

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

Harrison Hills City School District Board of Education,

Respondent.

Case No. 2007-ULP-09-0516

**ORDER
(OPINION ATTACHED)**

2010 AUG 12 P 1:20
STATE EMPLOYMENT
RELATIONS BOARD

Before Chairperson Brundige, Vice Chairperson Verich, and Board Member Spada: August 12, 2010.

On October 3, 2007, the Harrison Hills Teachers' Association ("the Association") filed an unfair labor practice charge against the Harrison Hills City School District Board of Education ("Respondent"). On February 7, 2008, the State Employment Relations Board ("Board" 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 to determine whether Respondent violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(2), but not (A)(5), by publishing bargaining information and proposal exchanges through the newspaper and Respondent's website or by telling the striking bargaining-unit members that the Association had made misrepresentations.

On December 22, 2008, a Complaint was issued. An Answer was filed by Respondent on December 31, 2008. On July 27, 2009, a hearing was conducted by an Administrative Law Judge. On October 27, 2009, the Administrative Law Judge's Proposed Order was issued, recommending that the Board find that Respondent violated O.R.C. §§ 4117.11(A)(1), but not (A)(2). The Association and Respondent each filed exceptions to the Proposed Order. Responses to the exceptions were filed. On February 11, 2010, the Board directed the parties' representatives to appear before it and present oral arguments. The oral argument was conducted on February 24, 2010.

On July 8, 2010, the Board voted to take action in this matter. Although the recommendation to the Board included finding a violation, the recommendation did not include the remedy. After reviewing the unfair labor practice charge, Complaint, Answer, Proposed Order, exceptions, responses to exceptions, and all other filings in this case, the Board rescinds its action taken at the July 8, 2010 Board meeting; adopts the Findings of Fact and Conclusions of Law in the Administrative Law Judge's Proposed Order, finding that Respondent violated Ohio Revised Code § 4117.11(A)(1), but not (A)(2), by communicating with employees concerning subjects of ongoing collective bargaining negotiations and that Respondent did not violate Ohio Revised Code §§ 4117.11(A)(1) or (A)(2) through the school principal's conversation with bargaining-unit members who were picketing.

The Harrison Hills City School District Board of Education 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, by communicating with employees concerning subjects of ongoing collective bargaining negotiations, and from otherwise violating Ohio Revised Code § 4117.11(A)(1).

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 Harrison Hills Teachers' Association work, stating that the Harrison Hills City School District Board of Education 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.

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, 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, and upon each party's representative by ordinary mail, this 12th day of August, 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, by communicating with employees concerning subjects of ongoing collective bargaining negotiations, and from otherwise violating Ohio Revised Code § 4117.11(A)(1).

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 Harrison Hills Teachers' Association work, the Notice to Employees furnished by the State Employment Relations Board stating that the Harrison Hills City School District Board of Education 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. Harrison Hills City School District Board of Education
Case No. 2007-ULP-09-0516

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**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Harrison Hills City School District Board of Education,

Respondent.

Case No. 2007-ULP-09-0516

OPINION

Brundige, Chairperson:

This unfair labor practice case comes before the State Employment Relations Board (“the Board” and “Complainant”) upon the issuance of the Administrative Law Judge’s Proposed Order, the filing of exceptions to the Proposed Order by both Harrison Hills City School District Board of Education (“the District”) and Harrison Hills Teachers’ Association (“Union”), responses to the exceptions by these parties and Counsel for Complainant, and oral arguments presented by the parties’ representatives. The issue to be decided is whether the District violated Ohio Revised Code (“O.R.C.”) §§ 4117.11(A)(1) and (A)(2). For the reasons that follow, we find that the District violated O.R.C. § 4117.11(A)(1) by communicating with employees concerning subjects of ongoing collective bargaining negotiations. We further find that the District did not violate O.R.C. § 4117.11(A)(2) through such communications and did not violate O.R.C. §§ 4117.11(A)(1) or (A)(2) through the school principal’s conversation with bargaining-unit members who were picketing.

I. BACKGROUND

In the spring of 2007, the District and the Union began negotiations for a successor collective bargaining agreement to the one set to expire on June 30, 2007. With negotiations stalling and a strike approaching imminently, the parties prepared for mediation on September 30, 2007.

