

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

State of Ohio, Department of Rehabilitation and Correction, Correctional Reception  
Center and Warden Virginia Lamneck,

Respondents.

Case No. 2008-ULP-12-0520

**ORDER  
(OPINION ATTACHED)**

Before Chairperson Brundige, Vice Chairperson Verich, and Board Member Spada: May 6, 2010.

On December 2, 2008, Robert F. Dalton filed an unfair labor practice charge against the State of Ohio, Department of Rehabilitation and Correction, Correctional Reception Center and Warden Virginia Lamneck (collectively "the Respondent"). On July 9, 2009, the State Employment Relations Board ("the Board" or "Complainant") determined that probable cause existed for believing the Respondent had committed or was committing an unfair labor practice in violation of Ohio Revised Code ("O.R.C.") § 4117.11(A)(1) and (2), authorized the issuance of a complaint, and referred the matter to hearing.

On October 26, 2009, a Complaint was issued. An Answer was filed by Respondent on November 9, 2009. On January 15, 2010, a hearing was conducted by an Administrative Law Judge. On March 4, 2010, the Administrative Law Judge's Proposed Order was issued. On March 29, 2010, the Respondent filed exceptions to the Proposed Order. On April 1, 2010, Counsel for Complainant filed a motion for extension of time to file its response to the Respondent's exceptions. On April 15, 2010, Counsel for Complainant filed its response to exceptions.

Counsel for Complainant's motion for extension of time is granted. After reviewing the unfair labor practice charge, Complaint, Answer, Proposed Order, exceptions, response to exceptions, and all other filings in this case, we adopt the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Administrative

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STATE EMPLOYMENT  
RELATIONS BOARD

Law Judge's Proposed Order, incorporated by reference, finding that the Respondent violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(2) by obtaining communications between Mr. Dalton and a grievant and using the information in a grievance-arbitration hearing.

The State of Ohio, Department of Rehabilitation and Correction, Correctional Reception Center and Warden Virginia Lamneck is ordered to:

A. Cease and desist from:

Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117, and initiating, creating, dominating, or interfering with the formation or administration of an employee organization, by using e-mail communications between a Union delegate and a grievant in the grievant's arbitration hearing, and from otherwise violating Ohio Revised Code §§ 4117.11(A)(1) and (A)(2).

B. Take the following affirmative action:

- (1) Post the Notice to Employees furnished by the State Employment Relations Board for sixty days in all of the usual and normal posting locations where bargaining-unit employees represented by the Service Employees International Union, District 1199 work; and
- (2) 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.

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

  
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 28<sup>th</sup> day of May, 2010.

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

# NOTICE TO EMPLOYEES

## FROM THE STATE EMPLOYMENT RELATIONS BOARD



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

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

#### A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117, and initiating, creating, dominating, or interfering with the formation or administration of an employee organization, by using e-mail communications between a Union delegate and a grievant in the grievant's arbitration hearing, and from otherwise violating Ohio Revised Code §§ 4117.11(A)(1) and (A)(2).

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

- (1) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Service Employees International Union, District 1199, work, the Notice to Employees furnished by the State Employment Relations Board stating that the State of Ohio, Department of Rehabilitation and Correction, the Correctional Reception Center and Virginia Lamneck shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- (2) 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. State of Ohio, Department of Rehabilitation and Correction, Correctional Reception Center and Virginia Lamneck, Case No. 2008-UPL-12-0520***

\_\_\_\_\_  
BY

\_\_\_\_\_  
DATE

\_\_\_\_\_  
TITLE

### **THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED**

This Notice must remain posted for 60 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. 08-ULP-12-0520
	:	
<b>Complainant,</b>	:	
	:	
v.	:	<b>BETH A. JEWELL</b>
	:	<b>Administrative Law Judge</b>
	:	
STATE OF OHIO, DEPARTMENT OF	:	
REHABILITATION AND CORRECTION,	:	
CORRECTIONAL RECEPTION CENTER AND	:	
VIRGINIA LAMNECK,	:	<b><u>PROPOSED ORDER</u></b>
	:	
<b>Respondents.</b>	:	

**I. INTRODUCTION**

On December 2, 2008, Robert F. Dalton filed an unfair labor practice charge against the State of Ohio, Department of Rehabilitation and Correction, Correctional Reception Center and Warden Virginia Lamneck (collectively, "Employer"), alleging that the Employer violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(2).<sup>1</sup> On July 9, 2009, the State Employment Relations Board ("SERB," "Board," or "Complainant") determined that probable cause existed to believe that the Employer committed an unfair labor practice in violation of §§ 4117.11(A)(1) and (A)(2) by obtaining communications between Mr. Dalton and a grievant and using the information in a grievance-arbitration hearing.

