is sent, unless and until it is withdrawn. (T. 346-347, 354)

24. Step 4 mediation sessions are scheduled and held quarterly. The OCB representative, Labor Relations Officer, and Union Staff Representative receive schedules quarterly for the mediations to which they are assigned. After he mailed the "Appeal and Prep Sheet," Mr. Steward became concerned about the timeliness of the processing of the grievance and asked Union Staff Representative James McElvain several times about the status of Ms. Davis' grievance. The grievance was not scheduled for mediation until 2004. On April 21, 2004, the Union and the State had a Step 4 mediation session on Ms. Davis' discharge grievance. At Ms. Davis' mediation session, OCB representatives raised the issue of timeliness, claiming that they had not received the paperwork to process Ms. Davis' grievance to Step 4. Nonetheless, the Union and OCB proceeded to hold the Step 4 mediation session. Ms. Davis' grievance was not settled at mediation. (S. 11; T. 159-162, 163-164, 173-174, 179, 198-199, 200, 232, 234, 315-316; R. Exh. E)
25. Grievances other than discharge grievances that are not resolved at Step 4 are reviewed by the Union's Arbitration Committee. If a discharge grievance is not resolved at Step 4, the Staff Representative presents the grievance to the Union's Discharge Review Committee, which meets monthly. The grievant is invited to attend the Discharge Review Committee meeting. The Discharge Review Committee is a subcommittee of the Arbitration Committee, and consists of three members of the Arbitration Committee. The Discharge Review Committee meeting is also referred to as "Step 4 1/2." (T. 163-164, 310-311, 326-327, 329)
26. On May 27, 2004, the Union sent Ms. Davis a letter indicating that the Discharge Review Committee would be reviewing her grievance on June 15, 2004. On June 16, 2004, the Union notified Ms. Davis that it was conditionally advancing her grievance to arbitration. An arbitration hearing was scheduled for August 23, 2004, but when Ms. Davis called RCI Union Steward Robert White as instructed by Staff Representative McElvain, she was told only that the hearing had been canceled. (T. 43, 46, 84; S. 13; C&I Exhs. 11,12)
27. The Union's Discharge Review Committee met on December 16, 2004, and decided not to arbitrate Ms. Davis' grievance. In a letter dated December 16, 2004, the Union communicated to the State that the Union was not advancing five grievances to arbitration, including Ms. Davis' grievance. (S. 14; C&I Exh. 15)
28. In a letter dated December 21, 2004, the Union informed Ms. Davis that it would not be arbitrating her grievance. The Union explained its reasoning as follows:

It is your position that management violated this language when it removed you from your Correction Officer (CO) position effective April 2002 based on an alleged violation of DR&C

Standards of Employee Conduct, - Rule #36 — *Actions that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee;* and Rule#40 — Unauthorized relationship (A) *The exchange of personal letters, pictures, phone calls or information with any individual under the supervision of the Department or friends or family of the same, without express authorization of the Department.* (emphasis in original) You ask as a remedy that management reinstate you to your CO position with back pay and benefits and make you whole.

The Union has the burden to prove that the Employer has violated the contract, which means that it must provide evidence and documentation of the alleged wrongdoing. The Committee did not find evidence to support the conclusion that a violation of the language cited occurred.

Specifically, the Committee determined that you attempted to manipulate the system by concealing your true relationship with an inmate; you also established unauthorized contacts with other inmates and their family members. Due to the nature of your work — a CO in a prison and the fact that inmate favoritism could compromise the safety of other inmates and staff which could subject the State of Ohio to liability, the Committee concluded that it would be highly unlikely that an arbitrator would rule in favor of the union based on the totality of the facts. *Additionally, in most cases, grievances not advanced in a timely fashion according to the time periods found in the contract are found to be procedurally defective, and procedural defects regarding timeliness issues are routinely cited by arbitrators as a reason for grievance denial; as such, the Committee further determined that it appears that your grievance was not advanced in a timely fashion.* (emphasis added)

While we understand that the events that gave rise to your grievance are important, our ability to pursue issues through the arbitration process is limited, in most cases, to specific violations of language in the contract, appropriate remedies, procedural correctness and proof of our position. For the

reasons stated above, the Discharge Review Committee declined to move your grievance forward to arbitration.

