

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Cleveland,

Respondent.

**Case Number 2007-ULP-04-0156**

STATE EMPLOYMENT  
RELATIONS BOARD  
2010 MAR 26 P 2:24

**ORDER  
(OPINION ATTACHED)**

Before Chairperson Brundige, Vice Chairperson Verich, and Board Member Spada: March 11, 2010.

On April 9, 2007, the Municipal Construction Equipment Operators' Labor Council ("Charging Party") filed an unfair labor practice charge against the City of Cleveland ("Respondent") and Mayor Frank Jackson. On July 12, 2007, the State Employment Relations Board ("SERB") determined that probable cause existed for believing Charged Parties had committed an unfair labor practice in violation of Ohio Revised Code ("O.R.C.") §§ 4117.11 (A)(1) and (A)(5) by meeting with bargaining-unit employees in an attempt to intimidate and unfairly circumvent the bargaining process.

On August 1, 2007, SERB issued "Finding of Probable Cause and Direction to Hearing." On October 2, 2008, SERB issued a Complaint and Notice of Hearing.

On October 2, 2008, Charging Party filed with SERB an application for subpoena for Mayor Frank Jackson to require him to appear for a video deposition in this matter, and to produce certain documents.

On November 5, 2008, Respondent filed "Motion to Quash Application for Subpoena, or in the Alternative, Motion for Protective Order." The Administrative Law Judge ("the ALJ") assigned to the case at that time issued a Procedural Order denying Respondent's "Motion to Quash Application for Subpoena, or in the Alternative, Motion for Protective Order."

On November 12, 2008, the ALJ denied Respondent's "Motion to Quash Application for Subpoena, or in the Alternative, Motion for Protective Order."

On November 20, 2008, Charging Party filed a motion to stay the proceeding in this case to allow Charging Party and Respondent "time to resolve their differences which may obviate the need for SERB to prosecute and take further action with respect to this case." The motion was unopposed.

On November 28, 2008, Respondent filed "Respondent's Motion to Suspend Time to Move for Reconsideration of the Administrative Law Judge's Denial of Motion to Quash." That motion was unopposed.

On December 11, 2008, the Board granted Charging Party's motion to stay and Respondent's motion to suspend time to move for reconsideration of the denial of the motion to quash.

On January 8, 2009, Charging Party filed a "Motion to Lift Stay and Renew the Time to Move for Reconsideration."

On May 29, 2009, the Board issued a "Directive Granting Motion to Lift Stay."

On May 29, 2009, Respondent filed "Respondent City of Cleveland's Request for Reconsideration Regarding the Administrative Law Judge's Procedural Order." In its request for reconsideration, Respondent requested that the Board limit the documents requested by Charging Party in its October 2, 2008 subpoena application, contending that the request was overly broad.

On June 3, 2009, Complainant filed "Complainant's Memorandum Regarding Respondent's Motion for Reconsideration."

On June 5, 2009, Charging Party filed a "Motion to Intervene and Opposition to Cleveland's Motion for Reconsideration of Discovery Order." On June 10, 2009, the ALJ granted the unopposed motion to intervene.

On July 9, 2009, the Board voted to postpone the matter and to remand the motion for reconsideration to the Chief Administrative Law Judge and the ALJ assigned to the case for further review. ("Order of Postponement, and for Discovery Reconsideration")

On August 5, 2009, Intervenor filed a "Motion for Orders to Reverse SERB's July 9, 2009 Order of Postponement, and for Discovery Reconsideration."

On August 20, 2009, the Board issued a Directive remanding the motion for reconsideration to the Chief Administrative Law Judge and the ALJ assigned to the case for further review ("Order of Postponement, and for Discovery Reconsideration").

On August 25, 2009, Charging Party/Intervenor filed a "Reply to [Complainant's] Opposition to Respondent's Motion for Orders to Reverse SERB's July 9, 2009 Order of Postponement and Remand for Discovery Reconsideration." Charging Party/Intervenor

listed a series of complaints regarding the processing of this matter, including delays that it requested.

In its August 25, 2009 filing, Charging Party/Intervenor also complained that it should have received a hearing within 10 days after the service of the complaint on October 2, 2008, pursuant to O.R.C. § 4117.12(B)(1). In this Board's "Finding of Probable Cause and Direction to Hearing" issued on August 1, 2007, the Board stated that:

"Pursuant to O.R.C. § 4117.12(B), if a party seeks to exercise its right to have the hearing conducted within 10 days of the issuance of the complaint, the party or its representative must give written notification to the Executive Director's office within 10 days of the receipt of this directive."

Charging Party/Intervenor received the "Finding of Probable Cause and Direction to Hearing" on August 3, 2007. While Charging Party/Intervenor did submit a request for continuance of the ULP mediation scheduled for October 5, 2007, to November 5, 2007, Charging Party/Intervenor did not submit a written notification to the Executive Director's office requesting a hearing within 10 days of the issuance of the complaint as required by this Board's "Finding of Probable Cause and Direction to Hearing."

