

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Elyria and Mayor William Grace,

Respondents.

Case No. 2010-ULP-01-0013

2011 FEB 03 10:14:59
STATE EMPLOYMENT RELATIONS BOARD

ORDER
(OPINION ATTACHED)

Before Chair Zimpher, Vice Chair Spada, and Board Member Brundige:
February 3, 2011.

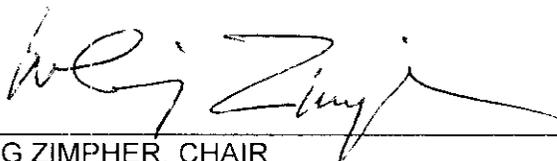
On January 19, 2010, the Elyria Fire Fighters, Local 474, IAFF ("the Intervenor") filed an unfair labor practice charge against the City of Elyria and Mayor William Grace ("the Respondents"), alleging that the Respondents had violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5). On April 8, 2010, the State Employment Relations Board ("the Board" or "Complainant") determined that probable cause existed to believe that the Respondents had committed or were committing an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) by releasing specific bargaining proposals to the media during negotiations in an attempt to directly deal with the bargaining-unit members. The Board also authorized the issuance of a Complaint and referred the matter to an expedited hearing. On July 13, 2010, a Complaint was issued.

A hearing was held on September 3, 2010. The parties filed post-hearing briefs. The Administrative Law Judge issued the Proposed Order on November 3, 2010, recommending that the Board find that the Respondents had not committed an unfair labor practice. On November 23, 2010, the Intervenor filed exceptions to the Proposed Order. On November 24, 2010, Counsel for Complainant filed exceptions to the Proposed Order. On December 3, 2010, the Respondents filed a response in opposition to the exceptions.

After reviewing the unfair labor practice charge, Complaint, Answer, transcript, and all other filings in this case, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Administrative Law Judge's Proposed Order, incorporated by reference, finding that the Respondents did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) because their actions did not rise to the level of direct dealing as prohibited by Ohio Revised Code Chapter 4117. Consequently, the complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

It is so ordered.

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



W. CRAIG ZIMPER, 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, 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 7th day of June, 2011.



MICHELLE HURSEY, ADMINISTRATIVE ASSISTANT

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

STATE EMPLOYMENT RELATIONS BOARD,	:	CASE NO. 2010-ULP-01-0013
	:	
Complainant,	:	
	:	
v.	:	BETH A. JEWELL
	:	Administrative Law Judge
CITY OF ELYRIA AND MAYOR WILLIAM	:	
GRACE,	:	
	:	<u>PROPOSED ORDER</u>
Respondents.	:	

I. INTRODUCTION

On January 19, 2010, the Elyria Fire Fighters, Local 474, IAFF ("Union"), filed an unfair labor practice charge against the City of Elyria (the "City") and Mayor William Grace (collectively, the City and Mayor Grace are referred to as "Respondents"), alleging that Respondents violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5).¹ On April 8, 2010, SERB found probable cause to believe that Respondents violated §§ 4117.11(A)(1) and (A)(5) by releasing specific bargaining proposals to the media during negotiations in an attempt to directly deal with the membership. On July 13, 2010, a complaint was issued. On July 19, 2010, Charging Party filed a motion to intervene, which was unopposed and granted in accordance with Ohio Adm. Code Rule 4117-1-07(A).

A hearing was held on September 3, 2010, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs.

II. ISSUE

Did Respondents violate §§ 4117.11(A)(1) and (A)(5) by releasing specific bargaining proposals to the media during negotiations in an attempt to directly deal with the membership?

¹ All references to statutes are to the Ohio Revised Code, Chapter 4117, unless otherwise indicated.

III. FINDINGS OF FACT²

1. The City is a public employer as defined in § 4117.01(B). (S.)
2. The Union is an “employee organization” as defined in § 4117.01(D) and is the Board-certified exclusive representative for a bargaining unit of City employees. (S.)
3. The City and the Union were parties to a collective bargaining agreement (“CBA”) that expired on July 11, 2009. The parties are currently in negotiations for a successor agreement. The CBA contained a grievance procedure that culminated in final and binding arbitration. (S.)
4. On July 17, 2009, the McGrath Consulting Group issued a revised independent audit of the City’s Fire Department (“McGrath Report”). The McGrath Report was posted on the City’s website. The report contained a section titled “Human Resources,” which contains the observation that “[t]he consultants have never encountered a situation of so many allowable days off in any previous study[.]” The report further reads, “a]n issue that will need to be negotiated will be the excessive amount of time off provided” within the CBA. (T. 111-114; R. Exh. S, pp. 88, 92, 112)
5. William M. Grace is the Mayor of the City. Mayor Grace is a member of the City’s bargaining team. (S.)
6. On November 23, 2009, the City and the Union exchanged their initial written bargaining proposals. (S.)
7. Dean Marks is a City Fire Fighter. Mr. Marks has served as Union President for the past three years. Mr. Marks chairs the Union’s bargaining committee. (T. 16-17)
8. The Union’s bargaining committee is comprised of up to eight members. Negotiating and decision-making during collective bargaining negotiations is done exclusively by the bargaining committee (T. 17, 18, 88)

² References in the record to the Joint Stipulations of Fact filed by the parties are indicated parenthetically by “S.” References to the Union’s Exhibit are indicated parenthetically by “U. Exh. P,” followed by the page number(s). References to the Respondents’ Exhibits in the record are indicated parenthetically by “R. Exh.,” followed by the exhibit number(s). References to the digital recording of the evidentiary hearing are indicated parenthetically by the witness’ name and approximate timing point. References to the record in the Findings of Fact 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.

