

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

Clark County Board of Developmental Disabilities,

Respondent.

Case No. 2009-ULP-06-0357

STATE EMPLOYMENT  
RELATIONS BOARD  
2010 AUG 19 P 1:59

**ORDER  
(OPINION ATTACHED)**

Before Chairperson Brundige, Vice Chairperson Verich, and Board Member Spada: August 18, 2010.

On June 26, 2009, the Professionals Guild of Ohio (“Intervenor”) filed an unfair labor practice charge against the Clark County Board of Developmental Disabilities (“Respondent”). On October 2, 2009, 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), (A)(2), and (A)(3) by not providing regularly-scheduled raises to proposed bargaining-unit employees because they requested a representation election.

On January 8, 2010, a Complaint was issued. An Answer was filed by Respondent on January 19, 2010. On March 4, 2010, a hearing was conducted by an Administrative Law Judge. On April 16, 2010, the Administrative Law Judge’s Proposed Order was issued, recommending that the Board find that Respondent violated O.R.C. §§ 4117.11(A)(1), (A)(2), and (A)(3). Intervenor and Respondent each filed exceptions to the Proposed Order. Responses to the exceptions were filed.

On July 22, 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 full 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 22, 2010 Board meeting; grants Respondent’s motion to clarify its exceptions; 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), (A)(2), and (A)(3) by unilaterally denying expected annual wage increases to all Registered Service Worker 1s ("RSW 1s") after a Petition for Representation Election was filed but before the election occurred; sets aside the election results in Case No. 2009-REP-05-0062 and orders a new election to be conducted by mail ballot as soon as practicable as determined by the Representation Section in consultation with the parties.

The Clark County Board of Developmental Disabilities is ordered to:

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;
- (2) Initiating, creating, dominating, or interfering with the formation or administration of an employee organization, and
- (3) Discriminating in regard to terms or conditions of employment on the basis of the exercise of rights guaranteed in Ohio Revised Code Chapter 4117 by denying all Registered Service Worker 1s their annual across-the-board wage increase after the Petition for Representation Election was filed but prior to the holding of the representation election, and otherwise violating Ohio Revised Code §§ 4117.11(A)(1), (A)(2), and (A)(3).

B. Take the following affirmative action:

- (1) Provide access to Professionals Guild of Ohio representatives to meet with Registered Service Worker 1s during non-work time;
- (2) Cooperate with the SERB Representation Section and the Professionals Guild of Ohio to schedule the rerun representation election,
- (3) Post for 60 consecutive calendar days in all of the usual and customary posting locations where Registered Service Worker 1s work, the Notice to Employees furnished by the Board stating that Respondent shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B) therein, and
- (4) Notify SERB via electronic mail within 20 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.

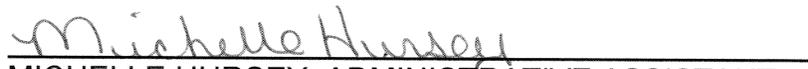
  
N. EUGENE BRUNDIGE, CHAIRPERSON

### 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 19<sup>th</sup> day of August, 2010.

  
MICHELLE HURSEY, ADMINISTRATIVE ASSISTANT



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

Ted Strickland, Governor

Sherrie J. Passmore Executive Director

Case No. 2009-ULP-06-0357

## 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 of the State Employment Relations Board entered on its journal on the 19<sup>th</sup> day of August, 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  
August 19, 2010

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

Clark County Board of Developmental Disabilities,

Respondent.

Case No. 2009-ULP-06-0357

**OPINION**

BRUNDIGE, CHAIRPERSON:

The Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Administrative Law Judge's Proposed Order, which are incorporated by reference in this opinion. The Board additionally opines on the following subjects:

**A. Ohio Revised Code § 4117.11(A)(2) Violation**

Ohio Revised Code ("O.R.C.") § 4117.11(A)(2) declares it an unfair labor practice for any public employer, its agents, or its representatives to "[i]nitiate, create, dominate, or interfere with the formation or administration of any employee organization." In the present case, the Clark County Board of Developmental Disabilities<sup>1</sup> ("DD Board") violated O.R.C. § 4117.11(A)(2) by interfering with the formation of an employee organization by the Registered Service Worker 1s ("RSW 1s").