In its August 25, 2009 filing, Charging Party/Intervenor also stated its desire that Mayor Jackson should appear for a trial deposition without delay and that "the hearing of the ULP complaint should be completed without further delay."

On September 3, 2009, the Board responded to Charging Party/Intervenor's request that the hearing be completed without further delay and that Mayor Jackson should appear for a trial deposition. Specifically, the Board issued a Directive, which transferred the matter for hearing by the Board pursuant to O.R.C. § 4117.12(B)(1). After transferring the matter to the Board for a hearing, the Board reconsidered Respondent's motion to quash and the scope of the subpoena *duces tecum*. In "Charging Party's Application for Subpoena" filed October 2, 2008, Charging Party requested that the *duces tecum* portion of the applied-for subpoena "require Mayor Jackson to produce the following categories of documents created or distributed from August 1, 2006 through the present":

(1) all email, memoranda and other documents sent or received by Mayor Jackson, his office and direct reports with respect to Cleveland's position on pay raises and/or privatization of jobs currently performed by or affecting Cleveland's employees who are represented by any union; (2) all email, memoranda and other documents sent or received by Mayor Jackson, his office and direct reports with respect to

Cleveland's employment and utilization or replacement of its construction equipment operator and master mechanic employees, including but not limited to their current or proposed compensation.

Because the finding of probable cause and the complaint issued in this case concern whether or not Mayor Jackson made certain statements to members of a particular bargaining-unit on February 16, 2007, at the City's Ridge Road Waste Collection Garage, the Board determined that the documents requested by Charging Party were not relevant to this case. Accordingly, in its September 3, 2009 Directive, the Board granted Respondent's motion for reconsideration and its motion for protective order. In its September 3, 2009 Directive, the Board also ordered that the trial deposition of Mayor Jackson be conducted no later than October 2, 2009, unless the parties obtained the consent and approval of SERB's Executive Director to extend the time for trial deposition. The parties did not request an extension. The parties ultimately decided not to proceed with the trial deposition of Mayor Jackson.

On October 21, 2009, a Notice of Hearing and Prehearing Order was issued to the parties, setting the evidential hearing before the Board on December 2, 2009 and the prehearing before the Board's Staff Attorney on November 3, 2009. By agreement of the parties, the prehearing was rescheduled to November 4, 2009.

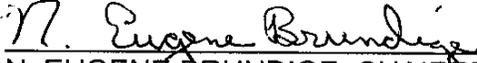
On November 3, 2009, Charging Party emailed a motion to stay and continue the prehearing and record hearing. On behalf of the Board, the Board's Staff Attorney denied the motion to stay the prehearing. Accordingly, the prehearing was held on November 4, 2009. On November 6, 2009, Charging Party's "Motion to Stay Scheduled Pre-hearing and Hearing" was received by the Board. No response was filed to the motion by Counsel for Complainant or Respondent City of Cleveland. Although the prehearing had occurred, the Board took action on the motion to stay the hearing scheduled to begin on December 2, 2009. The Board voted to deny the "Motion to Stay Scheduled Pre-hearing and Hearing" on November 19, 2009. The Board issued a Directive denying the "Motion to Stay Scheduled Pre-hearing and Hearing."

The evidentiary hearing in this matter was held before the full Board on December 2, 2009 and January 21, 2010, wherein testimonial and documentary evidence was presented. The issue in this case is whether the City of Cleveland engaged in direct dealing in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) when Cleveland Mayor Frank Jackson made certain statements to a group of approximately sixty employees from various union bargaining units at the City's Ridge Road Waste Collection Facility on February 16, 2007.

After reviewing the testimony and evidence and the entirety of the information contained in the record, for the reasons set forth in the attached Opinion, incorporated by reference, the complaint is dismissed and the unfair labor practice charge is dismissed with prejudice.

It is so ordered.

BRUNDIGE, Chairperson, VERICH, Vice Chairperson, and SPADA, Board Member, concur.

  
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N. EUGENE BRUNDIGE, CHAIRPERSON

### **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 setting forth the order appealed from and the grounds 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, 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, 12<sup>th</sup> 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, and upon each party's representative by ordinary mail, this 26<sup>th</sup> day of March, 2010.

  
\_\_\_\_\_  
SANDRA A.M. IVERSEN, ADMINISTRATIVE ASSISTANT

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**OPINION**

BRUNDIGE, Chairman:

**I. INTRODUCTION**

This unfair labor practice case comes before the State Employment Relations Board (“SERB” or “Complainant”) upon the Municipal Construction Equipment Operators’ Labor Council’s (“Charging Party” or “Intervenor”) filing of an unfair labor practice charge against the City of Cleveland (“the City” or “Respondent”), alleging that the Respondent engaged in direct dealing in violation of Ohio Revised Code (“O.R.C.”) §§ 4117.11(A)(1) and (A)(5). The issue to be decided in this case is whether Respondent violated O.R.C. §§ 4117.11(A)(1) and (A)(5) when Cleveland Mayor Frank Jackson made certain statements to a group of City employees during a February 16, 2007 meeting at the City’s Ridge Road Waste Collection Facility while negotiations were taking place between the City of Cleveland and several unions. For the reasons set forth below, we find that Respondent did not violate O.R.C. §§ 4117.11(A)(1) and (A)(5) when Mayor Jackson made statements to certain bargaining-unit employees during a February 16, 2007 meeting at the City’s Ridge Road Waste Collection Facility. Therefore, we dismiss the complaint and dismiss with prejudice the unfair labor practice charge.