9. The Union filed a Notice to Negotiate a successor CBA on June 9, 2009. The parties met for the first time on July 28, 2009. The Union made a verbal proposal for a one-year extension of the CBA. The City proposed bargaining ground rules. (T. 19, 20, 22)
10. The parties met for a second time on October 14, 2009. The parties were unable to agree upon bargaining ground rules, and the City withdrew its proposed ground rules. (T.23, 211, 222-223)
11. The parties met for a third time on November 18, 2009. The Union intended to exchange all written proposals at the meeting. However, the City did not have its proposals fully prepared. The parties then agreed to mutually exchange all proposals on November 23, 2009. (T. 19 23-24)
12. Union President Marks and City Safety Director Chris Eichenlaub mutually exchanged the parties' written proposals on November 23, 2009. (T. 19-20)
13. The parties met on December 16, 2009, and discussed the parties' written bargaining proposals. While each proposal was reviewed, the vast majority of the meeting was spent discussing the City's proposed cutting of the Fire Fighters' floating holiday time, vacation, holiday, and sick leave benefits. (T. 25, 31-32)
14. "Floating holiday time," or "FHT," is set forth under Article 10, "Work Schedule and Hours." The Fire Fighters have the ability to schedule the FHT hours off or work the time and place the hours in an FHT "bank" for payment in cash at a later date. (T. 29; Jt. Exh.1, pp. 7-9)
15. As set forth in the City's written proposals and discussed on December 16, 2009, the City proposed to eliminate floating holiday time in its entirety from Article 10 of the CBA. (T. 153-154; U. Exh. P, pp. 1-2)
16. One "tour" of duty for a Fire Fighter is one 24-hour shift. Under Article 15, "Vacation," the Fire Fighters receive vacation per year based upon a scale of seniority: 6 tours of vacation (144 hours) between 1 and 6 years of seniority; 9 tours of vacation (216 hours) between 7 and 13 years of seniority; 12 tours of vacation (288 hours) between 14 and 20 years of seniority; and 15 tours of vacation (360 hours) with 21 or more years of seniority. (Jt. Ex. 1, p. 13; T. 28)
17. As set forth in the City's written proposals and discussed on December 16, 2009, the City proposed to reduce the Fire Fighters' yearly vacation time as follows: for seniority between 1 and 6 years, from 144 hours to 100 hours; for seniority between 7 and 13 years, from 216 hours to 150 hours; for seniority between 14 and

20 years, from 288 to 200 hours; and for seniority of 21 or more years, from 360 hours to 250 hours. (T. 29-30, 154-155; U. Exh. P, p. 3)

18. Under Article 16, "Holidays," the Fire Fighters receive 8 tours off per year in recognition of the 13 holidays described in the CBA, along with one 24-hour personal day; an equivalent of 9 total tours off. (T. 30; Jt. Exh. 1, p. 14)
19. As set forth in the City's written proposals and discussed on December 16, 2009, the City proposed to reduce the Fire Fighters' holiday leave from 9 tours to 6.5 tours. (T. 30, 155; U. Exh. P, p. 5)
20. Under Article 19, "Sick Leave," the Fire Fighters may receive up to 15 tours of sick leave per year, depending upon the rate at which the Fire Fighter accrues and uses sick leave. (T. 30-31; Jt. Exh. 1, pp. 20-22)
21. As set forth in the City's written proposals and discussed on December 16, 2009, the City proposed to reduce the Fire Fighters' sick leave from a maximum of 15 tours per year to a maximum of 6.25 tours per year. (T. 31, 157-158; U. Exh. P, p. 8)
22. At the December 16, 2009 bargaining meeting, Mayor Grace stated that the purpose of the City's proposed cuts in the Fire Fighters' leave benefits was to bring the Fire Fighters more in line with Police Department employees, who work a 40-hour week. According to Mayor Grace, the Fire Fighters had too much time off under the current CBA compared to City employees who work a 40-hour week. (T. 27-28, 158-159)
23. At the conclusion of the December 16, 2009 bargaining session, the parties scheduled their next bargaining session for January 20, 2010. (T. 32, 160)
24. On January 14, 2010, Union President Marks received a phone call from Lisa Roberson, a reporter for the local newspaper, the Elyria Chronicle-Telegram ("Chronicle"). Reporter Roberson stated that she was doing a story on negotiations between the Union and the City. Ms. Roberson told Mr. Marks that she had spoken with the Mayor concerning the negotiations. Mr. Marks told Ms. Roberson that he would not discuss the details of the negotiations publicly. (T. 34-35)
25. On January 15, 2010, the Chronicle published an article under Ms. Roberson's byline titled, "Elyria starts fire talks," subtitled "City leaders seeking time-off concessions from firefighters union." The article read that "[t]he city is asking the local firefighters union to agree to give up some vacation and sick days as well as several hours of floating holiday time for the same pay," and that "[t]he changes