During mediation, the District issued its last, best, and final offer. The Union negotiating team then proceeded to a membership meeting that had been previously scheduled for 7:00 p.m. Because the mediation session lasted longer than expected, the Union did not arrive at the meeting until approximately 8:00 p.m. Consequently, the Union did not make written corrections to the document it had prepared comparing its proposals with the District's proposals as of September 26, 2007. Instead, the Union gave attendees a copy of the September 26 offer and communicated the changes orally. The union membership rejected the District's offer. The next day, October 1, 2007, the membership went on strike.

Also on October 1, 2007, the Superintendent discovered an envelope in his office containing a document and anonymous note. The note indicated that the document reflected what the Union had disseminated to attendees at the previous evening's membership meeting. Neither the Superintendent nor any administrator was present at the membership meeting; they had no information supporting the veracity of the author; and no one made any effort to corroborate the document's truthfulness. The document did not reflect the District's actual last, best, and final offer made on September 30, 2007.

Based on the anonymous letter, the District posted on its website a press release declaring that the Union had misrepresented its position regarding a non-reprisal clause. Subsequently the District issued a second press release, indicating that the Superintendent planned to ask the Union leadership to allow the membership to vote on either a tentative agreement (if one was reached during the mediation session) or the District's last offer. This request was also made directly to the Union's bargaining team during previous negotiations.

These were not the only press releases posted on the website, however. Between September 24, 2007, and October 8, 2007, the District published numerous releases. One news release stated: "The [Union] arrived late for the meeting and was unprepared to engage in meaningful negotiations." Another referred to "the strike that the [Union] choose to bring about." Finally, a third quoted the Superintendent as saying: "[T]he District agreed to every aspect of the Union's requirements, and still the Union chose to continue this unfortunate strike. . . . You wonder if the [Union] wants a strike for a strike's sake."

Meanwhile, on the morning of October 2, 2007, while picking up the newspaper in front of the school, High School Principal James Rocchi saw Music Director Brent Ripley, who was picketing nearby with a group of teachers. The two began a conversation. As they discussed how the teachers and students were faring during the strike, four or five other teachers joined the conversation. One teacher commented that the District had not offered a non-reprisal clause, to which Mr. Rocchi replied that it was his understanding that a non-reprisal clause had, in fact, been offered. Mr. Rocchi then stated that one of them had misinformation: either the District was not telling the truth or the Union was not telling the truth.

On October 3, 2007, the Union filed the unfair labor practice charge herein, alleging that the District had violated O.R.C. §§ 4117.11(A)(1), (A)(2), and (A)(5). The Board found probable cause to believe the District had violated (A)(1) and (A)(2), dismissed the (A)(5) allegation, and directed the matter to hearing. A complaint was issued on December 22, 2008. On July 27, 2009, a hearing was held before a SERB Administrative Law Judge. On October 27, 2009, the Administrative Law Judge's Proposed Order was issued. Exceptions were filed by the Union and the District. On February 11, 2010, the Board directed the parties' representatives to appear before it and present oral arguments. The oral argument was conducted on February 24, 2010.

II. DISCUSSION

O.R.C. §§ 4117.11(A)(1) and (A)(2) 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 the rights guaranteed in Chapter 4117. of the Revised Code[;]

(2) Initiate, create, dominate, or interfere with the formation or administration of any employee organization[.]

This case presents two primary legal issues. The first issue is whether the District violated O.R.C. § 4117.11(A)(1) [hereinafter “(A)(1)”] and O.R.C. § 4117.11(A)(2) [hereinafter “(A)(2)”] when it communicated with bargaining-unit members by posting information on its website concerning the subjects of an ongoing negotiations. The second issue is whether the District violated (A)(1) and (A)(2) when High School Principal Rocchi engaged in discussion with bargaining-unit members, while they were engaged in picketing, regarding the negotiations between the Union and the District.

A. The District Violated O.R.C. § 4117.11(A)(1) Via Its Web-postings

Whether the District violated O.R.C. § 4117.11(A)(1) depends on both the general standard for finding an (A)(1) violation as well as how that standard applies to communications from an employer to an employee to correct a mistake. In order to determine whether the District violated (A)(1), it is necessary to examine (A)(1) as well as its application to employer communications correcting a mistake before applying (A)(1) to the case at hand.