**II. PROCEDURAL HISTORY**

On April 9, 2007, the Municipal Construction Equipment Operators’ Labor Council (“Charging Party”) filed an unfair labor practice charge against the City of Cleveland (“Respondent”) and Mayor Frank Jackson. On July 12, 2007, the State

Employment Relations Board ("SERB") determined that probable cause existed for believing Charged Parties had committed an unfair labor practice in violation of Ohio Revised Code ("O.R.C.") §§ 4117.11 (A)(1) and (A)(5) by meeting with bargaining-unit employees in an attempt to intimidate and unfairly circumvent the bargaining process.

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The evidentiary hearing in this matter was held before the full Board on December 2, 2009 and January 21, 2010, wherein testimonial and documentary evidence was presented.

### **III. STATEMENT OF THE CASE**

The following parties were present at the first day of the record hearing in this matter: Complainant was present through its representative Anne Light Hoke, Assistant Attorney General; Charging Party/Intervenor Municipal Construction Equipment Operators' Labor Council was present through its representative Stewart D. Roll, Attorney at Law; and Respondent City of Cleveland was present through its representative Jon A. Dileno, Attorney at Law. Also present at the first day of hearing was Theodora Monegan, Assistant Law Director for the City of Cleveland.

As a preliminary matter, Mr. Roll moved for a continuance, or in the alternative, requested that the record be held open for the testimony of Chester Bill and Martin Kaznoch. The Board granted Mr. Roll's motion to hold the record open for further testimony of Mr. Bill and Mr. Kaznoch.

At the first day of record hearing, Complainant called Frank Madonia as its first witness. Mr. Madonia testified that he is employed by the City of Cleveland as a master mechanic. Mr. Madonia noted that he has been the President of the Municipal Construction Equipment Operators' Labor Council's bargaining unit in the City of Cleveland since 2002. Mr. Madonia was asked to describe a February 2007 conversation he had with Martin Kaznoch, a bargaining-unit member. Mr. Madonia recalled that Mr. Kaznoch contacted him to express his disapproval of certain statements made by Cleveland Mayor Frank Jackson during a meeting that Mr. Kaznoch attended on February 16, 2007.

On cross examination, Mr. Madonia acknowledged that he was not present at the February 16, 2007 meeting attended by Mr. Kaznoch.

Respondent called Randell Scott as a witness. Mr. Scott testified that he has been employed by the City of Cleveland for twenty-eight years. Mr. Scott testified he holds the position of Commissioner of the Division of Streets, which is a division of the City of Cleveland's Department of Public Service. He indicated that he has held that position for approximately sixteen years. Mr. Scott confirmed that there are a number of unions which represent employees who work in the City's Division of Streets, employees that include laborers, truck drivers, heavy equipment operators, and clerical workers.

On direct examination, Mr. Scott recalled that a major snow storm hit the City of Cleveland during rush hour on or about February 14, 2007. He recalled that the City received 16 to 20 inches of snow in a short period of time, followed by very cold temperatures with icy conditions. The witness also recalled that employees in the Department of Public Service worked around the clock for the first 48 hours after the storm to clear the streets and provide waste collection services. Mr. Scott recalled that, a few days after the storm, he was notified by the Director of Public Service that Mayor Jackson planned to visit a number of the City's garages to personally thank employees for their hard work in clearing the streets and providing waste collection services after the storm. Mr. Scott stated that he organized a series of three "whistle-stop" meetings, which took place between the early morning shift changes on February 16, 2007. He recalled that he instructed the Commissioners of Waste Collection and Motor Vehicle Maintenance and the district supervisors of the Carriage Garage Facility, the Glenville Garage Facility, and the Ridge Road Garage Facility to gather as many of their employees as possible to meet with the Mayor on February 16, 2007. Mr. Scott indicated that he accompanied the Mayor as he visited the three garages, which were located at various points throughout the city. He stated that the meetings were informal and brief.

