

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Toledo,

Respondent.

Case No. 2010-ULP-05-0147

STATE EMPLOYMENT  
RELATIONS BOARD  
2011 APR 29 P 2:30

**ORDER  
(OPINION ATTACHED)**

Before Chair Zimpher, Vice Chair Spada, and Board Member Brundige: April 28, 2011.

On May 3, 2010, the Toledo Police Command Officers' Association ("the Intervenor") filed an unfair labor practice charge against the City of Toledo ("Respondent"). On June 3, 2010, SERB found probable cause to believe that Respondent had violated O.R.C. §§ 4117.11(A)(1) and (A)(5) by unilaterally increasing the health-care premiums for members of the Intervenor and rescinding Respondent's 10% payment into the Intervenor's pension fund, authorized the issuance of a complaint, directed the parties to unfair labor practice mediation, and directed this matter to an expedited hearing before the Board.

On July 12, 2010, a Complaint and Notice of Hearing was issued. On July 26, 2010, Respondent filed its Answer to the Complaint.

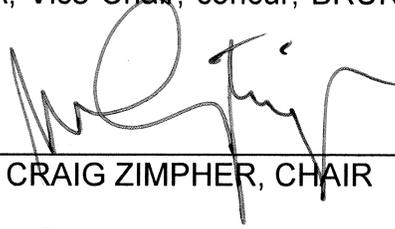
On January 24, 2011, the hearing was held and the parties filed two joint stipulations. On February 4, 2011, the transcript ordered by the parties was filed with SERB. On February 23, 2011, the parties simultaneously filed post-hearing briefs. On February 28, 2011, the parties simultaneously filed reply briefs.

After reviewing the unfair labor practice charge, Complaint, Answer, transcript, and all other filings in this case, we adopt the Findings of Fact and Conclusions of Law in the attached Board Opinion, incorporated by reference, finding that Respondent did

not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally increased the health-care premiums for members of the Toledo Police Command Officers' Association and rescinded its 10% payment into the Toledo Police Command Officers' Association's pension fund. Consequently, we hereby dismiss the complaint and dismiss with prejudice the unfair labor practice charge.

It is so ordered.

ZIMPHER, Chair, and SPADA, Vice Chair, concur; BRUNDIGE, Board Member, dissents.



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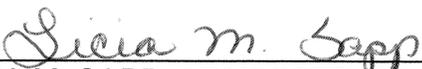
W. CRAIG ZIMPHER, CHAIR

### 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 29<sup>th</sup> day of April, 2011.



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LICIA M. SAPP, ADMINISTRATIVE ASSISTANT

**STATE OF OHIO  
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In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Toledo,

Respondent.

Case No. 2010-ULP-05-0147

**OPINION**

ZIMPHER, Chair:

This unfair labor practice case comes before the State Employment Relations Board (“SERB” or “the Complainant”) upon the issuance of a Complaint and a hearing held by the Board on January 11, 2011. The parties filed post-hearing briefs on February 22, 2011, and reply briefs on February 28, 2011. For the reasons below, we find that the City of Toledo (“the Respondent”) did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally increased the health-care premiums for members of the Toledo Police Command Officers’ Association and rescinded its 10% payment into the Toledo Police Command Officers’ Association’s pension fund.

**I. FINDINGS OF FACT**<sup>1</sup>

1. The City of Toledo (“the City”) is a “public employer” as defined by O.R.C. § 4117.01(B). (Complaint ¶ 1; Answer ¶ 1.)

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<sup>1</sup> References to the record are intended for convenience only and are not intended to suggest that such references are the sole support in the record for the related Finding of Fact.

2. The Toledo Police Command Officers' Association ("TPCOA") is an "employee organization" as defined by O.R.C. § 4117.01(D) and is the deemed-certified, exclusive representative for the Command Officers employed by the City. (Complaint ¶ 2; Answer ¶ 1.)

3. On May 3, 2010, TPCOA filed an unfair labor practice charge with SERB, pursuant to and in accordance with O.R.C. § 4117.12(B) and O.A.C. Rule 4117-7-01. (Complaint ¶ 3; Answer ¶ 1.)

4. On June 3, 2010, SERB determined that probable cause existed for believing that the City had committed or was committing unfair labor practices, authorized the issuance of a complaint, and referred the matter to hearing. (Complaint ¶ 4; Answer ¶ 1.)

