

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

Clark-Shawnee Local Education Association,

Respondent.

Case No. 2010-ULP-08-0304

**ORDER  
(OPINION ATTACHED)**

Before Chair Zimpher, Vice Chair Spada, and Board Member Brundige:  
November 17, 2011.

On August 2, 2010, John Timothy Shook, who was a bargaining-unit member of Clark-Shawnee Local Education Association in August 2010, filed an unfair labor practice charge against the Clark-Shawnee Local Education Association ("Respondent"), alleging that Respondent breached its duty of fair representation in violation of Ohio Revised Code ("O.R.C.") § 4117.11(B)(6). On November 18, 2010, the State Employment Relations Board ("the Board" or "Complainant") found probable cause existed to believe Respondent committed an unfair labor practice by engaging in actions that were arbitrary, discriminatory or in bad faith in violation of O.R.C. § 4117.11(B)(6), authorized the issuance of a complaint and directed the matter to an evidentiary hearing. An Administrative Law Judge was assigned to this case and a complaint was issued on January 31, 2011.

An evidentiary hearing was held on April 14, 2011. The parties filed post-hearing briefs. The Administrative Law Judge issued a Proposed Order on June 7, 2011, recommending that the Board find that Respondent did not violate O.R.C. § 4117.11(B)(6) when it negotiated a Memorandum of Understanding that changed the parties' contractual layoff provision, thereby favoring the Union President by saving him from layoff while causing the layoff of bargaining-unit member John Timothy Shook. On June 30, 2011, Counsel for Complainant filed exceptions to the Proposed Order. On July 12, 2011, Respondent filed its response to the exceptions.

Upon a comprehensive review of the unfair labor practice charge, complaint, answer, testimony, documentary evidence, the Proposed Order, exceptions, response to exceptions, and all other filings in this case, for the reasons set forth in the attached

Opinion, incorporated by reference, Conclusion of Law No. 3 in the Proposed Order is amended to read: "The Clark-Shawnee Local Education Association violated O.R.C. § 4117.11(B)(6) when it executed a Memorandum of Understanding on May 6, 2010 that altered the parties' contractual layoff provision, thereby favoring the Union president by saving him from layoff while causing the layoff of bargaining-unit member John Timothy Shook."; the Joint Stipulations, Additional Findings of Fact, and Conclusions of Law, as amended, in the Proposed Order are adopted, finding that the Clark-Shawnee Local Education Association violated O.R.C. § 4117.11(B)(6) when it executed a Memorandum of Understanding on May 6, 2010 that altered the parties' contractual layoff provision, thereby favoring the Union president by saving him from layoff while causing the layoff of bargaining-unit member John Timothy Shook.

The Clark-Shawnee Local Education Association is ordered to:

A. Cease and Desist From:

1. Failing to fairly represent all of its bargaining-unit members by executing a Memorandum of Understanding that altered the parties' contractual layoff provision, thereby favoring the Union president by saving him from layoff while causing the layoff of bargaining-unit member John Timothy Shook, and from otherwise violating Ohio Revised Code Section 4117.11(B)(6).

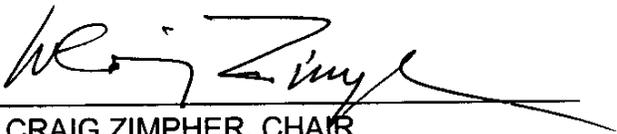
B. Take the Following Affirmative Action:

1. Fairly represent all of its bargaining-unit members employed by Clark-Shawnee Local School District Board of Education;
2. Assure that any future memoranda of understanding, which alter the express language of the parties' collective bargaining agreement, are ratified by the Union membership;
3. Implement procedures to ensure that all union officers are actively involved in matters pertaining to the representation of bargaining-unit members employed by Clark-Shawnee Local School District Board of Education;
4. Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Clark-Shawnee Local Education Association, the Notice to Employees furnished by the State Employment Relations Board stating that the Clark-Shawnee Local Education Association shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and

5. Notify the State Employment Relations Board in writing twenty calendar days from the date that this Order becomes final of the steps that have been taken to comply therewith.