The Ridge Road Waste Collection Garage at the Ridge Road Facility (Ridge Road Facility) was Mayor Jackson's last "whistle-stop" meeting on February 16, 2007. Mr. Scott described the Ridge Road Facility as a dual-purpose facility that operates one garage for the Division of Streets and one garage for the Division of Waste Collection. Mr. Scott recalled that, on the morning of February 16, 2007, there were approximately sixty to seventy employees who gathered in a semicircle in the Waste Collection garage at the Ridge Road Facility to hear Mayor Jackson speak. Mr. Scott stated that there were employees from Waste Collection and Motor Vehicle Maintenance, but he was not certain whether there were any employees from the Division of Streets present during the Mayor's visit to the Ridge Road Facility. Mr. Scott testified that Mayor Jackson thanked the employees for their hard work removing snow and collecting waste after the snow storm. Mr. Scott recalled that there were a couple of questions from employees who heard the Mayor speak. Mr. Scott stated that an employee from the Division of

Waste Collection asked the Mayor whether he was planning to privatize their jobs and another employee, possibly a heavy equipment operator, asked if the Mayor was planning to purchase new equipment. Mr. Scott stated that the Mayor responded to the employees' questions by stating that he was not planning on privatizing work, and, if the employees embraced technology and worked to become more efficient to save the City money, he told the employees he would reinvest money in the existing system and in new equipment. Mr. Scott recalled that the employees applauded the Mayor at the conclusion of the meeting. Upon further questioning, Mr. Scott testified that, during his meeting with employees at the Ridge Road Facility, the Mayor did not make statements that the City's three-year wage proposal was 0% the first year, 2% the second year, and 2% the third year. He further testified that the Mayor did not state that it was less expensive to hire private contractors to perform work for the City. He also testified that the Mayor did not state that the employees should take what the City offers in contract negotiations.

On cross examination by Intervenor's Representative, Mr. Scott stated that the meetings on February 16, 2007 were informal, and he indicated that the meetings were not recorded and no notes were taken. Mr. Scott was asked if he was familiar with Respondent's answer to paragraph 7 of the Complaint issued in this case. Mr. Scott responded that he was not familiar with the answer in paragraph 7. Upon further questioning, Mr. Scott reiterated that the Mayor did not make any statements in reference to the City's wage proposal. Mr. Scott indicated that he had no comment regarding the City's answer to paragraph 7 of the Complaint.

The second day of record hearing was held on January 21, 2010. Complainant called Chester Bill as a witness. Upon direct examination, Mr. Bill testified that he is employed by the City of Cleveland as a construction equipment operator in the Department of Public Service, Division of Streets. He indicated that his job duties included road maintenance work and operating a front loader to load salt on the City's trucks. Mr. Bill recalled that he worked the 3<sup>rd</sup> shift at the Ridge Road Facility in February 2007. Mr. Bill indicated that he has been a member of the Municipal Construction Equipment Operators' bargaining unit in Cleveland since 2004, and he noted that he has been the Vice President of the Union for the past two and one-half years.

Mr. Bill recalled that on the morning of February 16, 2007, the General Foreman informed him that Mayor Jackson would be meeting with employees of the Ridge Road Facility at 7:00 a.m. Mr. Bill stated that he was not told of the reason for the meeting. Mr. Bill stated that he had no recollection of a major snow storm hitting the City on or about February 14, 2007. Mr. Bill recalled that he walked to the Waste Collection garage where the meeting was to take place. He estimated that there were approximately fifty to sixty employees from 1<sup>st</sup> and 3<sup>rd</sup> shifts in the garage waiting for the Mayor to arrive. Mr. Bill indicated that there were employees from Waste Collection and drivers present at the meeting.

Upon further questioning, Mr. Bill testified that the Mayor walked in and immediately started to speak to the employees. Mr. Bill hesitatingly acknowledged that the Mayor congratulated the employees for their work. Mr. Bill then stated that all he remembered about the Mayor's visit was that the Mayor stated that the City's wage proposal was "0% the first year, 2% the second year, and 2% the third year." Mr. Bill testified that the Mayor pointed at the employees present and told them to make sure they learn each others' jobs, and if they did not like it, he could "get 'BFI' in here tomorrow." Mr. Bill stated that he interpreted the Mayor's statements to mean that the Mayor would privatize jobs and that he could lose his job. Mr. Bill testified that after the Mayor spoke about cross training and "BFI," he asked the Mayor if the City was planning to purchase new equipment. He recalled that the Mayor responded that the City would purchase new equipment in three years, when the City earned money from its recycle program. Mr. Bill stated that the meeting was brief and he went home at its conclusion. He further stated that he called Union President Frank Madonia to inform him of the Mayor's comments regarding privatization. Mr. Bill confirmed that he was bothered by the Mayor's comments regarding "BFI."

Intervenor's Representative asked Mr. Bill if other people performed operators' jobs and if he believed that the Mayor's comment regarding privatization meant that he could lose his job. Mr. Bill answered both questions in the affirmative. When asked if the Mayor's statements concerned him as a negotiator, Mr. Bill answered in the affirmative.