were proposed during recent contract talks between the administration and International Association of Firefighters Local 474, which represents 52 firefighters in Elyria.” (Jt. Exh. B)

26. The January 15, 2010 newspaper article either directly quotes Mayor Grace or attributes the following statements to him:

Mayor Bill Grace said Elyria firefighters make pay comparable to Elyria police officers, but in comparison have a contract that allows them to have significantly more paid time off. In light of recent financial challenges facing the city, now is the time to bring those numbers in line, he said.

“If they are truly intent on being professionals, they have to be willing to come to work more,” he said. “I think most people would argue that the person who is more dedicated to their profession is the person that comes to work. They can still make the amount of money they’re making now. We just need them to come to work more.”...

“It’s important for the community to understand our position and that our hands are tied,” Grace said. “It will be up to the Fire Department or eventually an arbitrator to give us something. All we are doing is asking.”

Grace said negotiations will continue and may even go to arbitration in the future, where there are no guarantees on the outcome.

“If cities like Elyria are to have full-time fire departments, they will have to accept changes,” he said. “They can blame Mayor Grace, but Mayor Grace can’t print money.”

While Grace said he understands firefighters work 24-hour shifts, he said what cannot be forgotten is the fact that they work 50-hour work weeks, which equates to two 24-hour shifts and part of another day each week.

“They work more hours a week so they should receive more hours of paid time off, but not in the way it is currently set up,” he said.

(Jt. Exh. B, pp. 1-2)

27. Mayor Grace testified that the above quotes and statements were not exact, but were "close" and "the general gist" of what he said to the reporter. (T. 163-173, 178-180)

28. The January 15, 2010 newspaper article also attributed the following statement to the Mayor:

Grace said the police contract is not out of line with the rest of the work force and that the proposals presented to the fire union are an attempt to bring their contract in line with that of police officers[.]

(Jt. Exh. B, p. 2)

29. Mayor Grace initially testified that the parity goal was "an overall sentiment" that he expressed, and that it was "a general reference to the discussion that... there is an attempt to get parity." The Mayor later testified that he did not discuss specific bargaining proposals with the media, and that his statements to the reporter were about "PowerPoint slides" on the Fire Fighters' benefits. (T. 174-177)

30. The January 15, 2010 newspaper article continued as follows:

Grace said at the beginning of negotiations the administration and fire union would not agree on the rules of negotiating. Without that separate contract in place, state bargaining rules came into play. State rules do not bar public discussion, Grace said.

(Jt. Ex. B, p. 1)

31. After reviewing the January 15, 2010 article, Union President Marks contacted the Union's legal counsel and requested that the bargaining session scheduled for January 20, 2010 be cancelled. (T. 40)

32. By letter dated January 15, 2010, Union outside legal counsel Ryan Lemmerbrock notified the City's labor representative, Robin L. Bell, that the Union believed that the Mayor Grace's actions were in violation of R.C. 4117.21; that they constituted an attempt to interfere with, restrain, or coerce Union members in the exercise of their rights under R.C. Chapter 4117; and that they constituted an attempt to circumvent the Union's bargaining representatives and negotiate directly with the members in a public forum. As a result, the Union cancelled the bargaining meeting scheduled for January 20, 2010. The notice was faxed to Bell on January 15, 2010. (Jt. Exh. C)

33. On January 16, 2010, the Chronicle published an article under Ms. Roberson's byline titled, "Retirement opens door for Elyria firefighter." The article referred to the City's bargaining proposals to the Union and read in part as follows:

The accumulation of so much vacation, holiday, floating holiday and sick time is something the mayor is trying to limit by asking the union to agree to reduce the number of days off firefighters receive each year. The change, if accepted by the union, will bring the Fire Department more in line with the amount of time off police officers are allowed, Grace said. "While they are taking off sick time during their careers, they still have hundreds of hours of sick time they are getting paid for at the end of their careers amount to thousands of dollars," he said. "We are asking them to change this for the sake of the department and the city."