On October 26, 2009, a Complaint was issued. A hearing was held on January 15, 2010, wherein testimonial and documentary evidence was presented. Subsequently, both parties filed post-hearing briefs.

**II. ISSUE**

Whether the Employer committed an unfair labor practice in violation of §§ 4117.11(A)(1) and (A)(2) by obtaining communications between Mr. Dalton and a grievant and using the information in a grievance-arbitration hearing.

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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.

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

1. The State of Ohio is a “public employer” as defined by § 4117.01(B). The Department of Rehabilitation and Correction (“DRC”) is a state agency. The Correctional Reception Center (“CRC”) is an institution within DRC. Virginia Lamneck is employed as the Warden at CRC and is an agent or representative of DRC. (S.1, 2)
2. The Service Employees International Union, District 1199 (“Union”) is an “employee organization” as defined by § 4117.01(D) and is the exclusive representative for certain employees of the State of Ohio. (S.3)
3. Robert F. Dalton was employed by DRC as a Psychologist Assistant 2 and was a “public employee” as defined by § 4117.01(C). Mr. Dalton worked at CRC and also served as a Union Delegate during the time period relevant to the complaint. (S.4; Dalton, 00:01:12-14)
4. The State of Ohio and the Union were parties to a collective bargaining agreement (“CBA”) effective from June 1, 2006 through May 31, 2009, that contained a grievance procedure culminating in binding arbitration. (S. 6; Exh. 1)
5. Article 3.08 of the CBA provides, in part, as follows:

When feasible...Union delegates may utilize electronic mail and/or facsimile equipment solely for contract enforcement and grievance processing matters. Such transmissions will be primarily to expedite communication regarding such matters, will be reasonable with respect to time and volume, and limited to communications with the grievant, if any, appropriate supervisors and employee’s staff representatives.

Article 42.05 of the CBA provides as follows:

No employee should have an expectation of privacy while on work time. The Employer may make reasonable use of technology to assure that employees are appropriately engaged in work activities while on work time. The Employer shall respect

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<sup>2</sup> All references to the digital recording of the hearing are indicated parenthetically by the witness’ name and approximate timing point. All references to the parties’ stipulations of fact in the record are indicated parenthetically by “S.,” followed by the stipulation number(s). References to the Exhibits in the record are indicated parenthetically by “Exh.,” followed by the exhibit number(s). References to the record in the Findings of Fact are for convenience only and are not intended to suggest that such reference is the sole support in the record for that related finding of fact.

employees' constitutional and legal rights when it uses technology as described in this Section.

(Exh. 1, pp. 8, 125)

6. In February 2008, bargaining-unit employee Marilyn Christopher, a Nurse 2 at Mansfield Correctional Institution ("ManCI"), filed an incident report, alleging that she had received harassing phone calls at work from a fellow employee. ManCI investigated the incident and determined that Correctional Program Coordinator and bargaining-unit-member Juanita Murphy was responsible for the phone calls. On March 12, 2008, following a predisciplinary hearing, DRC terminated Ms. Murphy's employment. (S.7; Murphy, 01:51; Tobin, 03:59-04:11)
7. On March 13, 2008, Ms. Murphy filed a grievance challenging her termination. Ms. Murphy listed three Union Delegates as her grievance representatives, ManCI Union Delegate Greg Morrow, Mr. Dalton, and Union Staff Organizer Kevin Muhammad. Mr. Dalton represented Ms. Murphy at various points in the grievance process and served as second chair at Ms. Murphy's November 7, 2008 arbitration hearing, while Staff Organizer Muhammad served as first chair. (S. 8; Andrews, 04:40; Exh. 2)
8. On March 19, 2008, Mr. Dalton sent a letter to ManCI Warden Stuart Hudson, informing Warden Hudson that Ms. Murphy would be represented at grievance Steps 4, mediation, and 5, arbitration, by Mr. Muhammad and Mr. Dalton. Mr. Dalton also provided names of employees the Union wanted to testify at the Step 4 and 5 hearings, including Ms. Christopher. (Exh. 4)
9. Shortly after Ms. Murphy's termination, Mr. Dalton emailed Ms. Christopher, asking her to call him to discuss Ms. Murphy's case. In April 2008, Ms. Christopher forwarded this email to ManCI Labor Relations Officer ("LRO") Janet Tobin. Ms. Christopher told LRO Tobin that she, Ms. Christopher, was management's witness, and, as such, did not want to speak with Mr. Dalton. LRO Tobin told Ms. Christopher that Ms. Christopher could tell Mr. Dalton that she did not want to speak with him. On July 1, 2008, Ms. Christopher sent an email to LRO Tobin in which she summarized a phone call she had received from Mr. Dalton on her personal cell phone the previous day. (Tobin, 03:59-04:11; Exhs. 15, 16)
10. Because Mr. Dalton resided in Westerville and worked in Columbus, while Ms. Murphy resided in Mansfield, they communicated about her grievance primarily via email. On June 30, 2008, an email correspondence between Mr. Dalton and Ms. Murphy with the subject line, "quick," commenced. The email contained a description of Mr. Dalton's attempt to contact Ms. Christopher to discuss Christopher's potential testimony at Murphy's arbitration. In the email, Mr. Dalton requested Ms. Christopher's phone number because Mr. Muhammad wanted Mr. Dalton to call her to "see if [Mr. Dalton] could soften her stance." On