On cross examination, Mr. Bill acknowledged that no privatization has occurred in the City of Cleveland. Mr. Bill reiterated that he had no recollection of the February 14, 2007 snow storm that prompted the Mayor to meet with employees at the Ridge Road Facility on February 16, 2007. Upon questioning regarding "BFI", Mr. Bill indicated that "BFI" is a private company. When asked if he knew whether "BFI" employs equipment operators, Mr. Bill stated that he did not know anything about the company. Mr. Bill was asked to name the other classes of employees who were present at the February 16, 2007 meeting at the Ridge Road Facility. In response, Mr. Bill stated that there were laborers, truck drivers, general asphalt foremen, and equipment operators present at the meeting. Mr. Bill indicated that there were ongoing negotiations for several union contracts in February 2007, but he did not know if all the contracts were being renegotiated. Upon further questioning, Mr. Bill stated that his question to the Mayor regarding new equipment came after the Mayor made his statement regarding "BFI."

On redirect examination by Intervenor's Representative, Mr. Bill stated that the City has never required truck drivers to operate construction equipment.

Respondent called Randell Scott as a rebuttal witness. Mr. Scott testified that the employees were made aware of the reason for the February 16, 2007 meetings with the Mayor. Mr. Scott stated that the purpose of the Mayor's meetings was to thank employees for their hard work plowing streets and performing garbage pickups after the February 14, 2007 snow storm. Mr. Scott stated that the Director of Public Service

instructed him to arrange the Mayor's meetings with employees and to gather as many employees as possible for these meetings. Mr. Scott indicated that there were drivers, equipment operators, laborers, and waste collectors present at these meetings. Mr. Scott stated that after the Mayor thanked employees at the Ridge Road Facility, the Mayor answered a couple of questions. He explained that the Mayor told the employees that they all needed to pitch in and help each other. He stated that the Mayor did not make any specific statements regarding cross training. Mr. Scott recalled that the Mayor stated that employees needed to pitch in and be more efficient and embrace cost saving measures. Mr. Scott stated that Mayor told employees that he had no intention of privatizing their jobs. Upon further questioning, Mr. Scott noted that the City purchased a front-end loader last year.

Chester Bill was recalled as a witness. Mr. Bill stated that he could not recall if Mr. Scott was present for the Mayor's meeting at the Ridge Road Facility on February 16, 2007.

#### **IV. FINDINGS OF FACT**

1. The City of Cleveland ("the City") is a "public employer" as defined by O.R.C. § 4117.01(B). Frank Jackson is the Mayor of the City, and, as such, is an agent or representative of the City.
2. The Municipal Construction Equipment Operators' Labor Council ("the Union") is an "employee organization" as defined by O.R.C. § 4117.01(D) and is the exclusive representative for the bargaining unit of the City's Construction Equipment Operators.
3. In February 2007, the City of Cleveland was engaged in contract negotiations with several unions that represented City of Cleveland employees, including but not limited to, laborers, waste collectors, truck drivers, and heavy equipment operators.
4. On February 14, 2007, the City of Cleveland experienced a severe snow storm. City employees in the Department of Public Service, including heavy equipment operators and waste collectors, worked hard to clear the streets and pick-up refuse in the aftermath of the storm. The City's Director of Public Service instructed Randell Scott, the Commissioner of the Division of Streets, to arrange a series of meetings with employees so that Mayor Frank Jackson could personally thank the employees for their hard work removing snow and providing waste collection services in the aftermath of the recent snow storm.
5. Mr. Scott organized three "whistle-stop" meetings, which took place during the early morning shift changes on February 16, 2007. Mr. Scott instructed the

Commissioners of Waste Collection and Motor Vehicle Maintenance and the district supervisors of the Carriage Garage Facility, the Glenville Garage Facility, and the Ridge Road Garage Facility to gather as many of their employees as possible for Mayor Jackson's visits. Mr. Scott accompanied the Mayor as he visited the three garage facilities. The meetings were brief and informal, with a short period allotted for employees' questions. The Ridge Road Facility was the Mayor's last "whistle-stop" meeting on February 16, 2007.

6. The Ridge Road Facility is a dual-purpose facility that operates one garage for the Division of Streets and one garage for the Division of Waste Collection.
7. On February 16, 2007, approximately sixty employees gathered in a semicircle in the Waste Collection garage at the Ridge Road Facility to listen to the Mayor speak. Waste collectors from the Division of Waste Collection, equipment operators and other employees from the Division of Streets, and employees from the Division of Motor Vehicle Maintenance were present. There were at least three different unions that represented employees who attended the February 16, 2007 meeting at the Ridge Road Facility.
8. Chester Bill is employed by the City of Cleveland as a heavy equipment operation. He is a member of the City's Municipal Construction Equipment Operators' Labor Council's bargaining unit. The general foreman at the Ridge Road Facility instructed Mr. Bill to go to the Waste Collection garage for the Mayor's meeting on February 16, 2007. Mr. Bill was one of the approximately sixty employees who attended the February 16, 2007 meeting at the Ridge Road Facility.
9. After thanking the employees gathered at the Ridge Road Waste Collection Garage for their hard work removing snow and performing waste collection services after the February 14, 2007 major snow storm, the Mayor, in direct response to a question from an employee regarding contract negotiations, referenced the City's wage proposal. In direct response to another question from an employee regarding privatization of jobs, the Mayor encouraged employees to learn each others' jobs in order to work more efficiently.