1. O.R.C. § 4117.11(A)(1), Generally

O.R.C. § 4117.11(A)(1) explicitly prohibits conduct that interferes with, restrains, or coerces employees in the exercise of their rights under O.R.C. Chapter 4117. While simple on its face, a literal interpretation of this provision is both overly narrow and

overly broad. First, it is too narrow because it suggests that only subjective, individualized, and immediate interference, coercion, or restraint is sufficient to trigger a violation. But we disposed of this interpretation, at least in part, 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) (hereinafter "*Pickaway*").

In *Pickaway*, we held that determining whether the employer violated (A)(1) is based on objective, rather than subjective, criteria — that is, “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.” *Id.* at 3-3. Furthermore, this inquiry includes a “thorough review of the circumstances under which the alleged misconduct occurred and its likely effect on the guaranteed rights of employees.” *Id.* Thus, it is well-settled that the scope of inquiry may extend broader than the effect on the particular employee toward whom an action is directed; it also includes the effect on other employees.

What is not precisely clear from *Pickaway*, however, is whether the *reasonable likelihood* of interference, restraint, or coercion is alone sufficient or whether, instead, it is but one factor in determining a violation. In *In re Springfield Local School Dist Bd of Ed.*, SERB 97-007 (5-1-97) (“*Springfield*”) at p. 3-49, in addressing statements made by a supervisor to bargaining-unit employees while they were on strike about possibly losing their jobs if they did not return to work, SERB stated: “The statements should be viewed in the context of the totality of conduct and the circumstances under which they were made.” SERB found the statements were “overtly threatening because they were tied directly to the individuals’ protected activity.” *Id.* In that case, SERB concluded thusly: “Considering the context and content of these statements, one may reasonably conclude that the employees were interfered with, restrained, or coerced in the exercise of their O.R.C. Chapter 4117 rights by the supervisor’s conduct.” *Id.* at 3-50.

In the case at hand, we conclude that a reasonable likelihood of harm is sufficient. To require actual evidence of interference would punish the resilient employee whose unwavering conviction refuses deterrence. And perhaps more

importantly, it would also place a practical circumscription on the safeguards of (A)(1) by limiting coverage merely to employer conduct with an immediate, discernible impact on the current employee toward whom the action is directed without paying due regard for the possible latent, prospective impact on that employee and on other employees as well.

For these reasons and SERB's position already set forth in *Springfield*, we now expressly join the National Labor Relations Board in holding that an employee can establish interference, restraint, or coercion solely by demonstrating that the employer's action reasonably *tends* to interfere with, restrain, or coerce employees in the exercise of their protected activity. See, e.g., *Clark Bros., Inc.*, 70 NLRB 802, 806 (1946). Thus, establishing that a violation of O.R.C. § 4117.11(A)(1) occurred does not depend on whether the interference, restraint, or coercion succeeded or failed, but on whether an employer engaged in conduct reasonably tending to interfere with the free exercise of employee rights. Accord *id* and *Springfield*.

In addition to problems of narrowness, a literal interpretation of (A)(1) also sweeps too broadly because it would create a violation every time any employer action is likely to create interference with an employee's rights, even while the employer is engaging in legitimate exercise of managerial discretion. We find this position untenable. When enacting O.R.C. § 4117.11, the legislature specifically articulated several actions that violate the Act.¹ Yet, construing the broad (A)(1) literally to proscribe *any* conduct that is reasonably likely to interfere with, restrain, or coerce protected activity would render the other, specific provisions virtually superfluous. Indeed, every time an employer discharges an employee in the wake of union activity, even if for some other legitimate reason, the employee may be deterred from future union activity. To find (A)(1) liability in this instance, where there is no overt threat or evidence showing a reasonable likelihood of intent to interfere with, restrain, or coerce bargaining-unit employees in exercising O.R.C. Chapter 4117 rights would abrogate those paramount prerequisites of intent that safeguard legitimate managerial decision making.

¹ E.g., O.R.C. § 4117.11(A)(2), (3), (4), and (5).