- or about July 1, 2008, Dalton telephoned Ms. Christopher, but she refused to talk with him about the arbitration. (Exh. 3; Dalton, 00:27-00:29, 00:57-00:59)
11. On July 7, 2008, continuing the “quick” email chain, Ms. Murphy emailed Mr. Dalton to ask if “it worked,” referring to contacting Christopher. On July 7, 2008, Mr. Dalton responded that it did not work and that Ms. Christopher did not want to talk to him. The email chain continues on July 8, 2008, when Ms. Murphy states, “Maybe if we told her we wouldn’t drag her through all the ugly stuff she has done it would help! I don’t know! Did she say anything?” Mr. Dalton responded, “Nothing. I hope she doesn’t show [to the arbitration.] She didn’t want to talk about it.” Mr. Dalton never attempted to contact Ms. Christopher after the July 1, 2008 phone call where Ms. Christopher told Mr. Dalton that she did not want to discuss Ms. Murphy’s arbitration. (Dalton, 00:59-01:01; Exh. 3)
  12. Jon Fausnaugh was employed as an Investigator at CRC for 16 years preceding his October 21, 2008 retirement. Mr. Fausnaugh’s duties included investigating allegations of staff and inmate misconduct. On June 30, 2008, Warden Lamneck assigned Mr. Fausnaugh to investigate an incident report filed by CRC employee Robin Cooper-Muntz involving Mr. Dalton. Ms. Cooper-Muntz had attached various email exchanges between Mr. Dalton and herself to the incident report. After reviewing the email exchanges and interviewing Mr. Dalton, Mr. Fausnaugh became concerned that Mr. Dalton was engaging in inappropriate political activity on work time. (Fausnaugh 02:52, 02:54, 03:20-03:22; Exh. 8)
  13. On July 21, 2008, Warden Lamneck requested that DRC Chief Inspector Gary Croft approve access to Mr. Dalton’s DRC email and CRC server accounts, and on the same day Mr. Croft approved access for Warden Lamneck and Investigator Fausnaugh. At the time Mr. Fausnaugh began reviewing Mr. Dalton’s emails, he was aware that Dalton was an SEIU delegate who handled grievances. Mr. Fausnaugh had access to Mr. Dalton’s accounts until August 18, 2008, and he reviewed a vast quantity of Mr. Dalton’s email, dating back to 2006. Searching for evidence of inappropriate political activity, Mr. Fausnaugh opened each email, read it, closed it, and moved on to the next. During this process, Mr. Fausnaugh read the email chain between Mr. Dalton and Ms. Murphy with the subject line, “quick.” The email chain, which is contained in Exhibit 3, included the messages sent from June 30, 2008 through July 8, 2008 described in Paragraphs 10-11 hereof. Mr. Fausnaugh became curious. Not knowing who Ms. Murphy was, Mr. Fausnaugh contacted CRC’s LRO, Cathy Merrill. LRO Merrill informed him that Ms. Murphy was a grievant formerly employed at ManCI, that Mr. Dalton was her Union delegate, and that the emails were related to Ms. Murphy’s ongoing grievance. (S. 10; Fausnaugh, 02:54 to 03:22; Exhs. 3, 5, 8, 9)
  14. LRO Tobin sent Mr. Fausnaugh the April and July 2008 emails she had received from Ms. Christopher. (Fausnaugh, supra; Tobin, 03:59-04:11; Exhs. 15, 16)