(Jt. Exh. D, pp. 1-2)

34. Mayor Grace acknowledged referring to the accumulation of vacation, holiday, and sick time in his conversation with Ms. Roberson. (T. 181-183)
35. The January 16, 2010 newspaper article also contained a chart detailing the Fire Fighters "current deal" for vacation, holiday and personal time, and sick time benefits, comparing those benefits to "proposed changes" for vacation, holiday and personal time, and sick time benefits, and current Police Officer vacation, holiday and personal time, and sick time benefits. The summary of "proposed changes," as detailed in the article, is identical to the changes proposed by the City in its bargaining proposals dated November 23, 2009. (T. 43; Jt. Exh. D, p. 2)
36. Mayor Grace acknowledged that the "Proposed changes" to the Union's CBA, as detailed in the article, reflected the same changes proposed by the City in its bargaining proposals. (T. 184-185)
37. On January 17, 2010, the Chronicle published an opinion-editorial titled, "Time for change," and subtitled "With the city's dire finances, firefighters need to convince us their overtime is warranted." The op-ed article chastised the Union for "complaining that Elyria Mayor Bill Grace has gone public with his campaign for contract concessions[.]" The article further read in part as follows:

The danger gives the city and the union an incentive to get more firefighters to come to work. In the absence of more money the only way to do it is to reduce the cost of employing each one of them. Uh-oh. So much for the shared incentive, right? Sounds like the

firefighters would have to accept pay cuts. Remarkably, that's not the case. The mayor is asking only that firefighters come to work more often, not that they take a cut in base pay. (Yes, they would sacrifice some overtime pay, but that's exactly what the department needs to lower its costs.) Do firefighters work too little now? Well, they get 39 percent more holidays and personal days than police, 44 percent more vacation time and 240 percent more sick time, according to the Grace administration's calculations.

(Jt. Exh. E)

38. When questioned whether he told the newspaper that he asked the Fire Fighters to come to work more often, Mayor Grace responded, "[n]ot in those words." The Mayor stated he was "comparing a 40-hour employee to a 50-hour employee... and I did say, you know, cumulatively we need them to come to work more." (T. 187)
39. Mayor Grace testified that he read the articles when they were published; that he spoke to the Chronicle reporter on a daily basis, meeting at City Hall and at the newspaper; and that although not all of the quoted statements attributed to him were accurate, he did not notify the newspaper, the Union, or City Council that he had been misquoted. (T. 197-198, 202-203)
40. According to Union President Marks, most, if not all, of the Union's members read the newspaper articles relating to the Fire Fighters' negotiations with the City. Marks began receiving phone calls from members, questioning Marks as to what was going on in negotiations. Less senior bargaining unit members were asking whether the Union would have to accept changes to maintain a full-time Fire Department and/or prevent layoffs. More senior members were telling the negotiating committee not to accept concessions. The membership, as a whole, was asking for further details about the negotiations. (T. 39-40, 43, 48-49)
41. Union Vice-President Graig Camp, a City Fire Fighter, testified that Fire Fighters at the station read the Chronicle articles. Camp stated that many younger Fire Fighters were concerned about retaining their jobs, while some more senior Fire Fighters were concerned about retaining their benefits, creating friction between the two groups on the Union's bargaining stance. (T. 102-103)
42. By letter dated January 19, 2010 to the undersigned, the City's representative, Bell, acknowledged receipt of the undersigned's January 15 letter and unfair labor practice charge, and asked that the parties schedule a new bargaining session. (Jt. Exh. F)

43. On January 19, 2010, during a regular City Council meeting, Mayor Grace stated that “the last week marked approximately the six...month anniversary of the fire audit,” and that “the newspaper was asking where [does the City] stand, [and] what progress has been made on the subject of the audit.” The Mayor stated that one of the subjects of the audit was “compensation,” and that he wanted to “explain this to the media, and...wanted to of course mention this and bring this forward to city council, and...the balance of the public, as it relates to [compensation].” Mayor Grace then began a PowerPoint presentation comparing the Fire Fighters’ vacation, holiday, and sick leave benefits to the City’s Police Officers’ vacation, holiday, and sick leave benefits. (Jt. Exh. G; Jt. Exh. H, at 4:53-5:09, 5:53-14:40)
44. Mayor Grace’s PowerPoint presentation at the City Council meeting set forth the specific vacation, holiday, and sick leave benefits of Elyria Police Officers, then set forth the proportional increase in the level of those benefits if the Police Officers worked a 50-hour workweek rather than a 40-hour workweek. This hypothetical 50-hour “comparison employee” would receive the following yearly vacation time as follows: for seniority between 1 and 6 years, 100 hours; for seniority between 7 and 13 years, 150 hours;; for seniority between 14 and 20 years, 200 hours;; and for seniority of 21 or more years, 250 hours. The comparison employee would receive “6.5 Holidays & Personal/year” and “6.25 sick days/year.” (Jt. Exh. G, pp. 13-14)
45. While discussing the PowerPoint slides, Mayor Grace explained that the Fire Fighters’ time off benefit levels were established at a time when the Fire Fighters worked a 72-hour workweek. He stated that the Fire Fighters’ time off benefits should have been reduced when their weekly hours of work were reduced in the past. He referred to the need for “parity” and a “fair comparison” between the time off benefits of Fire Fighters and Police Officers, stating the Fire Fighters’ current benefit accruals exceed the “fair, comparable” levels. (Jt. Ex. H, time 7:43-14:40; Jt. Exh. G, pp. 13-14)
46. Lieutenant Robert Krugman, a member of the Union’s bargaining committee at the time, attended the January 19, 2010 City Council meeting. Lt. Krugman submitted a petition to speak, and stated to City Council that the City should just “put the Fire Fighters on a 40-hour workweek,” and then the Fire Fighters would be equal to other City employees. (T. 93-96; Jt. Exh. H, at 53:35)
47. By letter dated February 1, 2010, Union counsel Lemmerbrock responded to Consultant Bell’s letter of January 19, 2010. Mr. Lemmerbrock wrote that the Union would not engage in public bargaining, requested that the City execute proposed ground rules enclosed with the letter, and asked Ms. Bell contact him to schedule dates for bargaining. The Union wanted to return to the bargaining table, but with