In the absence of contrary language, we conclude that the legislature must have intended to place some limitation on the protections of O.R.C. § 4117.11(A)(1). The manifold benefits of such a limitation include (1) reducing statutory redundancy; (2) protecting the employer's business prerogative in related decision making; and (3) maintaining employee protections against the limitless possible illegitimate invasions of essential rights.

In order to honor these distinct concerns appropriately, we hold that to establish an (A)(1) violation, the Complainant must demonstrate not only the reasonable tendency of the complained action to interfere with, restrain, or coerce employees in exercising their rights, but that the interference, restraint, or coercion outweighs any competing legitimate managerial right. This approach is consistent with the position of the United States Supreme Court and the National Labor Relations Board with respect to the (A)(1) analog in the National Labor Relations Act, §8(a)(1) [29 U.S.C. § 158(a)(1)]. See *Darlington Manufacturing v. NLRB*, 380 U.S. 263 (1965) ("*Darlington Manufacturing*"); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945) ("*Republic Aviation Corp.*"). See also *Business Services by Manpower, Inc. v. N.L.R.B.*, 784 F.2d 442, 453-54 (2d. Cir. 1986) (determining whether §8(a)(1) protects employees' rights to honor "stranger" picketing depends upon a balancing of employer's interests against those of employees, a balancing that must be performed on a case-by-case basis and not on a rigid, formalistic application of rules applicable in other contexts); *NLRB v. William S. Carroll, Inc.*, 578 F.2d 1 (1st Cir.1978) ("Whether or not [§8(a)(1)] has been violated depends on a case by case balancing of the right of the employee to express his union sympathies and the right of the employer to conduct his business.").

In *Darlington Manufacturing*, for instance, the United States Supreme Court held that although a plant shutdown may have a significant chilling effect on unionization, an employer's decision to close its plant will never violate §8(a)(1) because the decision to close a plant is so clearly within managerial prerogative that it cannot be outweighed by the employees' interest in preserving §7 [29 U.S.C. § 157] protection. *Darlington Manufacturing*, *supra* at 268. In other words, the reasonably likely *effect* of the shutdown will never be the source of a violation under these circumstances. Such a

decision could, however, violate §8(a)(3) [29 U.S.C. § 158(a)(3)], even though an employer has an immense interest in retaining the right to choose to shut down its plant, if the *purpose* of the decision is to achieve a chilling effect on unionization among employees at other plants. *Id.* Thus, a violation of §8(a)(1) depends on the reasonably likely effect of an employer action weighed against the legitimate business interests of the employer, while §8(a)(3) requires actual intent to discriminate and actual harm but will not concern itself with the employer's interests.

It is important to note that the scope of considered interests is not limited merely to broad, abstract concepts. Rather, the practical interaction of the specific interests involved in each individual case will be determinative. See *Republic Aviation Corp.*, *supra* at 803-804. For example, in *Republic Aviation Corp.*, the employer had adopted a broad rule against soliciting on company property; subsequently, an employee was terminated because of union solicitation on the premises. *Id.* at 803. Even though the employer's rule against solicitation was enforced against all solicitations and was not discriminatorily applied against union solicitation, the U.S. Supreme Court upheld the NLRB's finding that the discharge constituted a §8(a)(1) violation, namely that the employer's interest in maintaining productivity and discipline was outweighed by the employees' interest in self-organization because the rule prohibited solicitation even on the workers' own time, such as breaks and lunches. *Id.* at 804.

By contrast, where a no-solicitation rule covers only non-working time, the NLRB with the Court's approval has upheld discharges in violation of such rules, even though the discharge may hinder union activity, because the employees' ability to organize is less affected while the employer's interest remains the same. *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943). Thus, the scope of the employer action may affect the reasonable likelihood of interference with employee protected activity as well as whether such action constitutes an unfair labor practice.

For the foregoing reasons, we conclude that an employee may establish a viable (A)(1) claim without showing actual interference, restraint, or coercion against the specific employee against whom the action is directed. It is sufficient that the action has a reasonable tendency to interfere with, restrain, or coerce any employee in the

exercise of his or her protected rights under O.R.C. Chapter 4117. The employee, however, must also show that his or her interests in maintaining protection outweigh any legitimate business interest of the employer in taking the disputed action. Additionally, we reiterate that any determination of interference, restraint, or coercion must be based on the totality of the circumstances and the context in which the action was taken. *Pickaway*, 1995 SERB at 4-46.