15. During the week preceding Ms. Murphy's arbitration hearing, Mr. Fausnaugh and LRO Merrill called the Office of Collective Bargaining ("OCB") and spoke with two OCB employees, one of whom was Buffy Andrews, DRC's first-chair representative in Ms. Murphy's arbitration. During this phone call, Mr. Fausnaugh and LRO Merrill discussed Mr. Dalton's alleged political activity and then raised Mr. Fausnaugh's alleged concern that Mr. Dalton was trying to intimidate a witness in a pending grievance. Realizing that Mr. Fausnaugh was referring to Ms. Murphy's grievance, Ms. Andrews asked Mr. Fausnaugh to provide her with the June 30-July 8, 2008 email chain between Mr. Dalton and Ms. Murphy. Mr. Fausnaugh complied. Ms. Andrews and Mr. Muhammad already had exchanged witness lists and documents. Ms. Andrews did not supplement her documents by providing the Union with a copy of the email chain she had received from Mr. Fausnaugh, nor did she notify the Union of the possibility of using this email chain in the arbitration hearing. (Andrews, 04:51-04:57)
16. During Ms. Murphy's November 7, 2008 arbitration hearing, DRC called Ms. Christopher as a management witness. While questioning Ms. Christopher, Ms. Andrews showed the witness the June 30-July 8, 2008 email chain between Mr. Dalton and Ms. Murphy. (S. 11; T.; Exh. 3)
17. Recognizing the email chain, Mr. Dalton, who was present at the arbitration, interrupted the proceedings, announcing that the email chain was his. (Dalton, 01:04; Andrews, 04:10)
18. On February 6, 2009, the Arbitrator issued her Opinion and Award finding just cause for Ms. Murphy's termination and denying the grievance. (Exh. 2)

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

The Employer is alleged to have violated §§ 4117.11(A)(1) and (A)(2), which provide in relevant part as follows:

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

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

(2) Initiate, create, dominate, or interfere with the formation or administration of any employee organization, or contribute financial or other support to it; except that a public employer may permit employees to confer with it during working hours without loss of time or pay, permit the exclusive representative to use the facilities of the public employer for

membership or other meetings, or permit the exclusive representative to use the internal mail system or other internal communications system [.]

In 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 (4th Dist Ct App, Pickaway, 12-7-95)(“Pickaway”), SERB held that when a violation of § 4117.11(A)(1) is alleged, the appropriate inquiry is an objective rather than a subjective one. It must be determined whether, under all the facts and circumstances, one could reasonably conclude that employees were interfered with, restrained, or coerced in the exercise of their Chapter 4117 rights by the employer’s conduct. Sections 4117.03(A)(1)-(2) provide as follows:

(A) Public employees have the right to:

(1) Form, join, assist, or participate in, or refrain from forming, joining, assisting, or participating in, except as otherwise provided in Chapter 4117 of the Revised Code, any employee organization of their own choosing;

(2) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection [.]

A thorough review of totality of the circumstances under which the alleged conduct occurred and its likely effect on the guaranteed rights of employees must be part of the inquiry. Pickaway, *supra*.

The question presented is whether the Employer violated §§ 4117.11(A)(1) and (A)(2) when it obtained Mr. Dalton’s email messages on the Employer’s email system without his knowledge and used the email chain contained in Exhibit 3 in Ms. Murphy’s arbitration proceeding. The Employer argues that Mr. Dalton had no “reasonable expectation of privacy” in his work email account. This argument inappositely characterizes the issue. Mr. Dalton had the contractual right to use the Employer’s email system for Union business. As is fully set forth below, the contract language and § 4117.03(A) clearly give Mr. Dalton the right to use the employer’s email equipment for union purposes without unlawful surveillance by the Employer.<sup>3</sup>

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<sup>3</sup> In addition, the Employer argues that email on its email system may constitute a public record. This argument also mischaracterizes the issue. Moreover, not all emails generated by a public agency are “public records” subject to Ohio’s Public Records Act. The Ohio Supreme Court has held that emails circulated only to a few co-workers that did not document employer policy or procedures and were not used to conduct department business do not constitute public records. State ex rel. Wilson-Simmons v. Lake Cty Sherriff’s Dept. (1998), 82 Ohio St.3d 37, 41. The email chain contained in Exhibit 3 was an exchange between two people, only one of whom was a current employee. As a Union communication, it did not document any Employer policy or procedure, and was not used to conduct Employer business.

