

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

Mahoning County Board of Developmental Disabilities,

Respondent.

Case No. 2009-ULP-04-0144

**ORDER
(OPINION ATTACHED)**

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

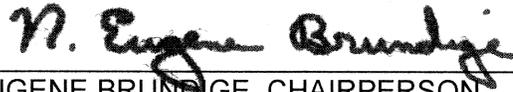
On April 8, 2009, the Mahoning Education Association of Developmental Disabilities ("the Union or "Intervenor") filed an unfair labor practice charge against the Mahoning County Board of Developmental Disabilities ("Respondent"). On July 23, 2009, the State Employment Relations Board ("Board" or "Complainant") 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) and (A)(5), but not (A)(2) or (A)(8), by releasing bargaining proposals directly to the bargaining-unit members and refusing to maintain the status quo regarding arbitrations during negotiations.

On April 7, 2010, a hearing was held. On August 3, 2010, the Administrative Law Judge's Proposed Order was issued. On August 13, 2010, the Administrative Law Judge's Corrected Proposed Order was issued, recommending that the Board find that Respondent did not violate O.R.C. §§ 4117.11(A)(1) or (A)(5). On September 2, 2010, Intervenor filed exceptions to the Proposed Order. On September 7, 2010, Counsel for Complainant filed exceptions to the Proposed Order. On September 20, 2010, Respondent filed its response to the exceptions.

After reviewing the unfair labor practice charge, Complaint, Answer, transcript, and all other filings in this case, the Board adopts additional Finding of Fact No. 5, which reads: "Because the issue related to the grievance was settled prior to the evidentiary hearing, the Union's charge that the Employer failed to maintain the status quo ante is moot." The Board hereby adopts the Findings of Fact, as amended, and Conclusions of Law in the Administrative Law Judge's Corrected Proposed Order, finding that Respondent did not violate Ohio Revised Code §§ 4117.11(A)(1) or (A)(5). Consequently, the complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

It is so ordered.

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



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 6th day of June, 2011.



MICHELLE HURSEY, ADMINISTRATIVE ASSISTANT

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OPINION

BRUNDIGE:

On April 8, 2009, the Mahoning Education Association of Developmental Disabilities (“the Union”) filed an unfair labor practice charge against the Mahoning County Board of Developmental Disabilities (“the Employer”), alleging violations of Ohio Revised Code (“O.R.C.”) §§ 4117.11(A)(1), (A)(2), (A)(5), and (A)(8). The charge was precipitated by two supposed instances of misconduct. In the first, the Union alleged that the Employer engaged in direct dealing with bargaining-unit members by intentionally leaving a document entitled “MEADD Negotiations Management Update” where members would find it. The Union also alleged that the Employer failed to maintain the status quo when it refused to arbitrate any current or future grievances.

On July 23, 2009, the State Employment Relations Board (“the Board”) found probable cause to believe that both instances violated O.R.C. §§ 4117.11(A)(1) and (A)(5). All other aspects of the charge, including the O.R.C. §§ 4117.11(A)(2) and (A)(8) allegations, were dismissed for lack of probable cause.

On February 4, 2010, the Board issued a complaint. On April 7, 2010, an evidentiary hearing was held in which testimonial and documentary evidence was

presented. Afterward, both parties filed post-hearing briefs. The Administrative Law Judge issued a Proposed Order on April 13, 2010, recommending that the Board find that the Employer did not violate O.R.C. §§ 4117.11(A)(1) or (A)(5).

On September 2, 2010 the Union filed exceptions to the Proposed Order. On September 7, 2010, the Union's representative filed exceptions to the Proposed Order. On September 20, 2010, the Employer filed a response to the exceptions. For the reasons set forth in this opinion, we find that the Employer did not violate O.R.C. §§ 4117.11(A)(1) or (A)(5) as related to the first charge of direct dealing.

I. BACKGROUND

On September 1, 2004, the parties entered into a collective bargaining agreement ("CBA") that expired on August 31, 2007. On June 26, 2007, the Union filed a statutory Notice to Negotiate with the Employer, and the parties began negotiations for a successor collective bargaining agreement. As of the date of the hearing, the parties had not obtained a successor agreement.

In April 2008, a union member filed a grievance. The grievance went through the levels identified in the expired CBA's grievance procedure. Because no resolution was achieved, the grievance was ultimately submitted for "final and binding arbitration," as required by the expired CBA.

Before arbitration, the Employer raised the question of arbitrability. The arbitration was then bifurcated. On January 13, 2009, an arbitration hearing was held regarding whether "the grievance procedure and arbitration clause remained in effect after the Agreement expired so that the grievance is arbitrable[.]" On March 18, 2009, the arbitrator rendered a decision, concluding that he was "without jurisdiction."

On April 2, 2009, Victor Marchese, chief spokesperson for the Union, was handed a piece of paper from a bargaining-unit member. The member told him it had been found on top of a tow motor, in an area where there were only bargaining-unit members. The document was entitled "MEAD NEGOTIATIONS MANAGEMENT UPDATE," and it contained information about the ongoing negotiations between the

Union and the Employer. Who found the document, who authored it, and why it was created, however, remained unknown.

II. DISCUSSION

In the Proposed Order, the Administrative Law Judge (“the ALJ”) recommended that the Board find the following: (1) that the Union timely filed its unfair labor practice charge; (2) that the Employer did not violate O.R.C. §§ 4117.11(A)(1) or (A)(5) when a bargaining-unit member obtained the “Negotiations Management Update” document; and (3) that the Employer did not violate O.R.C. §§ 4117.11(A)(1) or (A)(5) by refusing to arbitrate a grievance as required by the parties’ expired collective bargaining agreement.