2. O.R.C. § 4117.11(A)(1) Application to Collective Bargaining Communications from Employer to Employees

Prior to an election, an employer is permitted to communicate candidly and vigorously with its employees. See *In re Montgomery County Bd. of Mental Retardation and Developmental Disabilities*, SERB 88-012 (9-15-88). Such an exercise of free speech is not only well grounded in the First Amendment, it is also essential to a fair and meaningful representation campaign. “Open, active exchange of information is imperative to enable voters to make informed choices.” *Id* at 3-62. The Board has promulgated rules to “ensure a free atmosphere for the development of opinions and the dissemination of information and ideas for and against representation for purposes of collective bargaining.” O.A.C. Rule 4117-5-06(D).

Once the employees have certified a union as their exclusive representative, however, an employer’s relationship with its employees, individually and collectively, must change. Specifically, the employer may no longer deal directly with its employees concerning mandatory subjects of bargaining, i.e., terms and conditions of employment. *In re Mentor Exempted Village School Dist Bd of Ed*, SERB 89-011 (5-12-89).

Such direct communications not only “create dissension in the union’s ranks, damage its relationship with the employees it is representing, and put it in a defensive bargaining position,” *Vandalia-Butler City School Dist Bd of Ed v SERB*, 1991 SERB 4-81, 4-82 (2d Dist Ct App, Montgomery, 8-15-91), but perhaps most importantly, they circumvent the employees’ axiomatic right of union representation. Consequently, an employer’s direct communications with its employees regarding the status of negotiations, even where truthful, may constitute unlawful direct dealing in violation of O.R.C. §§ 4117.11(A)(1), (A)(5), and (A)(8). *In re Mentor Exempted Village School Dist*

Bd of Ed, SERB 89-011 (5-12-89). A complainant may thus establish a prima facie violation by presenting evidence sufficient to sustain a finding that the employer more likely than not made communications with employees concerning wages, hours, or other terms and conditions of employment.

From this principle, it does not follow necessarily that an employer may *never* communicate with its employees, however. Where an employer makes direct communications with its employees concerning the subject of collective bargaining, the ostensible purpose and predictable effect of such communications are to circumvent the union in some way, thereby infringing on the employees' right of union representation. Accordingly, the employer's legitimate managerial interest in making the communications is comparatively slight, while the infringement on protected employee activity is significant.

But where an employer initiates communication with employees *solely* in response to, and for the limited purpose of, correcting a union's material misrepresentation of its proposals, the employer's interests are different. Although a public employer may not possess the same First Amendment rights as a private employer and although O.R.C. Chapter 4117 may not contain a free speech proviso as in §8c of the NLRA [29 U.S.C. § 158(c)], the union's right of representation likewise is not without limitation. In this instance, the employer's purpose is no longer to avoid the union, but rather to ensure that its attempts to establish agreeable employment conditions are fairly considered.

The employees' interests are different here as well. Most often, an employer's proposal is, to some large degree, a product of the negotiation process. Therefore, when a union misrepresents the product of negotiations, it undermines the negotiation process, it undermines the union itself, and consequently, it undermines effective representation altogether.

To prohibit an employer from correcting its proposal would thus contradict the very purpose that the general rule against communication—preserving effective representation—that it purports to serve. Furthermore, allowing the employer to correct misrepresentations may well dissuade an employee organization from

opportunistically misrepresenting the employer's bargaining position in order to provoke a strike or other expedient concerted activity. Section 8c of the NLRA expresses a right of noncoercive free speech to employers to communicate directly with employees. In the absence of such express language, but consistent with our responsibilities under O.R.C. § 4117.22, we recognize such an implied privilege under O.R.C. Chapter 4117.² Thus, the substantial benefit to employers, to unions, to employees, and to the public-sector collective bargaining process supports granting an employer the implied privilege to correct union misrepresentations in certain situations.

Yet, we are also mindful that the policies supporting such a privilege must not be used to subterfuge fundamental employee protections against employer interference with the representation process. We therefore recognize that the employer has but two limited options to avoid an unfair labor practice charge for communicating with employees concerning the subject of negotiation. First, it may rebut the prima facie case, presenting evidence that it did not make communications with its employees in the aforementioned regard. In this case, the fact finder must weigh the evidence presented by both sides, but the ultimate burden of persuasion remains with the employee.