The core issue before SERB, whether the Employer has engaged in unlawful surveillance, is one of first impression. Since there is no SERB precedent on point, it is helpful to look at precedent from the National Labor Relations Board (“NLRB”). NLRB precedent can be instructive when SERB has no binding precedent. The NLRB has held as follows: “[A]n employer’s mere observation of open, public union activity on or near its property does not constitute unlawful surveillance...the inquiry is whether the [act which brought the surveillance charge] has a reasonable tendency to interfere with protected activity under the circumstances in each case.” Washington Fruit and Produce Co., 343 NLRB 1215, 1217 (2005) (citing F.W. Woolworth Co., 310 NLRB 1197 (1993)) (“Washington Fruit”). Unlawful surveillance, according to the NLRB, is found when, absent proper justification, an employer engages in surveillance of protected employee activities and that surveillance “has a tendency to intimidate.” Woolworth, supra, at 1197. A “mere belief that some misconduct might be afoot” does not justify an employer’s improper surveillance when, on balance, that surveillance has a tendency to interfere with employees’ right to engage in protected activity. Id. (citing Flambeau Plastics Corp., 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128, 136 (7th Cir. 1968); accord NLRB v. Colonial Haven Nursing Home, 542 F.2d 691, 701 (7th Cir. 1976) (“the Board may properly require a company to provide solid justification for its resort to anticipatory photographing.”)). Examples of proper employer justification for surveillance include legitimate employer interests in protecting safety or preventing trespass. Washington Fruit, supra.

Therefore, the appropriate analysis is as follows: (1) did protected activity occur; (2) did the employer engage in an act of surveillance of that activity; (3) did the surveillance have a tendency to interfere with the protected activity under the circumstances of the case; (4) did the employer demonstrate solid justification for the surveillance; and, if so, (5) does the employer’s proffered reason for the surveillance justify the potential interference with protected activity.

Application of this analysis leads to the conclusion that the actions taken by Ms. Andrews, an agent of the Employer, violated § 4117.11(A)(1). As a Union delegate, Mr. Dalton had the right under the CBA to use his work email account for Union business. While communicating with Ms. Murphy via the email system, Mr. Dalton was undoubtedly acting in his union capacity, as he was communicating with her about strategies and tactics to be used at her upcoming grievance arbitration. Mr. Dalton was clearly designated as Ms. Murphy’s union representative for the arbitration during this time. Consequently, the email chain Mr. Fausnaugh read during his investigation contained protected union activity. Mr. Fausnaugh’s actions constitute “surveillance,” as that term is normally understood, as he was searching through Mr. Dalton’s work email looking for information to aid in an investigation of Mr. Dalton.

However, Mr. Fausnaugh, and therefore the Employer, had a legitimate purpose in observing and reading the email chain. Mr. Fausnaugh’s actions in reviewing Mr. Dalton’s email for possible political activity were sanctioned under § 42.05 of the CBA. Also, it was not immediately clear from the subject line of the email chain, “quick,”

that the emails contained therein concerned protected Union activity. However, after reading the bodies of the emails and speaking with Ms. Merrill, it became obvious the emails contained protected Union communications. It is logical to divide the actions taken by the Employer into two: the first being Mr. Fausnaugh's discovery and reading of the email chain, and the second being the eventual delivery of the email chain to Ms. Andrews and her use of it at Ms. Murphy's arbitration. As Washington Fruit and Woolworth inform, it is not the act of surveillance itself, but the interference and chilling effect on protected activity that is the focus. Going by this instructive doctrine, Mr. Fausnaugh's incidental discovery and reading of the email chain was not unlawful surveillance; however, Mr. Fausnaugh's communication and forwarding of the email chain to OCB and Ms. Andrews' use of the email at arbitration were unlawful because of the "tendency to intimidate" public employees in their exercise of protected activity and the Employer's lack of proper, solid justification for these actions.