5. Negotiations for a successor collective bargaining agreement ("CBA") began in October 2008, and the CBA was ratified by City Council in August 2009. The CBA is effective from January 1, 2009 through December 31, 2011, although the CBA was not actually finalized and approved until August 18, 2009. The parties' CBA contains a grievance process that results in final and binding arbitration. (Complaint ¶ 5; Answer ¶ 1; Complainant's/Intervenor's Exhibit 1.)

6. Articles 2109.64 and 2109.65 of the parties' CBA address matters pertaining to health-care insurance premiums and pension benefits, respectively. Article 2109.64 provides cost caps of \$25.00, \$45.00, or \$55.00 on the amount bargaining-unit members pay for health insurance premiums, depending upon an individual's coverage. Article 2109.65 provides that the City is to pick up the full employee pension contribution amount, which is currently 10%. (Complaint ¶ 6; Answer ¶ 1.)

7. On March 30, 2010, City Council passed City of Toledo Ordinance 103-10, which unilaterally increased TPCOA members' health insurance premiums and eliminated the City's pension pick-up requirement. The City claimed the existence of exigent circumstances. (Complaint ¶ 7; Answer ¶ 1.)

8. On March 31, 2010, TPCOA filed a class action grievance regarding the changes made in the March 30, 2010 Ordinance 103-10. On April 5, 2010, Director of Public Safety Shirley Green denied the grievance. On April 22, 2010, Chief Michael

Navarre denied any wage-related grievance filed after April 22, 2010, stating that such grievances were “not subject to arbitration because they involve unilateral changes to the Collective Bargaining Agreement, via the enactment of Ordinance 103-10, that affects wages, hours, and terms and conditions of employment within the meaning of R.C. 4117.08(C).” (Complaint ¶ 8; Answer ¶ 1.)

9. Since that time, the City has repealed the exigent circumstances ordinance covering other unions, specifically AFSCME Locals 7 and 2058 and the Toledo Fire Chiefs’ Association. The City negotiated concessions with each bargaining unit, other than the TPCOA, regarding pension pick-up and contractually required health insurance co-pays for members of the Toledo Police Patrol Association, a much larger bargaining unit than the TPCOA. Further, the City has restored its pension pick-up for exempt employees who are not covered by a collective bargaining agreement. Except for TPCOA, the City has entered into memorandums of understanding with all other bargaining units in the City and has rescinded those units’ exigent circumstances ordinances. (Complaint ¶ 9; Answer ¶ 3.)

10. Ordinance 103-10 increases the bargaining-unit members’ health-insurance premiums and rescinds the City’s payment of 10% pension pick-up.

11. On or about March 31, 2010, TPCOA filed a class-action grievance regarding the changes made in the March 30, 2010 Ordinance 103-10.

12. On or about April 5, 2010, Director of Public Safety Shirley Green denied the class-action grievance mentioned in paragraph 11.

13. On or about April 22, 2010, Chief Michael Navarre, acting as an agent or representative of the City, began denying all wage-related grievances filed after April 22, 2010, stating that such grievances were “not subject to arbitration because they involve unilateral changes to the Collective Bargaining Agreement, via the enactment of Ordinance 103-10, that affects wages, hours, and terms and conditions of employment within the meaning of R.C. 4117.08(C).”

14. On or about April 19, 2010, the City repealed the “exigent circumstances” ordinance covering AFSCME Locals 7 and 2058 and the Toledo Fire Chiefs’ Association. Except for TPCOA, the City has entered into memorandums of understanding with all other

bargaining units in the City and has rescinded those units' "exigent circumstances" ordinances.

15. City Council has now approved a budget surplus of \$1.1M and plans to add 60 police officers in 2010.

16. The City is using the repeal of the City's contribution to TPCOA's pension fund to pay for the new police officers.

17. The fiscal year for the City is the calendar year, January 1 through December 31.

18. Mayor Michael Bell was elected Mayor of Toledo in November 2009, and took office on January 4, 2010. (Transcript ["T."] 141)

19. When Mayor Bell took office, a balanced budget for the City's general fund had been proposed in November 2009 by the previous City administration, but had not been enacted or approved by City Council. (T. 139)

20. When Mayor Bell took office on January 4, 2010, the budget deficit for Fiscal Year 2010 was projected to be \$37 million. The carry-over budget deficit from Fiscal Year 2009 was \$8.4 million. (T. 139)