It is so ordered.

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



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, on this 17<sup>th</sup> day of November 2011.



ERIN E. CONN, ADMINISTRATIVE ASSISTANT

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Clark-Shawnee Local Education Association,

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Case No. 2010-ULP-08-0304

**OPINION**

ZIMPHER, Chair:

This unfair labor practice case comes before the State Employment Relations Board ("the Board," "Complainant," or "SERB") upon the issuance of the Administrative Law Judge's Proposed Order, the filing of exceptions to the Proposed Order by Counsel for Complainant, and the filing of a response to the exceptions by Respondent, Clark-Shawnee Local Education Association. The issue to be decided is whether Respondent violated Ohio Revised Code ("O.R.C.") § 4117.11(B)(6). For the reasons set forth below, we find that Respondent violated O.R.C. § 4117.11(B)(6) when it executed a Memorandum of Understanding ("MOU") that changed the parties' contractual layoff provision, thereby favoring the Union president by saving him from layoff while causing the layoff of bargaining-unit member John Timothy Shook.

**I. SUMMARY OF FACTS**

The material facts in this case are undisputed and are stated as follows: During the time period relevant to this proceeding, the Clark-Shawnee Local School District Board of Education ("the Employer" or "School Board") and Clark-Shawnee Local Education Association ("the Union" or "Respondent") were parties to a collective bargaining agreement ("CBA") effective by its terms from July 1, 2007 through June 30, 2010. The parties' CBA contains a grievance-arbitration procedure that culminates in

final and binding arbitration. During the time period relevant to this proceeding, John Timothy Shook was a non-dues paying bargaining-unit member of the Clark-Shawnee Local Education Association and Steve Tincher was president of the Clark-Shawnee Local Education Association.

Article II, Section G of the parties' CBA provides that when the parties have reached a tentative agreement, reduced that agreement to writing, and approved same, the agreement constitutes the CBA between the parties.

Article XXII of the parties' CBA contains a procedure for a Reduction in Force ("RIF" or "layoff"). The RIF provision in the CBA states that reductions shall first be covered by attrition. If additional reductions are necessary, such reductions shall be executed by seniority. The CBA defines "seniority" as the number of years of service with the School District. The seniority list is to be comprised of each area of certification with certified/licensed personnel placed on all lists for which they are certified/licensed. The CBA further states that those teachers on limited contracts with the least seniority in the teaching field affected shall have their contracts suspended first. An individual who is recalled under the CBA shall have the right to return to the same seniority level, contractual status, and total sick leave accumulation.

There is nothing in the RIF provision of the parties' CBA that allows for the least senior teacher in a teaching field identified for reduction to displace or force the transfer of another teacher in a teaching field not identified for reduction (a non-affected teaching field). There is no provision in the parties' CBA that allows a teacher with dual certification to displace a less-senior teacher in a teaching field not identified for reduction.

On or about April 27, 2010, Clark-Shawnee School Board Superintendent Deborah Finkes met with Union President Steven Tincher and Labor Relations Consultant Kerri Newgard to discuss a RIF for the 2010-2011 school year. Ms. Newgard is employed by the Ohio Education Association and assigned to assist the Union with negotiating collective bargaining agreements and representing the membership regarding various employment matters. Ms. Newgard assisted the Union with the RIF process for the 2010-2011 school year. The School Board's legal counsel, Lisa Burleson, also was present at the meeting. Ms. Finkes presented a document that showed the School Board's RIF calculations, which listed reductions of three High School positions and one Elementary School position. The least senior teachers in the aforementioned areas were listed as Julie Dwyer in High School English, Mike Garberich in High School Math, Steve Tincher in High School Business, and Todd Musser in First Grade. A document that showed the Union's layoff calculations also was

presented at the meeting. Ms. Newgard's hand-written notations appear on both of the layoff documents admitted at hearing and identified as Respondent's Exhibits 6 and 7.