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<sup>1</sup> The Clark County Board of Developmental Disabilities was formerly known as the "Clark County Board of Mental Retardation and Developmental Disabilities." Its name was changed after Senate Bill 79 was passed and signed into law in July 2009.

Whether a violation of O.R.C. § 4117.11(A)(2) has occurred is determined objectively and without regard to the motivations of the employer. *NLRB v. Newport News Shipbuilding and Dry Dock Co.*, 308 U.S. 241, 251 (1939). To determine if an employer has interfered with the formation of an employee organization, the relevant question is whether “employees were not afforded the full freedom in their choice of representatives which the [statute] affords.” See, e.g., *In the Matter of M.E. Blatt Co.*, 47 NLRB 1055, 1070 (1943).

Here, the DD Board’s actions did interfere with the freedom of the employees to decide if they wanted to choose a representative. The DD Board took several actions that would objectively interfere with the ability of the RSW 1s to organize. First, the DD Board withheld the raise normally given to the RSW 1s during June or July while granting a raise to all other employees who normally received it. Additionally, the communications from the DD Board, read by a reasonable person, would suggest that if the RSW 1s were to select an exclusive representative thus resulting in the DD Board being required to negotiate, that the outcome might be less favorable than the raises that were granted to other employees. .

Finally, the DD Board posted materials suggesting that unionization would be a poor decision for the RSW 1s. Taken together, these actions created an atmosphere in which the DD Board interfered with the freedom of the RSW 1s to elect a representative. As a result, the DD Board violated O.R.C. § 4117.11(A)(2) by interfering with the formation of a union.

## **B. Remedies**

The Proposed Order from the Administrative Law Judge recommended that the Board set aside the representation election results and order a new election, issue a cease and desist order requiring the DD Board to cease violating Chapter 4117, forbid future violations, and ordering the DD Board to post the attached notice to the RSW 1s detailing its intention to cease and desist from taking actions that violate Chapter 4117. The Board agrees with the Administrative Law Judge for the following reasons.

The status quo between the DD Board and the RSW 1s was for annual wage increases to occur every June or July. The DD Board failed to maintain the status quo

in this case because by granting wage increases to all non-unionized employees while denying any increase to the RSW 1s. In June 2009, the only non-unionized employees who did not receive the annual wage increase were the RSW 1s, who awaited a representation election. This action may have caused some of the RSW 1s who initially favored Union representation to vote against representation in order to receive their annual wage increase. As a result, the failure to grant the wage increase to the RSW 1s, along with the communications of the DD Board to the RSW 1s, sufficiently disrupted the "laboratory conditions" needed for a fair election. *In re General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). Therefore, in order to return the parties to the status quo, the tainted election must be thrown out, and a new election ordered.

Although we find this remedy is available through an unfair labor practice charge, as we have here, we would have reached this conclusion much more readily via a representation case. This Board is hesitant to impose a new election as a remedy through the unfair labor practice channel except in circumstances such as those before us, where the parties can only be restored to the status quo through the ordering of a new election.

We concur with the Administrative Law Judge that it is not appropriate to simply certify the PGO as the exclusive representative in that the will of the employees must ultimately be the determining factor regarding union representation. In order to provide a "level playing field," it is necessary to provide access to PGO representatives to meet with RSW 1's during non-work time, and we so order.

We find that Respondent violated Ohio Revised Code §§ 4117.11(A)(1), (A)(2), and (A)(3) by unilaterally denying expected annual wage increases to all Registered Service Worker 1s ("RSW 1s") after a Petition for Representation Election was filed but before the election occurred; set aside the election results in Case No. 2009-REP-05-0062 and order a new election to be conducted by mail ballot as soon as practicable as determined by the Representation Section in consultation with the parties; and issue an order with a Notice to Employees requiring Respondent to cease and desist from: (1) interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117, (2) initiating, creating, dominating, or

interfering with the formation or administration of an employee organization, and (3) discriminating in regard to terms or conditions of employment on the basis of the exercise of rights guaranteed in Ohio Revised Code Chapter 4117 by denying all Registered Service Worker 1s their annual across-the-board wage increase after the Petition for Representation Election was filed but prior to the holding of the representation election, and otherwise violating Ohio Revised Code §§ 4117.11(A)(1), (A)(2), and (A)(3), and to take the following affirmative action: (1) provide access to PGO representatives to meet with RSW 1s during non-work time; (2) cooperate with the Representation Section and the Intervenor to schedule the rerun representation election, (3) post for 60 consecutive calendar days in all of the usual and customary posting locations where Registered Service Worker 1s work, the Notice to Employees furnished by the Board stating that Respondent shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B) therein, and (4) notify SERB via electronic mail within 20 calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

