SERB OPINION 2012-001

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Williams County Sheriff's Office,

Respondent.

Case No. 2011-ULP-12-0323

CORRECTED ORDER
(OPINION ATTACHED)

Before Chair Zimpher, Vice Chair Spada, and Board Member Brundige: November 15, 2012.

On December 14, 2011, the Ohio Patrolmen's Benevolent Association ("Union" or "OPBA") filed an unfair labor practice charge against the Williams County Sheriff's Office ("Employer" or "Sheriff's Office"), alleging that the Sheriff's Office violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1), (A)(3), and (A)(5). On April 5, 2012, the State Employment Relations Board ("the Board," "Complainant," or "SERB") found probable cause to believe that the Sheriff's Office violated O.R.C. §§ 4117.11 (A)(1) and (A)(5), but not (A)(3) by denying Deputy Michelle Zimmann the opportunity to have OPBA's attorney advise her before and during an investigative interview and by failing to negotiate the terms and conditions of the memorandum of understanding involving Deputy Zimmann's employment before the document was presented to her. SERB authorized the issuance of a complaint and directed the matter to hearing.

On April 23, 2012, a complaint was issued and the matter was set for an evidentiary hearing before an Administrative Law Judge. On May 1, 2012, OPBA filed a motion to intervene, which was granted in accordance with Ohio Administrative Code Rule 4117-1-07(A). On June 25, 2012, an evidentiary hearing was held. Subsequently, the parties filed post-hearing briefs. On August 21, 2012, the Administrative Law Judge's Proposed Order was issued, recommending that the Board find that the Williams County Sheriff's Office did not violate O.R.C. §§ 4117.11 (A)(1) or (A)(5) when it refused to allow the OPBA attorney to interject during the December 9, 2011 investigatory interview with Deputy Michelle Zimmann, when it refused to allow the OPBA attorney to review the December 13, 2011 memorandum of understanding, and

when the Sheriff's Office failed to negotiate the terms and conditions of the December 13, 2011 memorandum of understanding. On September 10, 2012, OPBA and Complainant filed separate exceptions to the Proposed Order. On September 19, 2012, Williams County Sheriff's Office filed a response to the exceptions.

After reviewing the unfair labor practice charge, complaint, answer, Proposed Order, exceptions, responses to exceptions and all other filings and documents in this case, the Board:

> **amends** Conclusion of Law No. 4 to read: "The Williams County Sheriff's Office violated O.R.C. § 4117.11(A)(1) with respect to OPBA's rights as exclusive representative when it refused to allow the OPBA attorney to review the December 13, 2011 memorandum of understanding/last chance agreement before the document was presented to Deputy Michelle Zimmann for her signature on December 13, 2011.";
>
> **amends** Conclusion of Law No. 5 to read: "The Williams County Sheriff's Office violated O.R.C. § 4117.11(A)(5) when it failed to negotiate the terms and conditions of the December 13, 2011 memorandum of understanding/last chance agreement with OPBA before the document was presented to Deputy Michelle Zimmann.";

and **adopts** Findings of Fact and Conclusions of Law, as amended, in the Proposed Order, finding that the Williams County Sheriff's Office violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) with respect to OPBA's rights as exclusive representative when it refused to allow the OPBA attorney to review the December 13, 2011 memorandum of understanding/last chance agreement before the document was presented to Deputy Michelle Zimmann for her signature on December 13, 2011 and when it failed to negotiate the terms and conditions of the December 13, 2011 memorandum of understanding/last chance agreement with OPBA before the document was presented to Deputy Zimmann.

Respondent, Williams County Sheriff's Office is hereby ordered to take the following actions:

A. Cease and desist from:

(1) Interfering with OPBA's selection of its representatives for the purposes of collective bargaining and the adjustment of grievances by refusing to allow OPBA's attorney to review a proposed memorandum of understanding/last chance agreement before the document is presented to the affected employee, and from otherwise violating Ohio Revised Code § 4117.11(A)(1);

(2) Refusing to bargain collectively with the exclusive representative of its employees by failing to negotiate the terms and conditions of a proposed memorandum of understanding/last chance agreement with OPBA before the document is presented to the affected employee, and from otherwise violating Ohio Revised Code § 4117.11(A)(5).