the understanding that nothing else would be released to the public. (T. 47; Jt. Exh. I)

48. On February 5, 2010, the Chronicle published an article titled, "Elyria fire union files complaint against mayor, city." The February 5, 2010 newspaper article reads in part as follows:

Grace said he does not believe the charge is warranted. He explained that the city and fire union could not agree on the rules for negotiating and without that separate agreement he was not prohibited from speaking out.

"Clearly I was walking a fine line in the process, but I do not now, nor did I then, think I was acting in bad faith," he said. "I think it is important that the public sees what we are faced with in the process. The public is calling for change and I merely wanted to show the circumstances in which we have to operate to achieve change."

(Jt. Exh. J, p. 1)

49. By letter dated February 8, 2010, Consultant Bell advised Union counsel that the City would not "return to the negotiation of ground rules," and requested dates for scheduling a bargaining session. (Jt. Exh. K)
50. In a letter dated February 23, 2010, Union counsel Lemmerbrock wrote to Consultant Bell that the Union was willing to meet with the City for bargaining if the City agreed, in writing, that it would bargain privately, not unilaterally release information concerning negotiations, and not attempt to directly deal with the Union membership. Mr. Lemmerbrock wrote that if the City would not agree, the parties should proceed to fact-finding. (Jt. Exh. L)
51. In a letter dated March 5, 2010, Ms. Bell responded to Mr. Lemmerbrock that the Union was conditioning meeting on the execution of ground rules. Ms. Bell offered the Union the options of providing additional dates for bargaining or proceeding to fact-finding. (Jt. Exh. M)
52. By letter dated March 10, 2010, Union counsel advised Bell that if the City was unwilling to commit in writing not to publicly bargain or engage in direct dealing then the parties could proceed to fact-finding. (Jt. Exh. N)

53. By letter dated March 15, 2010, Bell notified Union counsel that the City was requesting a fact-finding panel from SERB. (Jt. Exh. O)

IV. ANALYSIS AND DISCUSSION

A. Relevant Cases and Statutes; Burden of Proof

Section 4117.11 provides 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... [;]

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

To determine whether an employer violated R.C. 4117.11(A)(1), the inquiry must be based on objective, rather than subjective, criteria. In re Pickaway County Human Services Dept., SERB 93-001 (3-24-93), affirmed, SERB v. Pickaway Human Services Dept., 1995 SERB 4-46 (4 Dist. Ct. App., Pickaway, 12-7-95). 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. Furthermore, the inquiry includes a "thorough review of the circumstances under which the alleged misconduct occurred and its likely effect on the guaranteed rights of employees.

The analysis "does not depend on whether the interference, restraint, or coercion succeeded or failed, but on whether an employer engaged in conduct reasonably tending to interfere with the free exercise of employee rights." SERB v. Harrison Hills City School Dist. Bd. of Ed., SERB 2010-011 (8-12-2010) ("Harrison Hills"). To establish a violation of R.C. 4117.11(A)(1), the Complainant must demonstrate not only the reasonable tendency of the complained action to interfere with, restrain, or coerce employees in exercising their rights, but that the interference, restraint, or coercion outweighs any competing legitimate managerial right. Id. A prima facie violation is established by "presenting evidence sufficient to sustain a finding that the employer more likely than not made communications

with employees concerning wages, hours, or other terms and conditions of employment.”
Id.

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). An employer may not deal directly with its employees concerning mandatory subjects of bargaining. In re Mentor Exempted Village School Dist. Bd. of Ed., SERB 89-011 (5-12-89)(“Mentor”). To establish a violation of R.C. 4117.11(A)(5), the Complainant must prove by a preponderance of the evidence that the employer engaged in direct dealing with employees. However, to prove a violation of R.C. 4117.11(A)(1) in the context of an employer’s communication with employees during collective bargaining, the Complainant must also prove that the direct dealing reasonably tended to interfere with, restrain, or coerce the free exercise of employee rights guaranteed by Chapter 4117. Harrison Hills, supra.