On May 6, 2010, the School Board passed a Resolution that implemented a RIF for the 2010-2011 school year. The May 6, 2010 Resolution identified First Grade, High School Business, High School English, and High School Math as the teaching fields that would be affected by the RIF. The Resolution states that four teaching contracts in those teaching fields would be suspended. The Resolution also states that the School Board and the Union mutually agreed to enter into a one-time only MOU to specifically address how the above-mentioned suspensions would be implemented. Mr. Tincher, Ms. Newgard, Ms. Finkes, and Ms. Burleson worked together to create the MOU.

On May 6, 2010, Superintendent Finkes, on behalf of the School Board, and Union President Tincher, on behalf of the Union, signed the MOU that changed the RIF provision of the parties' CBA. The MOU allowed for a teacher who is reduced in force pursuant to the terms of the CBA to be able to displace another teacher with less seniority in another teaching field, if the reduced teacher has dual certification in the other teaching field. This new provision would then allow for the reduction in force of a teacher in a teaching field not identified for reduction by the School Board. The MOU states that it is "inconsistent with and outside the negotiated language regarding reduction in force contained in Article XXII, Reduction in Force, of the parties current Contractual Agreements (2007-2010)." The May 6, 2010 MOU was not submitted to the Union membership for ratification. On May 7, 2010, the School District notified John Timothy Shook and Todd Musser that they were to be laid off for the 2010-2011 school year.<sup>1</sup>

Under the terms of the RIF provision of the parties' CBA, and according to the teaching fields identified for reduction in the School Board's May 6, 2010 Resolution, the two teachers reduced in force should have been First Grade teacher Todd Musser and High School Business teacher Steve Tincher. However, with the MOU in place that provided for dual-certification to be considered in the layoff process, Mr. Tincher was not laid off. Instead, High School Math Teacher Mike Garberich, who had more seniority than Mr. Tincher, was forced to transfer to High School Music because he held a dual certificate in math and music. As a result of Mr. Garberich's involuntary transfer, Mr. Tincher moved into an open math position at the Middle School instead of the more-senior Garberich, and Mr. Garberich displaced Mr. Shook in High School Music.

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<sup>1</sup> Although four positions were identified as part of the reduction in force for the 2010-2011 school year, two of the reduced positions were ultimately covered by attrition. As a result, only two teachers needed to be laid off as part of this reduction in force.

## II. DISCUSSION

Respondent is alleged to have violated O.R.C. § 4117.11(B)(6) when it executed an MOU on May 6, 2010 that modified the parties' contractual layoff provision, thereby favoring the Union president by saving him from layoff while causing the layoff of bargaining-unit member John Timothy Shook.

O.R.C. § 4117.11(B)(6) states, in relevant part, as follows:

(B) It is an unfair labor practice for an employee organization, its agents or representatives, or public employees to:

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(6) Fail to fairly represent all public employees in a bargaining unit;

SERB has generally followed the development of federal labor law principles when interpreting the breach of the duty of fair representation. With respect to Ohio Revised Code § 4117.11(B)(6), SERB has applied the federal landmark decision in *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 916 ("a breach of the duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith"). A union acts arbitrarily by failing to take a basic and required step. *Vencl v. Int'l Union of Operating Engineers*, 137 F. 3d 420. The basic and required steps a union must take when fulfilling its duty of fair representation will vary depending upon the nature of the representation. *Id.*

In *In re OCSEA/AFSCME Local 11*, SERB 98-010 (7-22-98) ("*In re OCSEA/AFSCME*"), SERB held that arbitrariness, discrimination, and bad faith are distinct components of the same duty and should be reviewed on an equal basis. When an unfair labor practice is charged because a union has allegedly violated its duty of fair representation, SERB will determine whether the union's actions are arbitrary, discriminatory, or in bad faith. A breach of the duty of fair representation exists if any of these components are found.