### **C. Conclusion**

For the reasons set forth above, we conclude that the Clark County Board of Developmental Disabilities committed unfair labor practices in violation of Ohio Revised Code §§ 4117.11(A)(1), (A)(2), and (A)(3) by unilaterally denying expected annual wage increases to all Registered Service Worker 1s.

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

**Appendix A (Incorporated by Reference into SERB Opinion 2010-014):**

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

STATE EMPLOYMENT RELATIONS BOARD,	:	CASE NO. 2009-ULP-06-0357
	:	
Complainant,	:	
	:	
v.	:	BETH A. JEWELL
	:	Administrative Law Judge
	:	
CLARK COUNTY BOARD OF DEVELOPMENTAL DISABILITIES,	:	
	:	
Respondent.	:	<u>PROPOSED ORDER</u>
	:	

**I. INTRODUCTION**

On June 26, 2009, the Professionals Guild of Ohio (“PGO” or “Intervenor”) filed an unfair labor practice charge against the Clark County Board of Developmental Disabilities (“DD Board” or “Respondent”), alleging violations of Ohio Revised Code §§ 4117.11(A)(1), (A)(2), and (A)(3).<sup>2</sup> On October 2, 2009, the State Employment Relations Board (“SERB” or “Complainant”) determined that probable cause existed to believe that the Employer committed unfair labor practices by not providing regularly-scheduled raises to proposed bargaining-unit employees because they requested a representation election.

On January 8, 2010, a Complaint was issued. On January 15, 2010, PGO filed a motion to intervene, which was granted in accordance with Rule 4117-1-07(A). A hearing was held on March 4, 2010, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs.

**II. ISSUE**

Whether the Employer violated §§ 4117.11(A)(1), (A)(2) and (A)(3) by not providing regularly-scheduled raises to Registered Service Worker 1s (“RSW 1s”) because they requested a representation election.

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<sup>2</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.

### III. FINDINGS OF FACT<sup>3</sup>

1. The Clark County Board of Developmental Disabilities is a “public employer” as defined by § 4117.01(B). (S. 1)
2. The Professional Guild of Ohio is an “employee organization” as defined by § 4117.11(D). (S. 2)
3. On May 29, 2009, the PGO filed a Petition for Representation Election (Case No. 09-REP-05-0062) seeking to represent all regular full-time and part-time Registered Service Worker 1s of the DD Board. At the time of the petition, the PGO had greater than 50 percent support from the RSW 1s. Currently, regular full-time and part-time RSW 1s are non-bargaining unit/non-union employees of the DD Board. (S. 3; T. McClendon 6:54)
4. Assistant Superintendent Jennifer Rousculp sent a letter dated June 16, 2009, to the home of each RSW 1 stating that the RSW 1s would not receive a raise that year while the election was pending because doing so would violate Ohio state law. The letter refers to the raises as “typically voted on by the Board in June and implemented accordingly.” (Exh. 2)
5. At its June 16, 2009 meeting, the DD Board approved and implemented a resolution increasing wages by 2.5 percent for all non-union employees except for the RSW 1s. The wage increase was made retroactive to June 8, 2009 through June 20, 2010. It was within the DD Board’s power to withhold wage increases from all non-bargaining unit employees, but the Board chose not to, as such a decision would contradict its normal practice of granting wage increases in June/July of each calendar year. (S. 5; T. Bartee 1:48:00)
6. In a readily visible area of the main hallway in its Quest facility, where RSW 1s work, the DD Board posted the resolution from its June 16, 2009 meeting, stating that all non-bargaining unit employees except the RSW 1s were receiving a 2.5 percent wage increase and indicating that the RSW 1s’ decision to seek a representation election resulted in the decision to withhold the wage increase. (T. McCabe 28:46)
7. The DD Board has enacted resolutions granting wage increases to all non-bargaining-unit employees for the past 10 years on or about the following dates: June 16, 2009; June 17, 2008; May 15, 2007, June 19, 2007 and/or July 17, 2007; June 20, 2006; June 28, 2005; April 20, 2004; May 20, 2003; June 18, 2002; March 20, 2001; and/or May 29, 2001; May 16, 2000 and/or July 18, 2000. For the past 10 years, wage increases for non-bargaining-unit employees became effective on or about the following dates: June 21, 2000; June 18, 2001;