When Ms. Andrews used the email chain at the arbitration, she interfered with protected activities because her actions created a chilling effect. The CBA clearly designates email as an appropriate forum to expedite communication about specified union matters, including grievances, among Union representatives and the grievants they represent. If union members fear that their protected emails are going to be used against them, one can readily assume that they will stop using email as a form of communication.

The Employer's alleged legitimate interest in discovering Mr. Dalton's misuse of the email system does not justify Ms. Andrews' use of Exhibit 3 in Ms. Murphy's arbitration. The scope of Mr. Fausnaugh's investigation did not include email related to Mr. Dalton's representation of Ms. Murphy or any of Mr. Dalton's grievance-processing activities. Simply put, the Employer's legitimate interest in surveilling this email chain ended at the moment Mr. Fausnaugh was informed by Ms. Merrill that the email chain related to Mr. Dalton's functions as a grievance representative. The Employer was not justified in going beyond mere observation and reading of the email chain.

The Employer argues that it was justified in printing, sharing, and using Exhibit 3 at Ms. Murphy's arbitration because it believed that bodies of the emails suggested that Mr. Dalton was attempting to coerce witness Christopher to change her testimony. However, before the arbitration hearing, Ms. Andrews and management's second-chair representative, Labor Relations Officer Tobin, already had Ms. Christopher's own rough transcript of the single phone conversation Mr. Dalton had with Ms. Christopher regarding her testimony at the arbitration.<sup>4</sup> It is apparent from reading Ms. Christopher's own recollection that Mr. Dalton was not acting coercively. Mr. Dalton set forth the Union's position regarding Ms. Murphy's arbitration and asked Ms. Christopher about hers. However, he was not aggressive and did not continue to pursue her after she declined to respond and terminated the conversation. Mr. Dalton and the Union never contested the fact that Mr. Dalton attempted to contact Ms. Christopher before

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<sup>4</sup> Exh.15.

Ms. Murphy's arbitration, and it is undisputed that Mr. Dalton never again contacted Ms. Christopher after the phone call in which she rebuffed him.

The Employer's proffered justification for introducing the email chain is not persuasive. The Employer even concedes that its use of the email chain at arbitration "merely...reinforced Christopher's testimony as to a collateral, non-decisive point on which the union introduced no contrary evidence." (Respondent's Post-Hearing Brief at 14). The Union did not present contrary evidence because it did not dispute the fact that Mr. Dalton had contacted Ms. Christopher.<sup>5</sup> Ms. Andrews introduced the email chain while Ms. Christopher was testifying. Ms. Christopher was not a party to the email chain; therefore, it was not introduced for her to authenticate. Nor was the email chain used to impeach Ms. Murphy; she had not yet testified. In proffering the email chain, the only conceivable goal the Employer had was to inflame the arbitration proceedings. The email was introduced in an effort to convince the arbitrator that the Union planned to intimidate Ms. Christopher by threatening to "drag her through the ugly stuff"; however, the evidence is clear that Mr. Dalton was not receptive to Ms. Murphy's suggestion and never again contacted Ms. Christopher after his initial call. No legitimate justification existed for the Employer to use Exhibit 3. Thus, on balance, its use at the arbitration unreasonably chilled the exercise of protected union activity.

Viewed objectively in accordance with the foregoing factual and legal circumstances, it can only be concluded that the Employer violated § 4117.11(A)(1) when it used the emails during Ms. Murphy's arbitration, causing a chilling effect on the negotiated right to use the Employer's email equipment for protected union activity. The Employer also violated § 4117.11(A)(2). Mr. Dalton had the right to use the email system to perform his duties as a Union delegate. The Employer interfered with the administration of the Union when it sent the email chain to OCB and when Ms. Andrews introduced it at the arbitration.

#### B. The Remedy

The Board should issue a cease and desist order and a notice posting in accordance with § 4117.11(B)(3). Complainant also requests an order reinstating Ms. Murphy with back pay. Before her termination, Ms. Murphy admitted to engaging in the behaviors that caused the Employer to remove her. A review of the arbitration award reveals that the arbitrator focused her opinion on an analysis of the evidence before the ManCI Warden at the time of Ms. Murphy's March 2008 termination and considered all mitigating factors presented by the Union at arbitration. The arbitrator did not rely upon the email chain in making her findings.<sup>6</sup> Consequently, the cease and

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<sup>5</sup> Likewise, Ms. Andrews and Ms. Tobin contacted Union witnesses, including ManCI employee and bargaining-unit member Tina McKeever Dorsey, asking them about their testimony before the arbitration hearing. (Dorsey, 03:44-03:49) Ms. Andrews even claimed it was standard practice between herself and the Union to interview each other's witnesses outside the other's presence. (Andrews, 05:03-05:07)

<sup>6</sup> Exh. 2, Opinion and Award, pp. 11-13.

desist order and notice posting will serve as a full and equitable remedy to address the violations of §§ 4117.11(A)(1) and (A)(2).