In *In re OAPSE*, SERB 93-021 (12-21-93) ("*OAPSE*"), SERB stated that ". . . any preference by an employee organization in supporting one unit member over another for the reason that the preferred one is a union official is clearly an action of discrimination and bad faith in violation of the duty of fair representation. Thus, employee organizations should be on notice that special care is warranted whenever a contractual clause is in dispute between two unit members, one of who is a union official." *Id.* at 3-

123. See also *Lewis v. Tuscan Dairy Farms*, 25 F.3d 1138, 146 LRRM 2601(2d Cir. 1994) (union president breached duty of fair representation by telling employees seniority would be dovetailed if plant purchased after secretly agreeing with new purchaser that seniority lists would not be dovetailed. President's actions violated bylaws, which required membership ratification and approval of contract modification).

In the case before us, Union President Steve Tincher entered into a one-time only MOU on behalf of the Union with the School Board to modify the RIF provision of the parties' CBA at same the time the School Board passed a Resolution to implement a RIF for the 2010-2011 school year. As a result, Mr. Tincher was able to avoid being laid off by virtue of his dual certification in math and Tim Shook, a teacher in a teaching field not identified for reduction, was laid off.

The Union's stated reason for entering into the May 6, 2010 MOU was to protect the most senior and the most certified of its membership. In her Proposed Order, the Administrative Law Judge concludes that the Union's stated reason was rational and the Union's actions were not arbitrary, discriminatory, or in bad faith; therefore, the Board should find that the Union did not violate O.R.C. § 4117.11(B)(6).

Upon a comprehensive review of the testimonial and documentary evidence contained in the record, we find that the evidence is more than sufficient to establish that Respondent violated its duty of fair representation when it entered into the May 6, 2010 MOU. Specifically, the evidence demonstrates that the Union's stated reason for entering into the May 6, 2010 MOU was a pretext for the Union president to avoid being laid off at the expense of a Union member who did not hold office in the Union and thus lacked the same power to alter the parties' CBA.

Events that followed shortly after the Union president received notification of the impending layoff show that the Union president's primary objective in creating the May 6, 2010 MOU was to save himself from layoff. The testimonial and documentary evidence established that Mr. Tincher and Labor Relations Consultant Kerri Newgard knew at the end of April 2010 that the School Board's RIF calculations identified Mr. Tincher for reduction under the RIF provision of the parties' CBA. The evidence reveals that Mr. Tincher, Ms. Newgard, School Board Superintendent Deborah Finkes, and the School Board's legal counsel, Lisa Burleson, worked together to create the May 6, 2010 MOU that changed the parties' CBA. Ms. Newgard testified that she worked closely with Mr. Tincher to develop various layoff scenarios, and she indicated that they had a number of discussions with Superintendent Finkes and Ms. Burleson regarding how layoffs should occur. Ms. Newgard further testified that she entrusted the actual drafting of the May 6, 2010 MOU to Ms. Burleson. Mr. Tincher testified that he signed the MOU as drafted.

According to the May 6, 2010 MOU, a teacher who is reduced in force pursuant to the terms of the CBA may, if the teacher possesses certification/licensure in another teaching field, displace or force the transfer of another teacher with less seniority in the other teaching field. The new provision thus allows for the reduction in force of a teacher in a teaching field not identified for reduction by the School Board.

The testimony and documentary evidence further established that Mr. Tincher utilized the provisions of the May 6, 2010 MOU, along with a calculated involuntary transfer of another employee, to avoid being laid off at the expense of bargaining-unit member Tim Shook. Specifically, the unrebutted testimony and documentary evidence shows that at the time of the RIF, an open math position at the Middle School was available. Mr. Tincher was dual certified in math and business. Mike Garberich, who was a math teacher at the High School, had more seniority than Mr. Tincher and he was dual certified in math and music. Mr. Garberich testified that Superintendent Finkes contacted him on or about Sunday, May 2, 2010, requesting that he meet her at the High School that evening to discuss issues regarding his employment. Mr. Garerich met with Ms. Finkes, Mr. Tincher, and the High School Principal that evening. At that meeting, Mr. Garberich was informed that he must transfer to High School Music or be reduced in force. Mr. Garberich chose to transfer to High School Music. As a result of Mr. Garberich's involuntary transfer, Mr. Tincher moved into the open math position at the Middle School instead of the more-senior Garberich, and Mr. Garberich displaced Tim Shook in High School Music.