B. Take the following affirmative action:

(1) With the agreement of OPBA and Deputy Michelle Zimmann, rescind the memorandum of understanding/last chance agreement signed by Deputy Michelle Zimmann on December 13, 2011, and negotiate another memorandum of understanding/last chance agreement with OPBA prior to presenting the agreement to Deputy Zimmann;

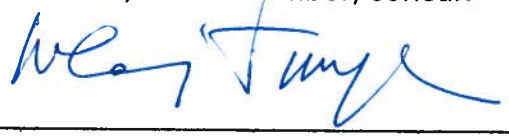
(2) Assure that OPBA is notified of and given an opportunity to review all future memorandums of understanding/last chance agreements before such agreements are presented to the affected employees;

(3) Post for sixty days (60) in all the usual and normal posting locations where bargaining-unit employees represented by OPBA work, the Notice to Employees furnished by the State Employment Relations Board stating that the Williams County Sheriff's Office shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative actions set forth in paragraph (B); and

(4) Notify the State Employment Relations Board via electronic mail within twenty (20) calendar days from the date the **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, 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 20TH day of November, 2012.

Elaine K. Stevenson

ELAINE K. STEVENSON, STAFF ATTORNEY

NOTICE TO EMPLOYEES
FROM THE
STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF
THE STATE EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF OHIO

By agreement of the parties in this matter, this case was submitted to the State Employment Relations Board upon the record developed at an evidentiary hearing and the subsequent Proposed Order of the assigned Administrative Law Judge. Upon review of the entirety of the record in Case No. 2011-ULP-12-0323, the State Employment Relations Board has determined that the Williams County Sheriff's Office violated the law and has ordered us to post this notice. We, the Williams County Sheriff's Office, intend to carry out the order of the State Employment Relations Board and to do the following:

A. CEASE AND DESIST FROM:

(1) Interfering with OPBA's selection of its representatives for the purposes of collective bargaining and the adjustment of grievances by refusing to allow OPBA's attorney to review a proposed memorandum of understanding/last chance agreement before the document is presented to the affected employee, and from otherwise violating Ohio Revised Code § 4117.11(A)(1);

(2) Refusing to bargain collectively with the exclusive representative of its employees by failing to negotiate the terms and conditions of a proposed memorandum of understanding/last chance agreement with OPBA before the document is presented to the affected employee, and from otherwise violating Ohio Revised Code § 4117.11(A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) With the agreement of OPBA and Deputy Michelle Zimmann, rescind the memorandum of understanding/last chance agreement signed by Deputy Michelle Zimmann on December 13, 2011, and negotiate another memorandum of understanding/last chance agreement with OPBA prior to presenting the agreement to Deputy Zimmann;

(2) Assure that OPBA is notified of and given an opportunity to review all future memorandums of understanding/last chance agreements before such agreements are presented to the affected employees;

(3) Post for sixty days (60) in all the usual and normal posting locations where bargaining-unit employees represented by OPBA work, the Notice to Employees furnished by the State Employment Relations Board stating that the Williams County Sheriff's Office shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative actions set forth in paragraph (B); and

(4) Notify the State Employment Relations Board via electronic mail within twenty (20) calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

SERB v. Williams County Sheriff's Office, Case No. 2011-ULP-12-0323

BY _____ DATE _____

TITLE _____

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the State Employment Relations Board.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

SERB OPINION 2012-001

STATE OF OHIO
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Case No. 2011-ULP-12-0323

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 both Intervenor, Ohio Patrolmen's Benevolent Association ("OPBA" or "Union") and Counsel for Complainant, and the filing of a response to the exceptions by Respondent, Williams County Sheriff's Office ("Respondent" or "Sheriff's Office"). For the reasons set forth below, we find that Respondent violated Ohio Revised Code ("O.R.C.") §§ 4117.11 (A)(1) and (A)(5) with respect to OPBA's rights as exclusive representative when it refused to allow the OPBA attorney to review a memorandum of understanding/last chance agreement before the document was presented to Deputy Michelle Zimmann for her signature on December 13, 2011 and when it failed to negotiate the terms and conditions of the memorandum of understanding/last chance agreement with OPBA before the document was presented to Deputy Zimmann.