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<sup>3</sup> All references to the digital recording of the hearing are indicated parenthetically by “T.,” followed 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.

- June 17, 2002; June 16, 2003; June 14, 2004; June 13, 2005; June 12, 2006; June 11, 2007; June 9, 2008; June 8, 2009. Since 1993, RSW 1s received wage increases every June or July. Although the percentage amount of the annual wage increase varied from year to year, some increase always occurred. (S. 6; T. McCabe 21:00; 23:30)
8. According to Jennifer Wade, Human Resources Director for the Respondent, not providing RSW 1s with a wage increase in June 2009 was “contrary to what [the DD Board has] done” in the past. (T. Wade 1:11:45)
  9. According to Lucas Michael Bartee, 20-year DD Board member, all non-unionized employees expected wage increases in June or July of each calendar year. Superintendent Jennifer Rousculp also testified at hearing that employees expected action to be taken regarding compensation in June or July of each calendar year. (T. Bartee 1:50:00; Rousculp 2:03:00)
  10. Before the representation election, the DD Board circulated a document to all RSW 1s with the heading: “Do you need the union? OR Does the union need you?” This document refers to the union organizers as “salespeople.” (C/I Exh. A)
  11. The representation election was held on September 10, 2009. The result of the representation election was that fourteen (14) of the forty-nine (49) valid ballots cast were for PGO while thirty-four (34) ballots were cast for “no representative.” PGO challenged one ballot, while the DD Board challenged no ballots. (S. 7; Exh. 6; Exh. 5)
  12. At all relevant times, RSW 1s eligible to vote in the representation election were employed by the DD Board. (S. 1, 3)
  13. On or about September 15, 2009, the DD Board approved a resolution increasing the wages of RSW 1s by 2.5 percent. The wage increase was made retroactive to June 8, 2009 through June 20, 2010. (S. 8)
  14. On June 26, 2009, the PGO filed an unfair labor practice charge with the State Employment Relations Board. (S. 9)
  15. On October 1, 2009, SERB issued a Finding of Probable Cause and Direction to Hearing. (S. 10)

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

Complainant alleges the DD Board violated §§ 4117.11(A)(1), (A)(2), and (A)(3), 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 [;]

(3) Discriminate in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117 of the Revised Code.

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. In addition, the provisions of §§ 4117.03(A)(1) and (A)(2), state 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 the 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 (A)(1) inquiry. Pickaway, *supra*.

To demonstrate a prima facie case of discrimination under § 4117.11(A)(3), the Complainant must prove the following elements: (1) the employee at issue is a public employee and was employed at relevant times by the Respondent, or the individual was an applicant for hire for a position as a "public employee"; (2) the employee engaged in concerted, protected activity under Chapter 4117, which fact was either known by the Respondent or suspected by the Respondent; and (3) the Respondent took adverse action against the employee under circumstances that could, if left un rebutted by other evidence, lead to a reasonable inference that Respondent's actions were related to the employee's exercise of concerted, protected activity under Chapter 4117. SERB v. Rehab. Servs. Comm., SERB 05-004 (4-21-05).