21. The City was required by Ohio Revised Code Chapter 5705 and the Toledo City Charter to have a balanced budget for each fiscal year 2010, approved by City Council, on or before March 31 of the fiscal year. For Fiscal Year 2010, the City was required to have a balanced budget that was approved by City Council by March 31, 2010. (T. 141)

22. The City had no "rainy-day" fund to help balance the budget. (T. 176)

23. The projected income tax receipts for Fiscal Year 2009 were \$202.3 million, which was less than the \$211 million that had been stated in the first budget proposal submitted in November 2009. Income tax receipts constitute the majority of the funding for City's general fund budget. (T. 140, 143)

24. The costs of all safety forces, including the command officers of TPCOA, are paid for out of the City's general fund budget. (T. 146-47)

25. Mayor Bell met with the leaders of all of the unions, including the TPCOA, on January 10, 2010, to discuss the budget deficit and enlist the help of the unions to address the shortfall. (T. 144-45)

26. Mayor Bell also met with members of the community, including business leaders, in January and February of 2010 to discuss the budget. Union leaders were invited to those meetings as well, and some leaders did attend and participate. (T. 150-54)

27. Mayor Bell and his staff also met directly with Toledo citizens, in each of the six City Council districts, to discuss the budget and seek input on closing the deficit. (T. 150-54)

28. The process of balancing the general fund budget involved a multi-step strategy of: cutting expenditures; increasing revenue through fee increases to the general public; selling City-owned assets; and, seeking concessions from City employees. (T. 157)

29. On February 10, 2010, the general fund deficit was projected to be \$48.2 million for Fiscal Year 2010. This amount included a 2009 carry-over deficit of \$8.4 million. (T. 155-56)

30. The \$48.2 million deficit is approximately 24% of the 2009 revenues of \$202 million.

31. Also on February 10, 2010, Mayor Bell and his staff specifically met with leaders of all eight (8) of the City's bargaining units. At that meeting, the budget deficit was discussed and each union was asked for mid-term contract concessions. (T. 154-55,166-67; City Exhibit ["City Exh.,"] 28)

32. At the February 10, 2010 meeting, the Mayor proposed, for *all* City employees, eliminating pension pick-ups, requiring employees to pay twenty percent (20%) of their health care costs, and a ten percent (10%) wage reduction. (T. 154-55,166-67; City Exh. 28)

33. All of the union leaders, including TPCO A's, were requested to respond to the Mayor's request for concessions by February 25, 2010. (T. 154-55,166-67; City Exh. 28)

34. During the month of February 2010, the mayor and his staff continued to meet with citizens of Toledo to discuss the general fund budget and gather ideas to balance the budget. (T. 158-59; City Exh. 8 and 9)

35. Many ideas to balance the budget were proposed, including imposing an entertainment tax, which was an additional fee for sporting events and concerts. That tax was not adopted due to strong opposition. (T. 165; City Ex. 10)

36. None of the unions, including the TPCOA, responded by February 25, 2010 response date. (T. 165; City Ex. 10)

37. On Friday, February 26, 2010, the members of Toledo City Council were provided with proposed budget ordinances, which included the ordinances declaring exigent circumstances.

38. During the first half of March, 2010, the Mayor and his team discussed with members of City Council different ways to balance the budget. Due to cutbacks and other measures, on March 15, 2010, the budget deficit was reduced to \$28.4 million. (T. 167-69; City Exh. 12)

39. One option that was considered to address the \$28.4 million deficit was layoffs of City employees, including police patrol officers and command officers. (T. 167-69; City Exh. 12)

40. On March 22, 2010, the Toledo police patrolman's union ("TPPA"), the largest safety force union, reached a tentative agreement to accept mid-contract concessions to help balance the budget. That agreement was rejected by the union membership.

41. Also on March 22, 2010, Mayor Bell and his staff met with the TPCOA leadership; the TPCOA was given a specific dollar amount, \$902,000, to reach in concessions. To reach that amount, suggestions were made about eliminating or reducing pension pick-up payments by the City, increasing the employees' share of health care costs, but the Union was free to reach that amount by other concessions. No agreement was reached between the City and TPCOA. (T. 82-84, 247-48)

42. On March 23, 2010, the fire fighters union ("Local 92") reached a tentative agreement on concessions. Local 92's membership did ratify that agreement.