## **V. DISCUSSION**

The issue to be decided in this case is whether Cleveland Mayor Frank Jackson made statements during a February 16, 2007 meeting with certain bargaining-unit employees at the City of Cleveland's Ridge Road Waste Collection Facility that constituted direct dealing in violation of O.R.C. §§ 4117.11(A)(1) and (5).

O.R.C. § 4117.11, states, in pertinent part:

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

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

\* \* \* \*

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

\* \* \* \*

A violation under O.R.C. §§ 4117.11(A)(1) and (A)(5) is committed when an employer deals directly with bargaining-unit members on mandatory subjects of bargaining affecting wages, hours, terms and other conditions of employment, circumventing the employees' certified exclusive representative. Past Board decisions have explored the issue of "direct dealing" and found that direct dealing "occurs when there is an attempt to deal with the union through the employees, rather than the employees through the union." *Vandalia-Butler City School Dist Bd. of Ed.*, SERB 90-003 (2-9-90) citing *General Electric*, 150 NLRB 192, 57 LRRM 1491 (1964)

When a violation of O.R.C. § 4117.11(A)(1) is alleged, the appropriate inquiry is an objective one rather than a subjective one. *In re Pickaway County Human Services Dept.*, SERB 93-001 (3-24-93), *aff'd sub nom. SERB v. Pickaway Human Services Dept.*, 1995 SERB 4-46 (4<sup>th</sup> Dist. Ct. App., Pickaway, 12-7-95). A violation will be found if, under the totality of the circumstances, it can be reasonably concluded that the employees were interfered with, restrained, or coerced in the exercise of their O.R.C. Chapter 4117. rights by the public employer's conduct. *In re Hamilton County Sheriff*, SERB 98-002 (1-23-98), *aff'd sub nom. Hamilton County Sheriff v. SERB*, No. A98-00714 (Mag. Dec., Cp Hamilton, 10-9-98).

The Complainant has the burden of demonstrating by a preponderance of the evidence that an unfair labor practice has been committed. (O.R.C. § 4117.12(B)(3)) In this case, the Complainant and Intervenor argue that the City violated Ohio Revised Code §§ 4117.11 (A)(1) and (A)(5) when the City's Mayor met with a number of the City's employees from various bargaining-units while the City and several unions were involved in contract negotiations and made statements to these employees that represented direct dealing.

The issue in this case is a narrow one. Paragraphs 7, 8, and 9 of the Complaint issued in this case allege that during a meeting with a group of employees at the City's

Ridge Road Facility on February 16, 2007, Cleveland Mayor Frank Jackson made the following statements:

(1) Addressed the City's ongoing collective bargaining sessions with the Union by stating that the Union negotiators would be offered wage increases at 0% for the first year, 2% for the second year, and 2% for the third year, and that as bargaining continued, the City would negotiate down, not up, from these levels. (Paragraph 7 of the Complaint)

(2) Stated to the employees present that if they did not like the arrangement, they should quit and he will privatize their jobs. (Paragraph 8 of the Complaint)

(3) Stated to the employees present that it is generally less expensive to privatize the City's workforce and have contractors worry about equipment costs than to purchase new equipment that the City cannot afford and that the employees should tell their unions to take what the City is offering during the negotiations. (Paragraph 9 of the Complaint)

In its Response to the Complaint, Respondent denies that Mayor Jackson made the aforementioned statements. Respondent admits that the Mayor spoke to employees to thank them for their services performed during a snow storm, when, in direct response to questions initiated by employees regarding negotiations, the Mayor made reference to the City's wage proposal as well as the City's desire to create more efficient operations. (Respondent's Answer to the Complaint.)

At record hearing, the following three witnesses offered testimony: Frank Madonia, who is employed by the City of Cleveland as a master mechanic; Randell Scott, who is employed by the City of Cleveland as a division commissioner; and Chester Bill, who is employed by the City of Cleveland as a heavy equipment operator.

We first consider the testimony of Randell Scott, who was called as a witness by Respondent. Mr. Scott testified that he has been employed by the City of Cleveland for approximately twenty-eight years and has held the position of Commissioner of the Division of Streets for the last sixteen years of his employment. Mr. Scott testified that, in February 2007, the City of Cleveland was engaged in contract negotiations with several unions that represented City of Cleveland employees, including laborers, truck drivers, waste collectors, and heavy equipment operators. Mr. Scott testified that on February 14, 2007, the City of Cleveland experienced a severe snow storm. Mr. Scott testified that City employees in the Department of Public Service, including heavy equipment operators and waste collectors, worked hard to clear the streets and pick-up refuse in the aftermath of the storm. Mr. Scott testified that the City's Director of Public

Service instructed him to arrange a series of meetings with employees so that the Mayor could personally thank the employees for their hard work removing snow after the recent snow storm.