The DD Board violated §§ 4117.11(A)(1), (A)(2), and (A)(3). During representation elections, management is forbidden to take any action that may “prejudice, or potentially prejudice, a free choice.” In re Lucas Cty. Bd. of MRDD, SERB 86-048 (12-4-86). As a general rule, wage increases or other benefits may not be granted by an employer, regardless of intent, during the representation election campaign; *however*, when an employer has “an established practice or custom” of providing a benefit, that benefit becomes status quo that *must* be maintained during representation elections. Id. Federal precedent is consistent with the concept of continuing to provide benefits expected thanks to an established practice or custom after a petition for representation election is filed but prior to the election. See NLRB v. Allied Products Corp., 548 F.2d 644 (6th Cir.1977) (the NLRA is violated by a unilateral change in the “existing wage *structure*, whether that change be an increase, or the *denial of a scheduled increase*.”) (emphasis added); NLRB v. W.T. Grant Co., 208 F.2d 710 (4th Cir. 1953) (“Certainly, it cannot be laid down as a governing rule that during a union campaign, management must deny to its employees increased advantages which in the absence of the campaign would be granted.”); Louisburg Sportswear Co. v. NLRB, 462 F.2d 380 (4th Cir. 1972) (negative purpose of a pay raise is negated if it can be shown that the announcement is consistent with established company practice, or was planned and settled upon before the organizing campaign began); American Mirror Co., 269 NLRB 1091 (1984) (periodic wage increases were given and, therefore, one was granted during an organizing campaign, but prior to certification); Wilhow Corp., 244 NLRB 303 (1979) (employer gave employees pay raises during union organizing campaign when evidence demonstrated an existing company policy and employees in stores not subject to organizing activity also received wage increases). Established practices and customs are, by their definition, not conditioned on the presence of formal requirements, obligations, or policies, such as compensation policies.

The DD Board failed to maintain the status quo in this case because, by its own admission, all non-unionized employees received across-the-board annual wage increases of some amount around June or July. In June 2009, the only non-unionized employees who did not receive the annual wage increase were the RSW 1s, who awaited a representation election.<sup>4</sup> This action may have caused some of the RSW 1s who initially favored Union representation to vote against representation in order to receive their annual wage increase.

The status quo between the DD Board and the RSW 1s was for annual wage increases to occur every June or July. “When annual changes to a condition of

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<sup>4</sup> That the DD Board granted two wage increases in 1993 is irrelevant. The central concern is the wage increases that became expected on the part of employees at a particular time during the year because of their reoccurrence over multiple years. Benefits added by the DD Board in 2001 and 2003, such as funeral days and tuition reimbursement, are similarly irrelevant for this reason.

employment are part of an established pattern or practice, the existence of such changes is, in fact, part of the current situation.” SERB v. City of Reynoldsburg, SERB 2010-003 (3-30-10). At hearing, witnesses from both parties testified that the wage increases were expected and dated back at least 17 years. (T. McCabe 21:00; Wade 55:00; Bartee 1:50:30; Rousculp 2:03:00). All parties agreed that although the annual increases varied in amount, some increase always occurred. The DD Board’s Human Resources Director referred to the increases at hearing as “annual, across-the-board [wage] adjustments.” (T. Wade 55:00). The DD Board’s current President stated that it was reasonable for non-unionized workers to expect a wage increase of some kind because “that’s...what’s happened [in the past].” (T. Bartee 1:50:30). Superintendent Rousculp stated non-unionized employees “would expect action as to compensation” around June or July of every year. (T. Rousculp 2:03:00). Finally, in his own Post-Hearing Brief, the DD Board’s counsel refers to the practice as the “annual increase for the past 10 years” and “the wage increase [that occurred] at the same time in years past.”

In addition to the oral testimony at hearing, the DD Board’s own documents identify the wage increase as being part of the status quo. The letter from Superintendent Rousculp to all RSW 1s dated June 16, 2009, identifies DD Board wage increases as “*typically* voted on by the Board in June and implemented accordingly.”<sup>5</sup> This language confirms that the wage increases were part of the DD Board’s status quo with the RSW 1s.