43. The concessions reached by Local 92 totaled \$3.3 million in savings. (T. 184)

44. On March 24, 2010, the Toledo *Blade* reported on the tentative agreements reached between the City and the TPPA and Local 92. Those articles detailed the union concessions.

45. Having not heard from the TPCOA leadership since the March 22, 2010 meeting, Safety Director Shirley Green called union president Sergeant Terry Stewart on March 26, 2010,

and inquired as to whether the union was able to offer any concessions. (T. 89, 248-49)

46. Sergeant Stewart did not offer any concessions. (T. 89, 248-49)

47. On March 30, 2010, Toledo City Council passed a number of ordinances that enacted a balanced budget for Fiscal Year 2010. Those ordinances included measures to increase revenue, decrease expenditures, as well as a declaration of exigent circumstances, an elimination of pension pick-ups, and an increase in health care costs for all exempt City employees, and all members of 6 of the 8 City bargaining units. (T. 141-42)

48. Had Toledo City Council not taken any action to balance the budget, it would have been impossible for the City to pay its bills past April 1, 2010. The City would have shut down at that point.

49. Members of 2 City bargaining units, Local 92 and Teamsters, were excepted from the elimination of pension pick-ups and an increase in health care costs.

50. Also included in the budget ordinances was an increase in the refuse pickup fee for all City residents.

51. On March 31, 2010, Mayor Bell signed the budget ordinances into law. The 2010 general fund budget was balanced.

52. In mid-April, 2010, members of 4 other City bargaining units reached agreement with the City on concessions.

53. On April 21, 2010, the TPCOA reached tentative agreement with the City. The membership voted, and rejected, the agreement.

54. On May 14, 2010, after a mediation with TPPA leadership, the City reached a second tentative agreement with TPPA. That agreement was ratified by TPPA members.

55. By reaching agreement with the TPPA, the City was able to avoid laying off 125 police officers. (T. 181-82; City Exh. 21)

56. No employees were laid off as a result of balancing the City budget.

57. The TPCOA never reached agreement with the City regarding concessions.

58. The TPCOA was the only City bargaining unit that did not reach an agreement.

## II. DISCUSSION

The City is alleged to have violated O.R.C. §§ 4117.11(A)(1) and (A)(5), which state 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. of the Revised Code[;]

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

The Complainant has the burden of demonstrating by a preponderance of the evidence that the Respondent has committed an unfair labor practice. O.R.C. § 4117.12(B)(3).

Good-faith bargaining is determined by the totality of the circumstances. *In re Dist 1199/HCSSU/SEIU, AFL-CIO*, SERB 96-004 (4-8-96). Pursuant to O.R.C. § 4117.01(G), the duty to bargain does not compel either party to agree to a proposal or require either party to make a concession. A circumvention of the duty to bargain, regardless of subjective good faith, is unlawful. *In re Mayfield City School Dist Bd of Ed*, SERB 89-033 (12-20-89); *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107 (1962).

In *In re Franklin County Sheriff*, SERB 90-012 (7-18-90) ("*Franklin County Sheriff*") at pp. 3-79 – 3-80, SERB found that the language of O.R.C. Chapter 4117 establishes that the statutory dispute resolution procedure does not apply to midterm disputes. "In the absence of a settlement procedure, the Board will deal with specific incidents on a case-by-case basis." *Id* at 3-80.

In *In re SERB v. Youngstown City School Dist Bd of Ed*, SERB 95-010 (6-30-95) ("*Youngstown*"), SERB discussed the requirements for midterm bargaining over subjects not covered by the collective bargaining agreement. SERB held that an employer may implement its last, best offer when the parties have reached ultimate impasse in bargaining

or when the employer has made good-faith attempts to bargain the matter before time constraints necessitated the implementation of its last, best offer. *Id.*

Ultimate impasse is the point at which good faith negotiations toward reaching an agreement have been exhausted. *In re Vandalia-Butler City School Dist Bd of Ed*, SERB 90-003 (2-9-90) (“*Vandalia-Butler*”). During negotiations for a successor agreement, the employee organization may pursue issues that required mandatory midterm bargaining and were not resolved by mutual agreement as part of its overall contract negotiations, including the submission of the issues to any applicable dispute settlement procedure that may include binding conciliation or arbitration, or the right to strike as permitted by statute. SERB has not yet addressed what standard to apply to determine whether an unfair labor practice has been committed when a party unilaterally modifies a provision in an existing collective bargaining agreement.