B. Direct Dealing Case Precedents

SERB and the courts recognize the important policy considerations that underlie the prohibition on direct dealing. By directly dealing with employees and circumventing their exclusive representative, an employer “not only breache[s] the rules and terms of the relationship, but also undercuts the status of the exclusive representative, potentially impairing the [union]’s relationship and effectiveness with the employees it represents.” Directly dealing with employees “create[s] dissension in the union’s ranks, damage[s] its relationship with the employees it is representing, and put[s] it in a defensive bargaining position.” Vandalia-Butler City School Dist. Bd. of Ed. v. SERB, 1991 SERB 4-81 (2d Dist. Ct. App., Montgomery, 8-15-91)(citing In re Findlay City School Dist. Bd. of Ed., SERB 88-006 (5-13-88)(“Vandalia-Butler”). Direct dealing is “inconsistent with the employer’s duty to bargain and interferes with the employees’ basic rights to representation and collective bargaining,” in violation of R.C. 4117.11(A)(1) and (A)(5). Id. Directly dealing with employees “circumvent[s] the employees’ axiomatic right of union representation. Harrison Hills, supra.

SERB held recently that an employer’s general expression of work goals, made to employees during negotiations, did not amount to direct dealing. In re City of Cleveland, SERB 2010-006 (3-26-2010). In City of Cleveland, the employer-mayor held three meetings with the purpose of thanking employees for their hard work during an emergency snowstorm. Id. In direct response to questions from employees, the mayor referenced the City’s wage proposal, the privatization of jobs, and encouraged the employees to work more efficiently and learn each others’ jobs in order for him to reinvest money into new equipment. Id.

By contrast, in Mentor, supra, the employer sent a memorandum directly to bargaining unit employees explaining the status of negotiations, issues agreed upon, unresolved issues, and proposals and counterproposals made by each party without editorial comment. SERB held that the report sent to the bargaining unit constituted a circumvention of the exclusive representative in the bargaining process in violation of R.C. 4117.11(A)(1) and (A)(5). Id.

In Vandalia-Butler, supra, the employer delivered a letter to all bargaining unit members during negotiations for a collective bargaining agreement. The letter summarized ongoing negotiations between the employer and the union's bargaining committee, warned the union membership that the bargaining committee may not present the employer's last best offer, and cautioned the union membership not to be led into a strike. Id. The letter also invited union members to discuss negotiations with the employer. Id. SERB held that the employer's direct communication with the employees interfered with, restrained, and coerced employees in the exercise of their rights and constituted a refusal to bargain collectively with the exclusive representation, in violation of §§ 4117.11(A)(1) and (A)(5).

In Harrison Hills, supra, the employer posted on its website terms of its proposed collective bargaining agreement and a request that the employees vote on a tentative agreement or the employer's last best offer. SERB held that the posting constituted direct communication with employees. Id. The employer circumvented the union's bargaining team by directly dealing with the union membership, which infringed on the employees' right of union representation in violation of § 4117.11(A)(1). Id.

A union did not engage in direct dealing when its comments directed at the employer occurred after impasse and did not amount to negotiations. OAPSE, Local 530 v. SERB, 138 Ohio App. 3d. 832 (2000) ("Local 530"). In Local 530, the union president and a negotiating team member spoke at school board meetings, during which the two discussed the negative consequences of the school district's subcontracting proposal and the possibility of a strike. Id. They did not make any proposals to the school board members, make any specific references to bargaining proposals, or make any specific references to contract terms. Id. at 839. The court of appeals held that the union members' comments did not amount to negotiations since the representatives did not submit any offers to the employer and the statements did not negatively affect or disrupt negotiations. Id. at 839. Further, the court noted that public discussion the subcontracting issue was not a disclosure of the negotiations proceedings because it was a known matter of public concern. Id. at 840.

Before impasse is reached in collective bargaining, if the purpose of a communication is not to inform the employer about the status of the labor relationship but rather is designed to affect that relationship, then that communication is tantamount to bypassing the designated bargaining representative. In re Int'l Assn. of Firefighters,

Local 1267, SERB 2006-009 (10-20-2006) (“Local 1267”). In Local 1267, the union president sent a letter to the city council to request a meeting to discuss strengthening the communication between the union and employer, to discuss pending grievances, and to discuss the unresolved collective bargaining agreement. Id. The letter read that if a private meeting was not able to be arranged, then the union members would attend the next city council meeting. Id. The union members attended the next city council meeting and requested the enactment of legislation that would further their cause. Id. None of these communications was first solicited by the employer. Id. SERB found the union’s direct requests to the legislative body for action to rise to the level of direct dealing. Id.

C. Newspaper Articles are Hearsay

Respondents argue that the newspaper articles quoting and paraphrasing Mayor Grace are hearsay, and that hearsay evidence cannot be used to form the basis for a finding of an unfair labor practice. The Ohio Administrative Code addresses the application of rules of evidence in quasi-judicial proceedings before SERB. Ohio Administrative Code Rule 4117-7-05 provides in pertinent part as follows:

(A) In conducting hearings under section 4117.12 of the Revised Code, the board, a board member, or an administrative law judge assigned to hear the case shall not be bound by the rules of evidence prevailing in the courts but may take into account all reliable evidence tending to prove the existence or nonexistence of an unfair labor practice.