Though all parties admit there is no express or written rule stating wage increases must occur or be considered at any set point during the year, all also admit that it was normal for non-bargaining-unit employees to expect an annual wage increase to occur around June or July. The facts establish a “practice or custom” of providing this benefit, making it part of the status quo at the DD Board. As such, that status quo could not be changed during the time between the filing of the petition for election and the election itself; i.e., the DD Board should have applied the wage increase as if the RSW 1s had not filed a petition for representation election. The mere fact that the amount of the annual increase varied somewhat from year to year is without consequence. Even if some discretionary components are involved in a wage increase, when the criteria for determining discretionary wage increases are fixed, the employer must “continue to apply the same criteria and use the same formula for awarding increases” as done previously. Daily News of Los Angeles v. NLRB, 73 F.3d 406, 412 (D.C. Cir. 1996). Accordingly, once the DD Board determined the amount of the 2009 annual across-the-board increase, the DD Board should have awarded that increase to the RSW 1s in June 2009, just as it did for all other non-unionized employees.

Under § 4117.11(A)(1), it is a violation for employers to interfere with, restrain, or coerce employees from exercising their rights under Chapter 4117. Here, the DD Board

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<sup>5</sup> Exh. 2 (emphasis added).

violated § 4117.11(A)(1) by failing to provide RSW 1s with their annual wage increase at the normal time in an effort to dissuade RSW 1s from voting in favor of affiliating with the PGO. The Employer's intentions in this case are clear from their own correspondence. Superintendent Rousculp's June 16, 2009 letter reads, in part, as follows:

Unfortunately, the Board had no control over when the union filed its petition for a representation election. However, once the petition was filed, the Board was prohibited from increasing your wages. Once the election is over, the Board will either be able to act regarding your wages in FY 2009 or will be negotiating with the union regarding wages, hours, benefits, and other terms and conditions of employment.<sup>6</sup>

This language implies that the PGO was responsible for the failure of RSW 1s to receive their scheduled wage increase and also might cause the RSW 1s to lose a chance at any sort of wage increase at all.

While not necessary to find a violation under the objective standard, the evidence also suggests that employees were coerced by the DD Board's actions. At hearing, retired RSW 1 Ruth McCabe testified that the June 16, 2009 letter sent by Assistant Superintendent Rousculp to all RSW 1s caused several RSW 1s to vote against Union representation because they wanted their annual raise. (T. McCabe 27:50). Before the DD Board announced its decision to withhold the annual wage increase, there was a "lot of interest" among the RSW 1s to unionize. (T. McCabe 18:50). Viewed objectively under the totality of the circumstances, the actions taken by the DD Board restrained and coerced employees from engaging in the protected activity of freely choosing to vote for or against representation, without changes to the status quo influencing their decisions. Section 4117.11(A)(1) is violated when there is a change to the status quo. In re Lucas Cty. Bd. of MRDD, SERB 86-048 (12-4-86).

The DD Board's reliance on the National Labor Relations Board's 1968 decision in Uarco Inc. and Int'l Printing Pressmen and Assistants' Union of North America, AFL-CIO, 169 NLRB 1153 (1968), is misplaced. Though factually similar to the present case in some respects, Uarco is different in one key aspect: in that case, the employer made clear that all its employees, both unionized and non-unionized, would receive the then-prevailing wage rates for their trade, in conformance with the company's annual practice. In this case, by contrast, the DD Board's June 16, 2009 letter to all RSW 1s reads: "Once the [representation] election is over, the Board will either be able to act regarding your wages in FY 2009 *or will be negotiating with the union regarding wages, hours, benefits and other terms and conditions of employment.*"<sup>7</sup> The italicized language implies that if the RSW 1s choose representation by the PGO, then they may not

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<sup>6</sup> Exh. 2.

<sup>7</sup> Exh. 2 (emphasis added).

receive the wages their non-unionized co-workers receive. In addition, the DD Board posted a letter titled, "Do you need the union? OR Does the union need you?" on the bulletin boards viewed by the RSW 1s. This letter implies several negative aspects of unions in general, including dishonesty, high cost, and complication of the work environment.<sup>8</sup> Also, the DD Board sent a letter to RSW 1s dated September 4, 2009, that listed several biased facts concerning the PGO itself; these facts implied that RSW 1s, should they choose representation by the PGO, would receive lower wages, pay high Union dues, be compelled to work holidays, and endure other negative experiences as a result of unionizing under the PGO.<sup>9</sup> The Uarco opinion heavily emphasized the lack of a coercive environment in its reasoning, while these exhibits evidence a coercive environment at the DD Board prior to the representation election. Furthermore, SERB precedent in SERB v. City of Reynoldsburg, SERB 2010-003 (3-30-10), stands for the proposition that unilaterally denying an expected wage increase is an unfair labor practice.