Had the RIF provisions of the parties' CBA been followed by allowing Mike Garberich to exercise his seniority and take the middle school math position, Mr. Tincher would have been reduced in force. Instead, Mr. Tincher, who had less seniority than Mr. Garberich but who was dual certified in math and business, was allowed to assume the math position against the terms of the CBA and to the detriment of Mr. Shook, who did not teach in any of the affected teaching fields identified by the School Board for reduction.

We note that Mr. Tincher and Ms. Newgard could have taken measures to avoid allegations of wrongdoing with respect to the May 6, 2010 MOU. They could have met with the Union membership to explain the effect and value of the MOU and they could have sought ratification of the MOU. Additionally, we note that Mr. Tincher could have removed himself from the process of the MOU and allowed the vice-president or another Union officer to work with Ms. Newgard on creating the MOU. Instead, Mr. Tincher chose not to disclose the development of the MOU to bargaining-unit members and he continued to involve himself in the process to change the layoff provision in the parties' CBA.

The Union argues that it was not required to seek the Union membership's approval because the purpose of the May 6, 2010 MOU was to clarify the contract and memorialize the parties' past practice concerning the mechanics of a reduction in force. We disagree. The May 6, 2010 MOU, by its own terms, was entered into to change the contract. The MOU signed by the Union president on behalf of the Union expressly states that it is "inconsistent with and outside the negotiated language regarding reduction in force contained in Article XXIII, Reduction in Force, of the parties current Contractual Agreements (2007-2010)." While there was testimony at hearing that the parties interpreted the RIF provision differently and had a past practice that utilized attrition and transfers to avoid RIFs, we find that the plain language of the RIF provision of the CBA in effect at the time did not permit the use of dual certification to displace or force the transfer of another teacher with less seniority in a teaching field not identified for reduction. Therefore, since the May 6, 2010 MOU changed the terms of the parties' CBA, Mr. Tincher should have sought the Union members' ratification of the MOU. Moreover, we note that Labor Relations Consultant Kerri Newgard recognized the intrinsic value of taking such action in her testimony when she acknowledged that the Union could seek ratification of any MOU because, "it does not hurt to get ratification to cover [yourself]."

The Union also argues that it did not seek ratification of the May 6, 2010 MOU because it had not sought ratification of past MOUs. We find this argument unpersuasive for two reasons. First, the Union membership had already spoken on the issue of how a RIF would be conducted when they ratified the CBA. Article XXII clearly states that if additional reductions are needed after attrition, "it shall be done through seniority." Since the May 6, 2010 MOU changed the RIF provision of the parties' CBA, Mr. Tincher and Ms. Newgard were obligated as representatives of the Union membership to seek ratification. Second, Mr. Tincher and Ms. Newgard should have taken special care by having the Union membership ratify the May 6, 2010 MOU because it was to the benefit of the Union president, whose job was spared at the expense of a bargaining-unit member by changing the criteria by which teachers were identified for reduction in force.

Therefore, given that the May 6, 2010 MOU resulted in a union official going from the list of teachers identified by the School Board for reduction pursuant to the CBA to being safely employed under the terms of a self-executed MOU to the detriment of a union member who was not in a teaching field identified for reduction, we conclude that the Union's actions were discriminatory and in bad faith as they failed to fairly represent all of the Union's bargaining-unit employees.