(C&I 16)

29. Ms. Davis appealed the decision of the Discharge Review Committee. Union General Counsel Sandra Bell handled Ms. Davis' appeal and upheld the Discharge Review Committee's decision, stating in relevant part as follows:

This letter is in response to your appeal of the Discharge Review Committee's decision not to pursue your grievance to arbitration. You stated in your investigatory interview that she [sic] were aware of the nexus rule and had received training on the subject. Although you completed nexus forms, you appeared to be less than forthcoming with all of the information about yourr [sic] true relationship with an inmate. Phone records, letters and pictures support the employer's position that you were less than honest about her [sic] relationship which was apparently more than friendship, and continued longer than indicated. Granted the rule have [sic] changed since the grievant was removed. However, alleged violations occurred at the time the former rule was in effect. The former rule in the department's code of conduct should be and was applied to this case. The rule did not change until approximately two (2) years following your removal.

After reviewing the information presented to the Committee and additional information you provided in your appeal, I find there is not sufficient evidence to warrant reversing the Committee's decision.

Therefore, your appeal of the decision of the Discharge Review Committee is denied.

(C&I 17, 18, 19)

#### **IV. ANALYSIS AND DISCUSSION**

##### **A. Statute of Limitations**

Both the Ohio Revised Code' and the Ohio Administrative Code state that generally, an unfair labor practice charge must be filed within 90 days of the alleged unfair labor practice. SERB has held that the ninety-day limitations period begins once two conditions are met: (1) the Charging Party obtains actual or constructive knowledge of the alleged unfair labor practice; and (2) the alleged unfair labor practice charge caused actual damage to the Charging Party. In re City of Barberton, SERB 88-008 (7-5-88); *aff'd sub nom. SERB v. City of Barberton*, 1990 SERB 4-46 (CP, Summit, 7-31-90).

Rule 4117-7-04(A) states as follows: "A respondent's answer to an unfair labor practice complaint shall be filed within ten days from receipt of the complaint or amendment to the complaint but in no event later than the commencement of the hearing. Such answer shall include a specific admission, denial, or explanation of each allegation of the complaint. ... The answer shall include a specific statement of any affirmative defense. Failure to state an affirmative defense in the answer shall constitute a waiver of such affirmative defense, except the defenses of failure to state a cause of action, unconstitutionality of the statute, or lack of subject matter jurisdiction, which defenses may be raised at any time."

In this case, the Union asserts in its Post- Hearing Brief for the first time that Ms. Davis did not file her unfair labor practice charge in a timely manner. The Union did not assert this defense in its Answer, prehearing statement, or through pleadings or motions. In accordance with Rule 4117-7-04(A), SERB has held that the a statute of limitations is an affirmative defense which is waived unless raised in the Answer to a Complaint. In re Central State Univ, SERB 89-027 (10-5-89). Since the Union did not raise the statute of limitations defense earlier, the Union has waived its right to assert this affirmative defense.

Moreover, the Union has admitted and stipulated that Ms. Davis' unfair labor practice charge was filed properly. On July 13, 2006, the Union filed an Answer admitting the allegations of paragraph 3 of the Complaint, which states that the Charging Party, "Ms. Anna M. Davis filed an unfair labor practice charge with SERB pursuant to and in accordance with O.R.C. § 4117.12(B) and O.A.C. Rule 4117-7- 01." Furthermore, the parties' August 1, 2006 Joint Stipulation of Facts states in paragraph 3 that Ms. Davis properly filed an unfair labor charge with SERB in accordance with O.R.C. §4117.12(B) and O.A.C. Rule 4117-7-01. The Union in this case has waived its right to assert an untimeliness defense to Ms. Davis' unfair labor practice charge.