Alternatively, the employer may utilize this privilege as an affirmative defense. When a union misrepresents an employer to its employee-members in a manner that the employer may reasonably expect will materially undermine its labor relations, the employer is entitled to make a limited, concise response to *correct* the misrepresentation. In order to avail itself of this limited, extraordinary action, however, the employer must satisfy the following conditions by a preponderance of the evidence: (1) that the statement is, in fact, untrue; (2) that it is of sufficient significance that it would reasonably be expected to influence the current bargaining climate; (3) that the misinformation materially interferes with the bargaining process; and (4) that prior to

² In *In re Mentor Exempted Village School Dist Bd of Ed*, SERB 89-011 (5-16-89) n.9, the Board acknowledged that an employer may communicate accurate, noncoercive communication of its bargaining proposals to its employees without committing an unfair labor practice in certain circumstances.

making a correction, the employer first notified the union of the error and provided a reasonable opportunity to correct the alleged misinformation.

Applying our framework to the case *sub judice*, we find that the School District violated (A)(1) when it when it posted on its website certain information regarding the terms of its proposed collective bargaining agreement and when it made a request on its website that the employees vote on either a tentative agreement or the District's last best offer.

Because the District did not dispute making the communications, nor did it dispute whether the communications were designed to reach, and did reach, employees, the Union has made a prima facie case. And for the same reasons, the District has not articulated evidence sufficient to rebut the prima facie case. Finally, the District cannot establish an affirmative defense, for nothing in the record suggests that the District met the fourth element — that it informed the Union of the alleged misinformation and offer it a chance to correct. We conclude, therefore, that the District violated O.R.C. § 4117.11(A)(1) when, through its website directed at employees, it attempted to correct alleged misrepresentations in its proposal and when it advised the employees to vote on a last best offer or tentative proposal.

B. The District Did Not Violate O.R.C. § 4117.11(A)(2) Via Its Web-postings

A public employer commits an O.R.C. § 4117.11(A)(2) violation when it dominates or interferes with the formation or administration of an employee organization. Whether the employer violated (A)(2) is determined without regard to beneficent employer motive, or even other amicable effects on employees. See *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 251 (1939) ("*Newport News*"). Thus, in *Newport News*, the U.S. Supreme Court sustained an NLRB order to disestablish an invalid employee organization, finding it immaterial that the committee "had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives." *Id.*

While an (A)(1) violation requires only a reasonable tendency to interfere with employees' exercise of their O.R.C. Chapter 4117 rights, to establish an (A)(2) violation requires substantial evidence of material harm to the union in the administration or performance of its duties. See *In re Springfield Local School Dist Bd of Ed*, SERB 97-007 (5-1-97) ("*Springfield*"). If the actions of the employer did not prevent the union from performing any of its administrative duties, nor interfere with its administration, then no violation is found. *Id.* Thus, in *Springfield*, SERB found no violation of the Act where the actions of the employer were never directed at the union and where the union's continued existence was not influenced by the employer's actions.

In this case, the Union contends that the District interfered with the performance of its duties as bargaining agent because it created distrust among its members, and thus the Union was forced to alter its bargaining strategy. Without any substantial evidence that this distrust actually created an economic hardship or otherwise materially affected the Union in some way, we find that the Union has not shown actual interference with the administration of its duties. Therefore, we conclude that the District did not violate (A)(2) when it communicated with bargaining-unit members through its web postings.

C. The District Did Not Violate O.R.C. §§ 4117.11(A)(1) or (A)(2) Via Principal Rocchi's Conversations with Picketing Bargaining-unit Members

Finally, the Union contends that the District violated O.R.C. §§ 4117.11(A)(1) and (A)(2) when Principal Rocchi conversed with Music Director Ripley and other teacher-pickers. Because the District did not delegate to Principal Rocchi authority to speak on its behalf with regard to collective bargaining matters, his conversations with union members cannot impose (A)(1) or (A)(2) liability on the District.