We agree with the ALJ’s first and second recommendations, and we adopt her Conclusions of Law with regard to these recommendations. We do not adopt the ALJ’s third recommendation, however. That issue, for the reasons set forth below, is moot.

“The doctrine of mootness is rooted in the ‘case’ or ‘controversy’ language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint.” *Bradley v. Ohio State Dept. of Job & Family Servs.*, 2011-Ohio-1388, ¶ 11, (10th Dist Ct App, Franklin, 3-24-2011) citing *James A. Keller, Inc. v. Flaherty* (1991), 74 Ohio App.3d 788, 791. “While Ohio has no constitutional counterpart to Section 2, Article III, the courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question.” *Id.*

“The duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.” *Miner v. Witt* (1910), 82 Ohio St. 237, 238, 92 N.E. 21, 22, (quoting *Mills v. Green* (1895), 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293, 293-294). A case becomes moot before a court when, as a result of subsequent events, “the legal issue is no longer amenable to review[,] such that judicial relief would serve no purpose.” *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 530-31 (6th Cir.2000); see also *Sinclair Refining Co.*, 145 NLRB 732 (1963)

(holding, in the context of an information request, where the employer subsequently furnishes the precise information requested, the case should be dismissed as moot) and *Ohio Civ. Serv. Emp. Assn., AFSCME, Local 11, AFL-CIO v. Ohio Dept. of Transp.*, 104 Ohio App.3d 340 (Tenth Dist.1995) (“*OCSEA v. AFSCME*”).

In *OCSEA v. AFSCME*, for example, OCSEA filed an unfair labor practice charge with SERB, alleging that the unilateral implementation of a “no-smoking” policy by the Ohio Department of Transportation (“ODOT”) violated O.R.C. §§ 4117.11(A)(1) and (A)(5), and asserting that the policy was a mandatory subject of bargaining under O.R.C. §§ 4117.08(A) and (C). While the parties were awaiting SERB’s final order, the governor of Ohio issued an executive order to prohibit smoking in most State facilities, including those operated by ODOT. As a result, OCSEA moved to withdraw its unfair labor practice charge and to dismiss SERB’s complaint on the grounds that the executive order, which superseded ODOT policy, had rendered the controversy regarding ODOT’s no-smoking policy moot.

SERB denied OCSEA’s motion, finding that the case raised the larger issue of how to identify subjects of mandatory bargaining under O.R.C. § 4117.08. Accordingly, SERB issued an opinion and order, setting forth a new balancing test for distinguishing between subjects of mandatory and permissive bargaining.

OCSEA appealed. Although the trial court upheld SERB’s order, the Tenth District reversed, stating:

[A]s a result of the executive order which created a smoke free work place in most state facilities, ODOT employees are prohibited from smoking at work, even if OCSEA were to prevail on its claim respecting the ‘no-smoking’ policy adopted by ODOT. The executive order thus rendered moot the justiciable controversy between the parties, as any order requiring ODOT to bargain over the implementation of a smoking policy was foreclosed by the executive order.

Id. Thus, SERB's decision was vacated.¹

The Tenth District Court of Appeal's decision in *OCSEA v. AFSCME* controls here as well. In April 2008, an individual filed a grievance. The grievance proceeded through the grievance procedure in accordance with the collective bargaining agreement, and then it was submitted for arbitration. Sometime before the SERB proceeding, however, the grievance was settled. The Union therefore, does not seek relief pertaining to the specific grievance that went to arbitration that caused this action to be filed; that grievance was *ultimately settled*. The Union argues, rather, that the Employer is bound to follow the grievance and arbitration procedure for "future grievances that may arise during the on-going negotiations." *ALJ Recommendation*, p. 10 (Emphasis added).

Because this controversy was rendered moot by settlement of the underlying grievance, any further opinion we might render on the survival of arbitration provisions past expiration of collective bargaining agreement would be, in effect, an advisory opinion. O.R.C. Chapter 4117 does not authorize SERB to issue advisory opinions. Id. Moreover, were we to issue an opinion on this issue and then use it in the future, that decision may be deemed an improperly promulgated rule. See, e.g., *Ohio Nurses Assn., Inc. v. Ohio State Bd. of Nursing Edn. & Nurse Registration* (1989), 44 Ohio St.3d 73, 540 N.E.2d 1354.

III. CONCLUSION

For the reasons stated above, we do not adopt the Administrative Law Judge's third recommendation and dismiss as moot the refusal-to-arbitrate allegation. As also stated above, we agree with the Administrative Law Judge's first and second recommendations, adopting the recommended Conclusions of Law with regard to these

¹ Arguably, even if the supervening executive order negated a duty to bargain, the Board could still have declared that OCSEA's refusal to negotiate over a no-smoking policy was, *at the time*, an unfair labor practice. The intervening executive order, then, would merely have limited the remedy. But by dismissing the case for mootness, the court implicitly rejected that argument. See, e.g., *SERB v Mad River-Green Local Board of Education*, 1988 SERB 4-1 (2d Dist Ct App, Clark, 12-28-87).

recommendations. Therefore, as to the remaining allegations, we find that the Mahoning County Board of Developmental Disabilities did not violate Ohio Revised Code §§ 4117.11(A)(1) or (A)(5). Consequently, we dismiss the complaint and dismiss with prejudice the unfair labor practice charge.

Spada concurs. Verich did not participate in the opinion.