B. The Union Violated § 4117.11(B)(6) by Processing Ms. Davis' Grievance in an Arbitrary Manner

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

When an unfair labor practice is charged because a union has allegedly violated its duty of fair representation, SERB will look to see if the union's actions are arbitrary, discriminatory, or in bad faith. If any of these components are found, there is a breach of the duty. The Complainant has the burden of proving that the union did not fairly represent its bargaining-unit members. In re OCSEA/AFSCME Local 11, SERB 98-010 (7-22-98) (“OCSEA/AFSCME I”). 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. In re OCSEA, AFSCME, Local 11, SERB 99-009 (5-21-99) (“OCSEA/AFSCME II”).

A union acts arbitrarily by failing to take a basic and required step. The basic and required steps a union must take when fulfilling its duty of fair representation will vary depending upon the nature of the representation. One of these representation functions is the processing of a grievance. Id. Failure to take a basic and required step while performing a representation function creates a rebuttable presumption of arbitrariness. Once that burden has been met, the Union must come forth with its justification or viable excuse for its actions or inactions. OCSEA/AFSCME II, *supra*, at 3-48.

Under the facts of this case, the Union acted arbitrarily when it failed to take the basic and required step of advancing Ms. Davis' grievance to Step 5 in a timely manner. The contract language is clear: a grievance must be advanced to Step 5, arbitration, no later than 180 days after the date the grievance was filed. Thus, the Complainant met its burden to provide evidence necessary to create a rebuttable presumption of arbitrariness.

The evidence in the record demonstrates that the Union was unable to offer adequate justification or viable excuse for its inaction. In fact, at hearing the Union's witnesses had no explanation for the Union's failure to timely request arbitration. The grievance was filed on May 7, 2002. Under the terms of the CBA, the due date for the Step 3 response was sixty (60) days from the grievance filing date. Sixty days from May 7,

2002, was Saturday, July 6, 2002. The next business day was Monday, July 8, 2002. The Step 3 response was issued by DRC on June 26, 2002, well within this time frame. According to the CBA, at this point either party could choose to waive mediation and proceed directly to arbitration; or the parties could conduct a mediation hearing within sixty (60) days from the due date of the Step 3 response. Consequently, the parties should have conducted the Step 4 mediation hearing on or before Tuesday, August 6, 2002. They did not. However, presumably in recognition of the kinds of delays that can occur when mediations are scheduled on a quarterly basis, the CBA also provides that the Union may request arbitration "no later than 180 days from the filing of the grievance." One hundred eighty days from May 7, 2002 was Sunday, November 3, 2002. The next business day was Monday, November 4, 2002.

Consequently, the Union should have processed the grievance to the arbitration step by requesting arbitration on or before November 4, 2002, unless by this date it had made a decision that the grievance lacked merit. Instead, on April 5, 2004, the Union mailed the Request to Arbitrate. Union Steward Steward had no explanation for this delay; neither did OCSEA General Counsel Sandra Bell, even after her internal investigation in December 2004. Mr. Steward testified that he processed the Appeal and Prep Sheet to advance the grievance to Step 4, mediation, on June 26, 2002. However, the Appeal and Prep Sheet, introduced into evidence at hearing as Respondent's Exhibit D, is stamped, "Reviewed By Grievance Coordinator April 5, 2004." According to Ms. Bell, her investigation confirmed that, consistent with the stamp on the Appeal and Prep Sheet, the Union's Grievance Coordinator did not process the appeal and issue the computer-generated Request for Arbitration letter until April 5, 2004, well outside all applicable time frames.

The Union's own witness confirmed that Union officials were aware of the time problems with Ms. Davis' grievance but failed to take action. Mr. Steward testified that he tracked the grievance after he mailed the Step 4 appeal and noticed that the grievance did not appear on the list of cases set for the quarterly Step 4 mediations. Mr. Steward further testified that he contacted Staff Representative McElvain, who said he didn't know why it wasn't on the list, but that it was still within time. Staff Representative McElvain told Mr. Steward to check to see if Ms. Davis' was on the next quarterly mediation list. The grievance was not on the next list, and Mr. Steward testified that he kept calling Staff Representative McElvain about the status of the grievance, but the Staff Representative took no action. Therefore, the evidence is clear that the Union was aware that it had failed to timely request arbitration long before OCB raised the timeliness issue in the mediation hearing. The Union's alleged belated consideration of the merits of the grievance cannot excuse its failure to timely process the grievance. The Discharge Review Committee did not even convene to assess the merits of Ms. Davis' grievance until June 2004, long after the 180-day time frame for an appeal to arbitration had expired.