Newspaper articles are hearsay. State v. Self, 679 N.E. 2d 1173, 1177 (Ohio 1996). The purpose of excluding hearsay is to avoid the introduction of statements that could be unreliable because the declarant is unavailable for cross examination. Id. Accordingly, newspaper articles are generally inadmissible as they do not fall within any of the statutory exceptions. Id. Following suit, the Board of Tax Appeals (“BTA”) acted to exclude hearsay evidence from an administrative hearing due to the legitimate concern of journalistic puffery. Leroy Jenkins Evangelistic Assn. v. Lawrence, 2000 WL 1727432, *4 (2000). The BTA noted that it gave the hearsay evidence “no weight” in its decision, since it had not been corroborated by any direct evidence. Id. The BTA’s approach to hearsay evidence mirrors SERB’s: hearsay evidence, while it may be admitted at a hearing, is not sufficient to support a finding of fact unless it is corroborated by other, non-hearsay, evidence.

Although administrative agencies are given leeway in applying the hearsay rule, the agency must support its decision with “reliable, probative, and substantial evidence.” H.K. Trading v. Ohio Liquor Control Comm., 2010-Ohio-913, ¶39 (10th Ct. App.). Further, the agency should not act upon evidence that is not admissible or competent. Id. at ¶ 41 (emphasis added). Reliable, the qualifier used in §4117-7-05, has been defined by the Ohio Supreme Court as “[d]ependable; that is, it can be confidently trusted. In order to be

reliable, there must be a reasonable probability that the evidence is true.” Id. In H.K. Trading, a decision of the Liquor Control Commission was overturned because a substantial portion of the evidence relied upon was hearsay, even though prior stipulated offenses were on the record. Id. at ¶¶ 41-45.

D. The Respondents Did Not Commit an Unfair Labor Practice Under Chapter 4117 of the Ohio Revised Code.

Neither Complainant nor the Union called the author of the newspaper articles as a witness at the hearing, and the newspaper articles do not fall into any of the exceptions to the hearsay rule. The newspaper articles provide the majority of the evidence of alleged direct dealing involving specific bargaining proposals. Since the Complainant failed to offer first-hand testimony regarding the statements in the article, only the statements the Mayor admitted to at hearing should be considered as evidence of the alleged direct dealing. Although it is true that the Ohio Administrative Code allows SERB discretion to admit hearsay evidence, case law cautions that administrative bodies should not act solely on inadmissible or incompetent evidence. H.K. Trading Ctr., Inc. v. Ohio Liquor Control Comm., 2010-Ohio-913, ¶ 41 (Ohio App.10 Dist.). Since the evidence is hearsay, it is unverifiable by itself. Because the statements the Mayor allegedly made to the newspaper reporter, as attributed to him in the articles, were not testified to by the reporter herself at the hearing, the competence of the alleged statements as evidence was not established. Further, Ohio Administrative Code Rule 4117-7-05 allows SERB discretion in admitting hearsay evidence. If hearsay evidence is deemed unreliable, then it falls outside the scope of §4117-7-05. As such, newspaper evidence should not be dispositive of an unfair labor practice and only the evidence testified to in the hearing should be considered. Overall, the statements the Mayor conceded to at the hearing do not rise to the level of direct dealing as prohibited by § 4117.11 of the Ohio Revised Code. The statements do not contravene the policies that underlie the ban on direct dealing, nor do the statements amount to an attempt to negotiate directly with represented employees.

The newspaper articles at issue were not directly distributed by the employer in its official capacity to the employees, in contrast with the communications in Harrison Hills and Vandalia-Butler. Respondents did not publish the communications and ensure that they were delivered to the employees. Instead, the articles were drafted by a person unaffiliated with employer and distributed for anyone to read. The author could have written the articles from any angle. The City had no control over the contents of the articles. This case is vastly different from the instances in which an employer or its agents intended to directly communicate with employees by providing the material in print, electronic or verbal form.

In Local 1267, the communication expressly asked for a meeting between the bargaining unit and the employer, or else threatened action by the bargaining unit. In Harrison Hills, the employer expressly requested that the employees vote on its last best

offer. In Vandalia-Butler, the employer directly appealed to the employees to not go on strike. In the case at hand, the only comparable remark would be the statements attributed to the Mayor about the need for Fire Fighters to come to work more. (T.187) The exact wording of this statement is disputed, but even read in the light most favorable to the Complainant, it does not rise to the level of direct negotiations with employees. The expression of the need for employees to be at work more was a general statement about goals and public policy, not a direct, specific request for action or an offer of any type. This situation is similar to that addressed in City of Cleveland, in which the employer did not commit an unfair labor practice by making general statements directly to employees, encouraging them to learn each others' jobs and to work more efficiently. In the case at hand, Mayor Grace did not even speak directly to employees. Further, whatever statements the Mayor did make were solicited from him by the reporter. He did not seek out the publication of his statements.