## **V. CONCLUSIONS OF LAW**

1. The State of Ohio is a “public employer” as defined by § 4117.01(B). The Department of Rehabilitation and Correction (“DRC”) is a state agency. The Correctional Reception Center (“CRC”) is an institution within DRC. Virginia Lamneck is employed as the Warden at CRC and is an agent or representative of DRC.

2. The Service Employees International Union, District 1199 (“Union”) is an “employee organization” as defined by § 4117.01(D) and is the exclusive representative for certain employees of the State of Ohio.

3. Robert F. Dalton is a “public employee” as defined by § 4117.01(C).

4. The State of Ohio, by and through its agents described in Conclusion of Law 1 above, violated §§ 4117.11(A)(1) and (A)(2).

## **VI. RECOMMENDATIONS**

The following is respectfully recommended:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.

2. The State Employment Relations Board issue an **ORDER**, pursuant to Ohio Revised Code § 4117.12(B)(3), requiring the State of Ohio to do the following:

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

(1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by using email communications between a Union delegate and a grievant in the grievant’s arbitration hearing, and from otherwise violating Ohio Revised Code Section 4117.11(A)(1);

(2) Initiating, creating, dominating, or interfering with the formation or administration of an employee organization by using email communications between a Union delegate and a grievant in the grievant’s arbitration hearing, and from otherwise violating Ohio Revised Code Section 4117.11(A)(2).

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

(1) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Service Employees International Union, District 1199, work, the Notice to Employees furnished by the State Employment Relations Board stating that the State of Ohio, the Department of Rehabilitation and Correction, and the Correctional Reception Center shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and

(2) 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

"Promoting Orderly and Constructive  
Labor Relations Since 1984"

State  
Employment  
Relations  
Board



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N. Eugene Brundige, Chairperson  
Michael G. Verich, Vice Chairperson  
Robert F. Spada, Board Member

Ted Strickland, Governor

Sherrie J. Passmore Executive Director

Case No. 2008-ULP-12-0520

## CERTIFICATION

I, the undersigned General Counsel and Assistant 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 28<sup>th</sup> day of May, 2010.

A handwritten signature in cursive script, appearing to read "J. Russell Keith", is written over a horizontal line.

J. Russell Keith  
General Counsel and Assistant Executive Director  
May 28, 2010

**CASE 2008-ULP-12-0520 – SERB v. State of Ohio, Department of Rehabilitation and Correction, Correctional Reception Center and Warden Virginia Lamneck**

**The 05/28/2010 Directive was served as follows:**

**CERTIFIED MAIL TO:**

**Case 10-ULP-12-0520**

Robert F. Dalton  
5061 Buffalo Run  
Westerville, Ohio 43081

**10-ULP-12-0520**

**Case 10-ULP-12-0520**

Marissa Hartley, Labor Counsel  
Office of Collective Bargaining  
100 E. Broad Street, 14<sup>th</sup> Floor  
Columbus, Ohio 43215

**Case 10-ULP-12-0520**

Virginia Lamneck, Warden  
ODRC and Corrections Reception Center  
11271 State Route 762  
Orient, Ohio 43146

**REGULAR MAIL TO:**

**INTEROFFICE AG PICK-UP TO:**

**Case 10-ULP-12-0520**

Jack W. Decker, Assistant Attorney General  
Rory Callahan, Assistant Attorney General  
Employment Law Section  
30 E. Broad Street, 23<sup>rd</sup> Floor  
Columbus, Ohio 43215

**Case 10-ULP-12-0520**

Katie Tesner, Assistant Attorney General  
Zachary Kravitz, Assistant Attorney General  
Employment Law Section  
30 E. Broad Street, 20<sup>th</sup> Floor  
Columbus, Ohio 43215

**\*HAND DELIVERED TO:**

**Case 10-ULP-12-0520**