As Union witnesses testified at hearing, if Step 4 mediation does not result in the resolution of a grievance, the grievance is referred to the Union's Discharge Review Committee. After Ms. Davis' April 21, 2004, mediation session, the Union notified Ms. Davis of the Discharge Review Committee hearing to be held on June 15, 2004. She attended the hearing. On June 16, 2004, the Union notified Ms. Davis that it was conditionally advancing her grievance to arbitration. An arbitration hearing was scheduled for August 23, 2004, but the hearing was canceled without explanation. Three months later, Ms. Davis was notified that the Committee would be reviewing her grievance again on December 14, 2004. She appeared before the Committee and repeated the same story and provided the same information to the same questions asked in the prior meeting. This time the Committee wrote a letter to Ms. Davis stating that her grievance did not have merit, and "the Committee further determined that it appears that your grievance was not advanced in a timely fashion." Thus, the Union even has admitted that it failed to timely process Ms. Davis' grievance.

It must also be said that the Union sat on its rights to the detriment of Ms. Davis. The Union spent a significant amount of time at hearing trying to establish whether and when Mr. Steward mailed the Appeal and Prep Sheet, and whether and when OCB received it. The timing of the Step 4 mediation hearing is a non-issue in light of the clear contract language, which places the burden on the Union to request arbitration within 180 days from the grievance filing date. This timeline was running regardless of whether and when a mediation hearing was held. In any event, it can be inferred from the testimony that Staff Representative McElvain did not attempt to contact OCB or to do any other research regarding the reason for the delay in scheduling the mediation, even though Mr. Steward brought Ms. Davis' grievance to the Staff Representative's attention several times. Moreover, the contract provides either party with the option to waive Step 4 and proceed directly to Step 5. If OCB was intentionally or unintentionally delaying the mediation, the union had every right to bypass Step 4 and proceed directly to arbitration to ensure that timelines were maintained.

C. Ms. Davis' Grievance Had a Reasonable Likelihood of Succeeding On the Merits

"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." In re OCSEA/AFSCME Local 11, SERB 2006-005 (6-22-06) (citations omitted). The above discussion clearly shows that the OCSEA violated R.C. §4117.11 (B)(6). Consequently, at a minimum, a cease and desist order and notice posting must be issued for the violations. In re Amalgamated Transit Union Local 627, SERB 04-006 (8-5-04); In re Ohio Council 8, AFSCME, AFL-CIO, SERB 04-005 (8- 5-04); In re Ohio Council 8, AFSCME, Local 11, SERB 99-009 (5-21-99). Once the violation is found, SERB must make a determination of the merits of the grievance in order to determine the appropriate remedy. 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 Ms. Davis' grievance, had it been processed properly, would have likely been meritorious.

Ms. Davis' grievance had a reasonable likelihood of succeeding on the merits had the Union moved it properly through the grievance process. In this regard, it is of the utmost significance that Ms. Davis was terminated for an alleged Rule 46A violation, and Rule 46(A) reads "The exchange of personal letters, pictures, phone calls, or information with any individual under the supervision of the Department or friends or family of same, without express authorization of the Department." This rule does not even mention relationships with individuals under the jurisdiction of a criminal court, which was Mr. Larkins' status at the time of Ms. Davis' relationship with him. Therefore, by the express terms of the rule, Ms. Davis' Rule 46A violations consisted of friendships with friends or family of current inmates, rather than relationships with inmates themselves. The level of seriousness of such infractions can be inferred from the fact that as of October 2004, DRC no longer prohibits Correction Officers from having such relationships.