Management decisions that are found, on balance, to be mandatory subjects must be bargained before implementation, upon notice by the employer and timely request by the employee organization, except where emergency situations render prior bargaining impossible. *In re Toledo City School Dist Bd of Ed*, SERB 2001-005 (9-20-2001) (“*Toledo Schools*”); *SERB v. Youngstown City School Dist. Bd. of Ed.*, SERB 95-010 (1995) (“*Youngstown*”). The *Toledo Schools* decision states the controlling legal principle:

Where the parties have not adopted procedures in their collective bargaining agreement to deal with midterm bargaining disputes, SERB will apply the following standard to determine whether an unfair labor practice has been committed when a party unilaterally modifies a provision in an existing collective bargaining agreement after bargaining the subject to ultimate impasse as defined in *Vandalia-Butler* :

A party cannot modify an existing collective bargaining agreement without the negotiation by and agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unforeseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement became effective that requires a change to conform to the statute.

In addition, to clarify *Youngstown*, follow *Franklin County Sheriff*, and assure consistency in future cases involving issues not covered in the provisions of

a collective bargaining agreement, but which require mandatory midterm bargaining, SERB will apply the same two-part test as stated above.

This case does not involve the “higher-level legislative body” exception under *Toledo Schools*; the Toledo City Council is the “same-level” legislative body for the public employer in this case. Thus, the second part of the foregoing test is inapplicable herein. The issue before us is whether immediate action was required by the City due to exigent circumstances that were unforeseen at the time of negotiations, thereby requiring the City to modify an existing collective bargaining agreement without the negotiation by and agreement of both parties.

Michael Bell was elected to the office of Mayor of the City of Toledo in November 2009. A balanced budget for the City's general fund had been proposed by the previous City administration in November 2009, but a budget for Fiscal Year 2010 had not been enacted or approved by City Council. Upon taking office on January 4, 2010, Mayor Bell was presented with a budget deficit for Fiscal Year 2010 that was projected to be \$37 million.

The carry-over budget deficit from Fiscal Year 2009 was \$8.4 million. The City had no “rainy-day” fund to help balance the budget. The projected income tax receipts for Fiscal Year 2009 was \$202.3 million, which was less than the \$211 million that had been stated in the first budget proposal submitted in November 2009. Income tax receipts constitute the majority of the funding for City's general fund budget. The costs of all safety forces, including the command officers of TPCOA, are paid for out of the City's general fund budget.

On January 10, 2010, Mayor Bell met with the leaders of all of the unions, including the TPCOA, to discuss the budget deficit and enlist the help of the unions to address the shortfall. Mayor Bell also met with members of the community, including business leaders, in January and February of 2010 to discuss the budget. Union leaders were invited to those meetings as well; some leaders did attend and participate.

Mayor Bell and his staff also met directly with Toledo citizens, in each of the six City Council districts, to discuss the budget and seek input on closing the deficit. The process of balancing the general fund budget involved a multi-step strategy of: cutting expenditures; increasing revenue through fee increases to the general public; selling City-owned assets; and, seeking concessions from City employees.

On February 10, 2010, the general fund deficit was projected to be \$48.2 million for Fiscal Year 2010. This amount included a 2009 carry-over deficit of \$8.4 million. The \$48.2 million deficit was approximately 24% of the Fiscal Year 2009 revenues of \$202 million. The \$48.2 million deficit was the largest ever faced by the City, and was the result, in large part, of a steep decline in income tax revenue collected by the City.

Also on February 10, 2010, Mayor Bell and his staff specifically met with leaders of all eight of the City's bargaining units. At that meeting, the budget deficit was discussed and each union was asked for mid-term contract concessions. At that meeting, Mayor Bell proposed, for all City employees: eliminating pension pick-ups, requiring employees to pay twenty percent (20%) of their health-care costs, and a ten percent (10%) wage reduction. All of the union leaders, including TPCOA's, were requested to respond to the Mayor's request for concessions by February 25, 2010.

"Exigent circumstances" are a "situation that demands unusual or immediate action and that may allow people to circumvent usual procedures." BLACK'S LAW DICTIONARY, EIGHTH EDITION. The employer's predicament – facing a 24% funding deficit and requiring a budget that must be balanced, submitted to the legislative body, and a balanced budget adopted by said legislative body in less than three months, with potential spending reductions spread across six different bargaining units as well as exempt employees – certainly fits the description of exigent circumstances in the present case.