Although the question of who may act on behalf of a party to collective bargaining is one of first impression before this Board, under the National Labor Relations Act questions of agency are generally resolved according to common-law principles. *NLRB v. Local 64, Falls Cities District Council of Carpenters*, 497 F.2d 1335, 1336 (6th Cir.1974); *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 217, 100

S.Ct. 410, 414, 62 L.Ed.2d 394 (1979). We see no reason to depart from this rule and find support for it under Ohio case law. For example, in *Miller v. Kilcullen*, 2009-Ohio-5723, ¶24, the Fifth District Court of Appeals stated:

Accordingly, as dictated by Ohio law, "an 'agency relationship' is a consensual fiduciary relationship between two persons where the agent has the power to bind the principal by his or her actions, and the principal has the right to control the actions of the agent. *Evans v. Ohio State Univ.*, 112 Ohio App.3d 724, [10th Dist Ct, App, Franklin, 7-23-96] *appeal not allowed*, 77 Ohio St.3d 1494. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." Restatement of the Law 2d, Agency (1958).

Moreover, the principal is not liable for the conduct of an agent unless the agent is acting within the scope of his authority, *Fay v. Swicker*, 154 Ohio St. 341, 347-48 (1950), whether expressly or impliedly conferred. See *Damon's Missouri, Inc. v. Davis*, 63 Ohio St.3d. 605, 608 (1992). A party who claims that a principal is responsible for the acts of an employee is obligated to prove the agency and scope of the employee's authority. *Aetna Cas. & Sur. Co. v. Leahey Const. Co.*, 219 F.3d 519, 2000 FED App. 0227P (6th Cir. 2000) (applying Ohio law); *Brown v. Christopher Inn Co.*, 344 N.E.2d 140 (10th Dist.1975).

While Principal Rocchi may have been an agent by virtue of his employment with the Harrison Hills School District, there is no evidence in the record to suggest that he was expressly or impliedly delegated authority to represent the principal-employer District in bargaining. Collective bargaining was not part of his express job duties, and he was neither actually present at the bargaining table nor otherwise played a significant role in negotiating on behalf of the employer. Nor does the evidence indicate that Principal Rocchi represented himself as having authority on bargaining matters. Finally, the nature of Principal Rocchi's employment respective to the District does not reasonably create the perception that he has authority to speak on behalf of the District in bargaining.

Moreover, even if Principal Rocchi was authorized to communicate on behalf of the District for the purposes of bargaining, the conversation that took place between

Principal Rocchi and the picketing bargaining-unit members is not sufficiently likely to interfere with employees' protected activity to violate (A)(1). Principal Rocchi did not attempt to bargain with or otherwise engage in negotiations with the teachers, nor did he offer benefits, make threats, or otherwise attempt to influence the teachers. He simply stated that the information he had received through his bargaining representatives differed from the information that the union members received through their representatives.

Additionally, the context of the communication does not support a finding of interference. The conversation occurred outside, in front of the school, rather than in a conference room or the principal's office. And the communication was not made during an organized meeting or agenda; rather, it arose in the course of a casual conversation between a principal and his teachers while the principal was picking up the newspaper. Taking into account the content of the communication and the context in which it was made, we fail to see how such an exchange would be reasonably likely to interfere with the right to exclusive representation in bargaining or any other O.R.C. Chapter 4117 rights.

Furthermore, the record is utterly void of any evidence that the effects of Principal Rocchi's conversation materially burdened the administration of the union to create a cause of action under (A)(2). In sum, the District did not violate O.R.C. §§ 4117.11(A)(1) and (A)(2) through the communications from Principal Rocchi to picketing bargaining-unit members. Principal Rocchi was not expressly or implicitly delegated authority to speak on behalf of the District with regard to bargaining matters. Moreover, even if such authority could be implied, the District still did not violate (A)(1) because the totality of the circumstances and the content of the communication do not reasonably tend to interfere with employees' exercise of protected rights, and the District still did not violate (A)(2) because the communication was not shown to materially interfere with the administration of the Union.

III. CONCLUSION

For the reasons set forth above, we conclude that the Harrison Hills City School District Board of Education violated Ohio Revised Code § 4117.11(A)(1) via its web-postings directed to employees. We conclude further that the District did not violate O.R.C. § 4117.11(A)(2) via such web-postings and did not violate O.R.C. §§ 4117.11(A)(1) or (A)(2) through Principal Rocchi's conversation with picketing union members.

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