Complainant provided three compelling examples of Correction Officers who were charged with Rule 46 violations that were arguably more heinous and certainly at least as heinous as Ms. Davis' violation. The disciplines of Correction Officers Lucas, LeMaster, and Shoemaker are appropriate comparables. These disciplines are for Correction Officers from other nearby institutions, but they are all bargaining unit members represented by OCSEA, and subject to the same employee standards of conduct. Two of the comparable individuals received a reasonable penalty for their offenses and didn't need to grieve the discipline. Correction Officer Lucas grieved his termination, which was subsequently rescinded under the terms of a settlement agreement with the Union. Had the Union been able to mediate Ms. Davis' grievance at Step 4, armed with the LeMaster and Shoemaker disciplines and the Lucas settlement, but without the timeliness issue hanging over its head, a resolution would have been more likely. Even if the grievance did not settle at Step 4, it is considerably more likely that it would have settled prior to arbitration, as countless cases do. Finally, if the grievance did not settle prior to arbitration, it is reasonably likely that an arbitrator would have reviewed the facts of Ms. Davis' case, compared it to the LeMaster and Shoemaker disciplines, and overturned the termination.<sup>3</sup> Ms. Davis, who broke off her personal relationship once Mr. Larkins became incarcerated at RCI, cannot be said to have engaged in conduct more odious than that engaged in by Correction Officers LeMaster and Shoemaker, namely, harboring a fugitive who was under the supervision of the Department in one's own home and developing a personal relationship with a current inmate. The discipline Ms. Davis received, termination, is not consistent with the suspensions issued to the other Correction Officers, who retained their jobs. It is reasonably likely that Ms. Davis would have received some discipline, but the arbitrator would have eliminated the disparity

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<sup>3</sup> Pursuant to its terms, the Lucas settlement would not have been admissible at Ms. Davis' arbitration.

and awarded discipline consistent with that meted out to the other Rule 46 violators. Based upon the comparables, it is reasonably likely that the arbitrator would have rescinded Ms. Davis' removal and imposed a suspension of ten days or less.

Ms. Davis' loss in back pay is not speculative; it is quantifiable. She was able to provide her work history during her testimony, thus enabling actual calculations to be made. Pursuant to these calculations, which are set forth in Appendix A to this Proposed Order, Ms. Davis incurred approximately \$89,067 in lost back wages, less mitigation, from her termination date through October 19, 2006, the parties' briefing deadline. Ms. Davis continues to incur \$124 per week in unmitigated lost wages. This does not include any raises, overtime or other benefits to which she would be entitled, but provides for what she would have earned at \$14.29 per hour, her wage at the time of her termination, less what she actually earned through mitigation. This is not to say that Ms. Davis would not have received some discipline; only that the punishment meted out would better fit the violation by using the other three disciplines as a benchmark.

When a union fails to properly and timely advance an employee's grievance to the next step and abandons pursuit of a remedy, as was done here, the union has committed an unfair labor practice in violation of § 4117.11(B)(6). Furthermore, if Ms. Davis' grievance 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 for the Board to issue an order, pursuant to Ohio Revised Code § 4117.12(B)(3), requiring the Union to cease and desist from failing to fairly represent all public employees in a bargaining unit and from otherwise violating O.R.C. § 4117.11(B)(6), and an order requiring the Union to pay Ms. Davis an amount representing her out-of-pocket back pay loss of \$89,067, plus \$124 for each week from October 19, 2006 to the date of the Board's final order in this matter, and an order that the Union post the attached Notice to Employees for sixty days in all of the usual and normal posting locations where DRC Correction Officers 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. Anna M. Davis was a "public employee" as defined by § 4117.01(C).
2. The State of Ohio is a "public employer" as defined by § 4117.01(B). The Ohio Department of Rehabilitation and Correction 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 Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO violated § 4117.11(B)(6) by arbitrarily failing to timely process Ms. Davis’ grievance.

## **VI. 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 § 4117.12(B)(3), requiring the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO, to do the following:

### **A. CEASE AND DESIST FROM:**

- (1) Failing to fairly represent all employees in a bargaining unit by failing to timely process Anna M. Davis’ grievance, and from otherwise violating Ohio Revised Code Section 4117.11(B)(6).

### **B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:**

- (1) Pay Anna M. Davis the amount of \$89,067, plus \$124 for each week from October 19, 2006 to the date of the Board’s Final Order in this matter;
- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO work, 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 within twenty calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.