Mayoral Candidate Michael Bell, while campaigning for the office, attempted to ascertain the City's financial situation. He was told that the City had a potential deficit for the next fiscal year of \$10-15 million in April 2009, \$20 million during the summer of 2009, and \$30 million by the election. He was later told that the potential deficit would be \$37 million (in December 2009), then \$40 million (by the time he took office in January 2010), and finally \$48.2 million (in February 2010). With a moving target that escalates from a potential deficit of 5% of expenditures to 24% of the Fiscal Year 2009 revenues, it would have been impossible to have foreseen those changes at the time that negotiations concluded in July 2009. This foreseeability determination is further complicated by the retroactivity

within the CBA – it was negotiated in July 2009, but is effective from January 1, 2009 through December 31, 2011.

Taking all of the facts together, we find that the City did not commit an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) when it modified its existing collective bargaining agreement with the TPCOA without the negotiation by and agreement of both parties because immediate action was required due to exigent circumstances that were unforeseen at the time of negotiations.

### **III. CONCLUSIONS OF LAW**

1. The City of Toledo is a “public employer” as defined by O.R.C. § 4117.01(B).
2. The Toledo Police Command Officers’ Association is an “employee organization” as defined by O.R.C. § 4117.01(D) and is the deemed-certified, exclusive representative for the Command Officers employed by the City.
3. The City’s general budget fund deficit of \$48.2 million for Fiscal Year 2010 was not foreseeable at the time of the negotiations between the City and the TPCOA in the summer of 2009. The City was faced with a \$48.2 million deficit and a March 31, 2010 deadline to fix it or face a City government shutdown; if the budget was not balanced by March 31, 2010, the City would have insufficient funds to continue operating essential services, i.e., police, fire, and refuse-collection services.
4. In order to balance the budget and avoid a shutdown, immediate action was required by City Council to address the exigent circumstances that were not foreseeable at the time of the negotiations between the City and the TPCOA in 2009.
5. The City did not commit an unfair labor practice in violation of Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally increased the health-care premiums for members of the Toledo Police Command Officers’ Association and rescinded its 10% payment into the Toledo Police Command Officers’ Association’s pension fund.

#### **IV. DETERMINATION**

For the reasons above, we find that Respondent City of Toledo did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally increased the health-care premiums for members of the Toledo Police Command Officers' Association and rescinded its 10% payment into the Toledo Police Command Officers' Association's pension fund. As a result, the Complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

Spada, Vice Chair, concurs in the foregoing Opinion; Brundige, Board Member, concurs in part and dissents in the final determination in a separate Dissenting Opinion.

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Toledo,

Respondent.

Case No. 2010-ULP-05-0147

**DISSENTING OPINION**

BRUNDIGE, Board Member:

Because the circumstances in this case occurred during the term of a collective bargaining agreement, this matter turns on the application of *In re Toledo City School Dist Bd of Ed*, SERB 2001-005 (9-20-2001) (“*Toledo Schools*”). In that case, the Board established the mechanism by which mid-term bargaining might occur if the parties had not provided for such possibility within their collective bargaining agreement.

The two circumstances that permit bargaining during the term of a collective bargaining agreement and when the parties are not in agreement are: “(1) exigent circumstances that were unforeseen at the time of negotiations or (2) legislative action taken by a higher legislative body after the agreement became effective that requires a change to conform to the statute.” *Id* at 3-29.

The issues presented are first, how should the Board define “exigent circumstances” and do they exist in this case? Secondly, if exigent circumstances do exist, what are the consequences for bargaining? Based upon the BLACK’S LAW DICTIONARY definition of *exigent circumstances*, the majority explicitly addresses the first

part by determining that the projected 48.2 million dollar budget shortfall for FY 2010 constituted *exigent circumstances*. In this specific case, presented with the size of the projected deficit as a percent of the total General Fund Budget, I agree with the majority's determination in this regard, while adding the caution that a lesser budget shortfall does not, in and of itself, constitute *exigent circumstances*.

The second key issue is addressed only implicitly in the judgment. Having found that the City Council faced exigent circumstances, the majority holds, *ipso facto*, that the City Council did not commit an unfair labor practice when it made changes with no further bargaining. Thus, the majority assumes that once exigent circumstances are duly declared, the duty to bargain is over: the union disappears, and the employer is free to make whatever changes it wants, in whatever manner it deems appropriate. I do not read *Toledo Schools* so broadly, and for the reasons that follow, I respectfully dissent.