Lastly, we address Mr. Shook's allegations that the Union violated its duty of fair representation by failing to assist him in processing his grievance and failing to appeal his grievance to arbitration. In her Proposed Order, the Administrative Law Judge concludes that the record did not establish that the Union acted arbitrarily, discriminatory, or in bad faith in processing Mr. Shook's grievance.

We agree with the Administrative Law Judge that the testimony and evidence presented regarding the processing of Mr. Shook's grievance is insufficient to support a conclusion that the Union denied Mr. Shook representation or failed to represent him during the grievance process. The testimony indicates Mr. Shook asked Mr. Garberich to accompany him to the first and second levels of his grievance but Mr. Garberich specifically testified that he was not asked to continue to represent Mr. Shook at the other levels. Mr. Shook did not rebut Mr. Garberich's testimony. The record indicates that Mr. Shook's brother, who is an attorney, represented him at levels three and four.

The final issue concerns the Union's refusal to take Mr. Shook's grievance to arbitration. We conclude that while this fact, standing alone, is not dispositive of a violation of O.R.C. § 4117.11(B)(6) in this case, given that the Union's conduct regarding the May 6, 2010 MOU is the subject of Mr. Shook's grievance, we find that the Union's refusal to take his grievance to arbitration further supports the conclusion that the Union's actions regarding the May 6, 2010 MOU violated O.R.C. § 4117.11(B)(6).

Based on the foregoing, we find that Respondent, Clark-Shawnee Local Education Association violated O.R.C. § 4117.11(B)(6) when it executed the May 6, 2010 MOU that changed the parties' contractual layoff provision, thereby favoring the Union president by saving him from layoff while causing the layoff of bargaining unit member Tim Shook.

### **III. REMEDY**

An order with a Notice to Employees should be issued ordering the Clark-Shawnee Local Education Association to do the following:

- A. Cease and desist from:
  1. Failing to fairly represent all of its bargaining-unit members by executing an MOU on May 6, 2010 that altered the contractual layoff provision, thereby favoring the Union president by saving him from layoff while causing the layoff of bargaining-unit member

John Timothy Shook, and from otherwise violating Ohio Revised Code Section 4117.11(B)(6).

- B. Take the following affirmative action:
1. Fairly represent all of its bargaining-unit members employed by Clark-Shawnee Local School District Board of Education;
  2. Assure that any future memoranda of understanding, which alter the express language of the parties' collective bargaining agreement, are ratified by the Union membership;
  3. Implement procedures to ensure that all union officers are actively involved in matters pertaining to the representation of bargaining-unit members employed by Clark-Shawnee Local School District Board of Education;
  4. Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Clark-Shawnee Local Education Association, the Notice to Employees furnished by the State Employment Relations Board stating that the Clark-Shawnee Local Education Association shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
  5. Notify the State Employment Relations Board in writing twenty calendar days from the date that this Order becomes final of the steps that have been taken to comply therewith.

#### **IV. CONCLUSIONS OF LAW**

1. The Clark-Shawnee Local School District Board of Education is a "public employer" as defined by O.R.C. § 4117.01(B).
2. The Clark-Shawnee Local Education Association is an "employee organization" as defined by O.R.C. § 4117.01(D).
3. The Clark-Shawnee Local Education Association violated O.R.C. § 4117.11(B)(6) when it executed a Memorandum of Understanding on May 6, 2010 that altered the parties' contractual layoff provision, thereby favoring the Union president by saving him from layoff while causing the layoff of bargaining-unit member John Timothy Shook.

**V. DETERMINATION**

For the reasons stated above, we find that the Clark-Shawnee Local Education Association violated Ohio Revised Code § 4117.11(B)(6) when it executed a Memorandum of Understanding on May 6, 2010 that altered the parties' contractual layoff provision, thereby favoring the Union president by saving him from layoff while causing the layoff of bargaining-unit member John Timothy Shook. A cease and desist order with a Notice to Employees shall be issued to the Clark-Shawnee Local Education Association.

Spada, Vice Chair, and Brundige, Board Member, concur.