I. BACKGROUND

OPBA is the exclusive representative for a Deputy bargaining unit of employees of the Sheriff's Office. OPBA and the Sheriff's Office are parties to a collective bargaining agreement effective through December 31, 2013. The Williams County Commissioners ratified the agreement on November 7, 2011, and the Union ratified the agreement on November 19, 2011. The agreement contains provisions for progressive discipline and a just cause standard and a grievance-arbitration process that culminates in binding arbitration. The agreement also provides that OPBA may have a Director, an Assistant Director, and more than one designated representative.

During the time period relevant to this proceeding, Kevin A. Beck held the position of Williams County Sheriff. He held that position for eight years. Michelle Zimmann has been employed by the Sheriff's Office as a Deputy since 2006. Deputy Zimmann has been a member of the OPBA bargaining unit since 2011. Gregory E. Ruskey has been employed by the Sheriff's Office as a Deputy since April 2002. Deputy Ruskey has been a member of the OPBA bargaining unit since 2011, and he currently serves as the Union Director. Deputy Ruskey's responsibilities as Union Director include representing bargaining-unit members filing grievances, providing direction to bargaining-unit members regarding employment matters, and serving as the contact person between bargaining-unit members and the OPBA attorney.

Ken Jacob is employed by the Sheriff's Office as a Deputy. During the time period relevant to this proceeding, Deputy Jacob has been married to Amanda Jacob. Amanda Jacob is employed as a Dispatcher for the Williams County Communications Center, which dispatches for the Sheriff's Office and other public safety entities and is located in the same building as the Sheriff's Office.

About a week prior to December 9, 2011, Deputy Jacob "dared" Deputy Zimmann to email him a topless photograph of her. Deputy Zimmann agreed to Deputy Jacob's request and, while off-duty, she sent a topless photo of herself to Deputy Jacob at his home email.

On December 9, 2011, Sheriff Beck received a telephone call from Ms. Jacob requesting a meeting. Sheriff Beck and Ms. Jacob met at 11:30 a.m. that same day. During the meeting, Ms. Jacob informed Sheriff Beck that she discovered a topless photo of Deputy Zimmann on her and her husband's home computer. Ms. Jacob was upset by this discovery and she was concerned that Deputy Zimmann and her husband would retaliate against her for reporting the incident. Ms. Jacob told Sheriff Beck that as a result of the incident, she and her husband were in the process of separating. Sheriff Beck believed that the issue needed to be addressed immediately because the Sheriff's Office and the Communication Center operate 24 hours/7 days a week and their personnel have contact with each other. Sheriff Beck spent the remainder of the work day gathering information and consulting with a management consulting company.

At approximately 5:45 p.m. on December 9, 2011, Chief Deputy Snivley called Deputy Zimmann at her residence and requested that she come to the Sheriff's Office. Deputy Zimmann surmised that the meeting concerned the photo incident and responded to Chief Deputy Snivley's request by stating that she assumed she would need a union representative. Chief Deputy Snivley informed Deputy Zimmann that his next call would be to Union Director Ruskey, who was the sole OPBA union officer for the bargaining unit at that time due to the vacancy of the Assistant Director position. Deputy Zimmann called Deputy Ruskey as soon as she left her residence to confirm that he would meet her at the Sheriff's Office.