At the outset, it should be noted that *Toledo Schools* does not explicitly answer the precise question here that the majority seems to assume in drawing its conclusion—whether exigent circumstances alone is a sufficient condition for unbargained-for, unilateral modification. It is, at best, ambiguous. *Toledo Schools* states only that “a party cannot modify an existing collective bargaining agreement without the *negotiation by and agreement of both parties unless* immediate action is required \* \* \* by exigent circumstances.” *Id.* at 3-29. In other words, exigent circumstances is a *necessary* but not *sufficient* condition for unilateral modification; there may be other requirements as well. Had the Board meant to make exigent circumstances both necessary and sufficient for unilateral modification, it could have simply so stated as such: “A party *can* modify an existing collective bargaining agreement *if and only if* immediate action is required \* \* \* due to exigent circumstances.”

*Toledo Schools* was adopted to deal with the specific situation where no vehicle existed to re-open the collective bargaining agreement (“CBA”) currently in place. The “*exigent circumstances*” or “*higher legislative body*” exceptions establish the ability to re-open the current agreement. Re-opening requires good faith bargaining prior to any unilateral changes to the existing agreement.

It is not an unfair labor practice to declare exigent circumstances. The existence and validity of such circumstances is determined by SERB on a case-by-case basis.

The question that remains is what happens after exigent circumstances are declared. In the instant case, the City Council passed an ordinance declaring exigent circumstances and in the same meeting increasing health-care premiums and eliminating the 10% pension pickup for members of this bargaining unit.

No bargaining took place. To allow an employer to unilaterally pick sections of the CBA and abolish them without any attempt at good-faith bargaining flies in the face of SERB's mission to *promote orderly and constructive labor relations* and, I believe, of the *Toledo Schools* decision and, thus, constitutes a violation of O.R.C. § 4117.11(A)(5).

Meetings and conversations were held between the Administration and the various unions, both jointly and separately, but nothing in the record indicates that these exchanges rose to the level of good-faith bargaining.

It can be argued that the Employer was compelled to take such action since it was up against the deadline for having a balanced budget and *Toledo Schools* states: "A party cannot modify an existing collective bargaining agreement without the negotiation by and agreement of both parties unless immediate action is required[.]" *Id.*

It must be noted, however, that the new administration knew the depth of the budget problem early in January. The action and timing of the declaration of *exigent circumstances* was totally under the control of the Employer.

Following the determination of *exigent circumstances*, my reading of *Toledo Schools* convinces me that negotiation, or "bargaining," is still required, but that ultimate agreement is not.

This conclusion is further buttressed by another statement in the same opinion. Specifically, the Board says, "SERB has not yet addressed what standard to apply to determine whether an unfair labor practice has been committed when a party unilaterally modifies a provision in an existing collective bargaining agreement." *Id.* at 3-27. In other words, SERB has not decided what elements are required for unilateral modification.

It appears the majority simply concludes, however, that exigent circumstances is not only necessary for unilateral modification but also sufficient. I believe that such a ruling, while not unreasonably drawn, ignores the critical balance that the courts, this Board, and the legislature have struck when creating O.R.C. Chapter 4117.

There is no argument that the employer needs flexibility, but this flexibility has profound implications for collective bargaining, and it must not be given without caution. Therefore, I believe that after exigent circumstances have been declared, the employer must bargain with the union to the extent reasonably practicable.

Exigent circumstances undoubtedly require exigent decisions, and exigent decisions require greater flexibility. But greater flexibility cannot mean *unlimited flexibility*. After all, who better to help decide how those exigencies are to be distributed than those most affected by them? In this case, subsequent bargaining might have yielded a different set of concessions, or changes, or could have led to ultimate impasse and implementation of the Employer's last, best offer. In any case, the Employer would have complied with its duty to bargain in good faith. Absent such action, I believe that the Employer violated O.R.C. § 4117.11(A)(5) by failing to bargain in good faith following the declaration of *exigent circumstances*.



W. Craig Zimpher, Chair  
Robert F. Spada, Vice Chair  
N. Eugene Brundige, Board Member

John R. Kasich, Governor

Christine A. Dietsch, Executive Director

Case No. 2010-ULP-05-0147

## 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 29<sup>TH</sup> day of April, 2011.

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

J. Russell Keith  
General Counsel and Assistant Executive Director