The statements admitted to by Mayor Grace do not contravene the policies that underlie the ban on direct dealing. See Vandalia-Butler. In his testimony at hearing, Mayor Grace conceded that the newspaper articles conveyed his general sentiment about the need for "parity." (T. 176) Mayor Grace later testified that he did not make the verbatim statements referenced in the January 15, 2010 article, but rather that he discussed the PowerPoint slides with the reporter. (T. 174-177) He said that he referenced the accumulation of vacation, holiday, and sick time, and admitted that he made a statement to the effect that the Fire Fighters needed to come to work more often. (T. 181-183) He also testified that he compared 40-hour employees to 50-hour employees, and that he discussed the McGrath report and the financial consequences of the current contract. (T. 187, 199) Such statements do not amount to specific bargaining proposals. The references to parity merely represent the employer's overarching goals. The references to the accumulation of vacation, holiday, and sick time are matters of public record and knowledge, and the same goes for the hypothetical 50-hour employee comparison, the McGrath Report, and all matters concerning the current contracts. The McGrath Report and the City's collective bargaining agreements with all employee organizations within the City are public record.

General discussion of overarching bargaining goals and matters of public record do not constitute direct dealing. Unlike the communications in Vandalia-Butler and Mentor, no evidence was presented that suggested that Mayor Grace discussed the employee organization's position on or reaction to any matter. The overarching goal of the City to reduce paid time off was well-known in light of the McGrath Report; therefore, the Mayor's public discussion of this goal should not be of such surprise as to be the proximate cause of the alleged dissension between more- and less-senior bargaining-unit members. Additionally, the City and the Union had no bargaining ground rules in place regarding public communications. The media is involved in the affairs of a public employer to such a degree that news coverage over matters that could possibly affect the public employees is

inevitable. Similar to the subcontracting at issue in Local 530, the subject of the Fire Fighters' leave benefits was a known matter of public affairs. The Union President and Vice President reported an increase in phone calls, questions, and direct input from the bargaining-unit members directly to the negotiating committee. The response of bargaining-unit members was no more disruptive than would be expected in the normal course of media coverage of a public employer. One could easily imagine the same reaction to a news article on anticipated budget cuts by a city.

The Mayor's statements do not amount to direct dealing because they do not amount to an attempt to bypass the exclusive representative and negotiate directly with employees. See Local 1267, *supra*. The testimony at the hearing does not support a finding that the Mayor discussed the specific bargaining proposals and counterproposals of either party. Mentor, *supra*. Rather, the matters discussed were known matters of public affairs. The statements in the newspaper articles are different from communications directly delivered to employees as a result of official action on behalf of the employer. Neither Mayor Grace nor other City representatives issued official press releases or appealed to the employees via letter or email or on the City's website. See Harrison Hills and Vandalia-Butler, *supra*. The statements in the newspaper articles did not seek the participation of the employees by directly appealing to them to act in any way. The statements do not constitute offers to the employees.

At the City Council meeting, the Mayor did not discuss specific bargaining proposals or counterproposals of either party, unlike the communications in Mentor and Vandalia-Butler, *supra*. The general sentiments and facts and figures expressed by the Mayor do not amount to specific bargaining proposals, although they may allow a person to glean what some of the proposals might be. Further, it is also important that statements about the employee organization's bargaining positions were not attributed to the Mayor. These types of statements would be more likely to undermine the union negotiating team's relationship with its members. Statements about the goal of parity and factual information about the current benefit levels of various groups of employees are not specific bargaining proposals. Further, like the public statements made in Local 530, the statements made by the Mayor were generally of public concern and public record.

Because the statements made by the Mayor do not constitute prohibited direct dealing with the employees represented by the Union, Respondents did not violate §§ 4117.11(A)(1) or (A)(5).

V. CONCLUSIONS OF LAW

1. The Elyria Fire Fighters, Local 474, IAFF is an "employee organization" as defined by § 4117.01(D).

2. The City of Elyria is a “public employer” as defined by § 4117.01(B).
3. Respondents did not violate §§ 4117.11(A)(1) and (A)(5) because their actions did not rise to the level of direct dealing as prohibited by Chapter 4117.

VI. RECOMMENDATIONS

Based upon the foregoing, the following is respectfully recommended that:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The State Employment Relations Board dismiss the unfair labor practice charge and complaint, with prejudice.

SERB

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Case No. 2010-ULP-01-0013

CERTIFICATION

I, the undersigned General Counsel and Assistant Executive Director for the State Employment Relations Board, hereby certify that the attached document is a true and exact reproduction of the original Order (with Opinion Attached) of the State Employment Relations Board entered on its journal on the 7th day of June, 2011.

J. Russell Keith
General Counsel and Assistant Executive Director
June 7, 2011