Mr. Scott testified that he organized three "whistle-stop" meetings, which took place during the early morning shift changes on February 16, 2007. Mr. Scott instructed the commissioners of Waste Collection and Motor Vehicle Maintenance and the district supervisors of the Carriage Garage Facility, the Glenville Garage Facility, and the Ridge Road Garage Facility to gather as many of their employees as possible for the Mayor's "whistle-stop" meetings on February 16, 2007. Mr. Scott accompanied the Mayor as he visited the three garages. Mr. Scott described the meetings as brief and informal, with a short period allotted for employees' questions. The Ridge Road Facility was the Mayor's last meeting on February 16, 2007. Mr. Scott described the Ridge Road Facility as a dual-purpose facility that operates one garage for the Division of Streets and one garage for the Division of Waste Collection. Mr. Scott recalled that there were approximately sixty to seventy employees who gathered in a semicircle in the Waste Collection garage at the Ridge Road Facility to listen to the Mayor speak. Mr. Scott recalled that there were waste collectors, equipment operators, and employees from the Division of Motor Vehicle Maintenance present. Mr. Scott testified that a couple of employees asked the Mayor questions regarding privatization and new equipment. He testified that the Mayor responded to the employees' questions by stating that he was not planning on privatizing work. He testified that the Mayor stated that if the employees embraced technology and worked to become more efficient to save the City money, he would reinvest money in the existing system and in new equipment. Mr. Scott testified that the Mayor did not make any statements regarding the City's wage proposal.

In evaluating the entirety of Mr. Scott's testimony, we find his testimony regarding the purpose of the Mayor's February 16, 2007 "whistle-stop" meetings and the arrangements made for these meeting to be credible. Complainant did not present any reliable testimony or evidence to rebut Mr. Scott's testimony in that regard.

As to the statements made by the Mayor at the February 16, 2007 meeting, we note that Mr. Scott's testimony was not consistent with the Respondent's answer to paragraph 7 of the Complaint. Specifically, Mr. Scott testified that the Mayor did not make *any* statements regarding the City's three-year wage proposal. However, as we noted above, Respondent in its Answer to the Complaint explained the context and the nature of the statements made by the Mayor. Respondent admitted that the Mayor spoke to employees to thank them for their services performed during a snow storm, when, in direct response to questions initiated by employees regarding negotiations, the Mayor made reference to the City's wage proposal as well as the City's desire to create more efficient operations. Respondent never admitted that the Mayor made any specific statements regarding wage proposal percentages or bargaining up, not down, as alleged in paragraph 7 of the Complaint.

Complainant and Intervenor called Frank Madonia and Chester Bill as witnesses. Mr. Madonia, who is employed by the City of Cleveland as a master mechanic and who currently holds the position of Union President of the Municipal Construction Equipment Operators' Labor Council's bargaining unit in the City of Cleveland, testified that he was not present at the February 16, 2007 meeting at the Ridge Road Facility. Mr. Bill, who is employed by the City of Cleveland as a heavy equipment operator, testified that he was present at the Mayor's February 16, 2007 meeting at the Ridge Road Facility. Mr. Bill is a member of the Municipal Construction Equipment Operators' Labor Council's bargaining unit in the City of Cleveland. Mr. Bill's job duties include road maintenance work and operating a front loader to load salt on the trucks. In February 2007, Mr. Bill worked the 3<sup>rd</sup> shift at the Ridge Road Facility.

In evaluating the entirety of Mr. Bill's testimony, we find his testimony to be vague and unpersuasive. For example, Mr. Bill testified he recalled that the general foreman instructed him to attend the Mayor's meeting at the Ridge Road Facility on February 16, 2007, but he indicated that the foreman did not tell him, or he did not remember being told, the reason for the meeting. Mr. Bill further testified that he was told "recently" that the meeting was called so that the Mayor could thank employees for their work removing snow after the February 14, 2007 snow storm. Moreover, even though Mr. Bill was responsible for loading salt on the City's trucks, he testified on both direct and cross examination that he had no recollection of the major snow storm that hit the City of Cleveland on February 14, 2007. Although Mr. Bill could not recall the February 14, 2007 snow storm, he was able to recall that there were approximately sixty employees present at the February 16, 2007 meeting, and that these employees included laborers, truck drivers, general asphalt foremen, and equipment operator Martin Kaznoch. At one point during his testimony, Mr. Bill appeared to hesitatingly acknowledge that the Mayor did congratulate the employees for their work clearing the snow. However, he then testified that he did not remember the Mayor thanking employees and that all he remembered about the Mayor's visit was that he talked about ongoing negotiations with the union. Mr. Bill testified that the Mayor walked into the garage and immediately stated to the employees that the City's wage proposal package was "0% the first year, 2% the second year, and 2% the third year." Mr. Bill offered no further testimony regarding the wage proposal statement. Mr. Bill went on to testify that the Mayor pointed at the employees present and told them to make sure they learn each others' jobs and if they did not like it he could bring in "BFI" (a private waste collection operator) tomorrow. Mr. Bill testified that he interpreted the Mayor's statements to mean that the Mayor would privatize jobs and that he could lose his job.