The DD Board intended to dissuade the RSW 1s from voting in favor of unionization by denying RSW 1s their annual wage increase as its regular time. This conduct also violated § 4117.11(A)(2) because the DD Board interfered with the efforts of the PGO to organize and represent the employees in the proposed bargaining unit.

The DD Board also discriminated against the RSW 1s in violation of O.R.C. § 4117.11(A)(3). The RSW 1s are public employees who engaged in the protected activity of petitioning for a representation election. After the petition for representation election was filed, the DD Board took the adverse action of denying the RSW 1s their annual wage increase, while providing all other non-unionized employees with a wage increase at the normal June/July time. The DD Board freely admits this action was based solely on the filing of the petition for representation election. Moreover, "the ultimate issue in a discrimination case is anti-union animus," and the evidence includes correspondence sent by the DD Board to the RSW 1s in anticipation of the representation election portraying unions in a negative light. The DD Board failed to rebut the prima facie case of discrimination presented by the Complainant. The DD Board discriminated against RSW 1s in violation of § 4117.11(A)(3) when it failed to give RSW 1s the wage increase given to all other non-unionized employees.

## **V. REMEDIES**

The appropriate remedies in this case are for SERB to set aside the representation election results and order a new election issue a cease and desist order requiring the DD Board to cease violating Chapter 4117, forbid future violations, and ordering the DD Board to post the attached notice to the RSW 1s detailing its intention to cease and desist from taking actions that violate Chapter 4117. An employer's conduct during a representation election campaign can prevent a free and untrammelled election and

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<sup>8</sup> C/I Exh. A.

<sup>9</sup> C/I Exh. B.

necessitate a rerun election. In re Montgomery County Combined Health Dist., SERB 92-001 (1-23-92) (“An employer’s statements that employees will lose benefits, wage increases, and retirement and civil service status are coercive and violate the hygienic conditions necessary for a free and untrammelled [sic] election.”). If merely threatening the loss of a benefit can violate the hygienic conditions needed for a free and untrammed election, then the actual loss of a benefit must be a more persuasive indicator of a tainted election. Here, testimony provided at hearing indicated that the withholding of the annual wage increase potentially swayed the votes of some RSW 1s from favoring representation to voting against representation. It is clear that the hygienic conditions necessary for a free and untrammed election were disturbed in this case and SERB must set aside the original election’s results and order a new election as soon as practicable.

## **VI. CONCLUSIONS OF LAW**

1. The Clark County Board of Developmental Disabilities is a “public employer” as defined by O.R.C. § 4117.01(B).
2. The Professional Guild of Ohio (“PGO”) is an “employee organization” as defined by § 4117.11(D).
3. The Clark County Board of Developmental Disabilities violated §§4117.11(A)(1), (A)(2), and (A)(3) by unilaterally denying expected annual wage increases to all RSW 1s after a Petition for Representation Election was filed but before the election occurred.

# 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:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117;
- (2) Initiating, creating, dominating, or interfering with the formation or administration of an employee organization, and
- (3) Discriminating in regard to terms or conditions of employment on the basis of the exercise of rights guaranteed in Ohio Revised Code Chapter 4117 by denying all Registered Service Worker 1s their annual across-the-board wage increase after the Petition for Representation Election was filed but prior to the holding of the representation election, and otherwise violating Ohio Revised Code §§ 4117.11(A)(1), (A)(2), and (A)(3).

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

- (1) Provide access to Professionals Guild of Ohio representatives to meet with Registered Service Worker 1s during non-work time;
- (2) Cooperate with the SERB Representation Section and the Professionals Guild of Ohio to schedule the rerun representation election,
- (3) Post for 60 consecutive calendar days in all of the usual and customary posting locations where Registered Service Worker 1s work, the Notice to Employees furnished by the Board stating that Respondent shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B) therein, and
- (4) Notify SERB via electronic mail within 20 calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

**SERB v. Clark County Board of Developmental Disabilities, Case No. 2009-ULP-06-0357**

\_\_\_\_\_  
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.