Mr. Bill's testimony regarding the alleged threat to privatize was unconvincing. First, we note that although Mr. Bill testified he was aware that "BFI" is a private company, he did not know the company's services and he did not know whether "BFI" employed equipment operators such as himself. Second, Mr. Bill's explanation as to why he thought his job as a heavy equipment operator with the Division of Streets would be in jeopardy was unclear. In that regard, Mr. Bill simply stated that there were "other

people" performing operators' jobs and that he believed that the Mayor's comment regarding "BFI" meant that he could lose his job. Mr. Bill offered no further testimony regarding the "other people" who allegedly were performing operators' jobs or the circumstances surrounding this alleged outsourcing of work. Additionally, we find Mr. Bill's testimony unconvincing because he alleges that the Mayor told employees he was planning to purchase new equipment for the City immediately after he supposedly pointed his finger at these employees and threatened to bring "BFI" in here tomorrow.

After careful review of the testimony presented and evidence admitted, we find that the testimony and evidence failed to establish that the Mayor made the statements alleged in paragraphs 7, 8, and 9 of the Complaint. Regarding the allegations contained in paragraph 7 of the Complaint, we note that although the record established that the Mayor mentioned the City's wage proposal in response to a question from an employee, no testimony was presented to establish that the Mayor stated to the employees at the Ridge Road Facility that the City would negotiate down, not up, from its wage increase proposal. Regarding the allegations contained in paragraph 8 of the Complaint, as previously noted, we concluded that Mr. Bill's testimony on this issue was not convincing. Regarding the allegations contained in paragraph 9 of the Complaint, we note that no testimony was presented to establish that that the Mayor told the employees at the Ridge Road Facility that it is generally less expensive to privatize the City's workforce and have contractors worry about equipment costs than to purchase new equipment that the City cannot afford and that the employees should tell their unions to take what the City is offering during the negotiations.

Having determined that Complainant did not prove the allegations as outlined in the Complaint, it remains to be determined whether the Mayor's statements regarding the City's wage proposal and working more efficiently constitute direct dealing in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5). As previously discussed, the testimony and evidence contained in the record established that the Mayor of Cleveland briefly met with three different groups of employees during the early morning shift changes on February 16, 2007. The meetings were arranged so that the Mayor could personally thank the employees for their hard work clearing the streets after the City's major snow storm of February 14, 2007. The Ridge Road Facility was the third and final meeting on February 16, 2007. The employees present during the Mayor's visit to the Ridge Road Facility included equipment operators from the Division of Streets, employees from the Division of Motor Vehicle Maintenance, and waste collectors from the Division of Waste Collection. There were at least three different unions that represented certain employees who were present at the February 16, 2007 meeting at the Ridge Road Facility. The testimony established that after thanking those employees for their hard work, the Mayor, in direct response to a question from an employee asking whether the Mayor planned to privatize their jobs, encouraged employees to learn each others' jobs in order to work more efficiently. In direct response to a question from another employee regarding negotiations, the Mayor referenced the City's wage proposal.

In considering the number of different unions that were serving as exclusive representative for employees who attended the February 16, 2007 meeting at the Ridge Road Facility, the innocuous purpose of the meeting, and the description of the statements made by the Mayor in direct response to employee questions, we conclude that the Mayor's statements did not rise to the level of direct dealing with employees of the City's Municipal Construction Equipment Operators' Labor Council's bargaining unit. We further conclude that the Mayor's statements did not interfere with, restrain, or coerce members of the City's Construction Equipment Operators' Labor Council's bargaining unit in the exercise of their rights under Ohio Revised Code Chapter 4117., or amount to a refusal to bargain with the exclusive representative of the City's Municipal Construction Equipment Operators' Labor Council's bargaining unit.

## **VI. CONCLUSION**

For the reasons set forth above, we find that the City of Cleveland did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when Cleveland Mayor Frank Jackson made statements to certain bargaining-unit employees during a February 16, 2007 meeting at the City's Ridge Road Waste Collection Facility. Accordingly, we dismiss the complaint and dismiss the unfair labor practice charge with prejudice.

Verich, Vice Chairperson, and Spada, Board Member, concur.

**CASE: 07-ULP-04-0156**

**The 03/26/2010 Order and Opinion was served as follows:**

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Ted Strickland, Governor

Sherrie J. Passmore, Executive Director

Case No. 2007-ULP-04-0156

## CERTIFICATION

I, the undersigned Executive Director for the State Employment Relations Board, hereby certify that the attached document is a true and exact reproduction of the original Order (with Opinion Attached) of the State Employment Relations Board entered on its journal on the 26th day of March, 2010

Sherrie Passmore  
Executive Director