As soon as Deputies Zimmann and Ruskey arrived, Sheriff Beck initiated an investigatory interview regarding the allegations that Deputy Zimmann emailed a topless photo of herself to a coworker. Ruskey requested time to speak with Deputy Zimmann before proceeding with the interview. Sheriff Beck initially denied the request, but subsequently allowed Deputy Ruskey to speak privately with Deputy Zimmann. During their brief conversation, Deputy Zimmann explained the photo incident and Deputy Ruskey left a message for the OPBA attorney to contact him. After Deputy Zimmann explained the photo incident to Deputy Ruskey, they were called back into the office for the interview. Although their private meeting was brief and he could not reach the OPBA attorney, Deputy Ruskey believed that he was given enough time to discuss the issue

with Deputy Zimmann before Sheriff Beck and Chief Deputy Snivley questioned Deputy Zimmann. During the investigatory interview, Deputy Ruskey received a call from the OPBA attorney. While on the phone with Deputy Ruskey, the OPBA attorney asked to speak to Deputy Zimmann and Sheriff Beck. Sheriff Beck denied the request. Deputy Zimmann did not pursue the matter by asking to speak with the OPBA attorney because she already was facing discipline and did not want to be considered insubordinate. She also believed that Sheriff Beck was angry with her.

At the conclusion of the investigatory interview, Deputy Zimmann was placed on paid administrative leave until the investigation was completed. Deputies Ruskey and Zimmann drove to Deputy Zimmann's residence to collect her patrol car, gun, and badge. During that trip, the Deputies spoke with the OPBA attorney on speakerphone. Deputy Zimmann also had several telephone conferences with the OPBA attorney regarding her situation following the December 9, 2011 investigatory interview.

During the events of December 9, 2011, Deputy Zimmann regarded Deputy Ruskey as her union representative, she considered Deputy Ruskey to be competent, and she did not request any other representative at any time.

On December 13, 2011, Chief Deputy Snivley contacted Deputies Zimmann and Ruskey to arrange a meeting for that day. Sheriff Beck and Chief Deputy Snivley met with Deputies Zimmann and Ruskey. Neither Deputy Zimmann nor Deputy Ruskey knew exactly what to expect during the meeting, nor were they given any paperwork to review prior to the meeting. At the beginning of the meeting, Sheriff Beck handed Deputy Zimmann a last chance agreement in the form of a memorandum of understanding (hereinafter "MOU/LCA"). According to the terms of the MOU/LCA, Deputy Zimmann would receive a ten-day working suspension and she would have no recourse of action through the union or arbitration. The MOU/LCA changed the terms and conditions of Deputy Zimmann's employment by making her automatically subject to termination for certain conduct and by preventing Deputy Zimmann from using the grievance and arbitration procedure contained in the parties' collective bargaining agreement as an avenue of appeal in the event the Sheriff's Office terminates her employment.

Sheriff Beck stated that the MOU/LCA was a one-time offer. Deputies Ruskey and Zimmann reviewed the document and then met in private. Deputy Ruskey recognized that the document was a last chance agreement and, for that reason, he contacted the OPBA attorney for advice. The OPBA attorney requested a faxed copy of the MOU/LCA. Deputies Ruskey and Zimmann returned to the meeting room, whereupon Deputy Ruskey requested that the document be faxed to the OPBA attorney for review. Sheriff Beck denied the request. Deputy Ruskey left the room to call the OPBA attorney for advice as to how to proceed.

While Deputy Ruskey was outside of the room, Deputy Zimmann read the terms of the MOU/LCA and discussed her concerns regarding certain terms with Sheriff Beck. Deputy Zimmann asked for clarification of parts of the MOU/LCA and she questioned the impact of the MOU/LCA should there be future disciplinary issues. Deputy Zimmann decided to sign the MOU/LCA without any further review of the document and without waiting for Deputy Ruskey to return to the room because she did not want to be terminated.

II. DISCUSSION

Respondent is alleged to have violated O.R.C. §§ 4117.11(A)(1) and (A)(5), which provide, in relevant part:

> (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 the rights guaranteed in Chapter 4117 of the Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances.
> ***
>
> (5) Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117 of the Revised Code;
> ***

Complainant has the burden to prove by a preponderance of the evidence that an unfair labor practice has been committed. See O.R.C. § 4117.12(B)(3). When a violation of O.R.C. § 4117.11(A)(1) is alleged, the appropriate inquiry is an objective rather than subjective one. *In re Pickaway County Human Services Dept.*, SERB 93-001 (3-24-93), aff'd sub nom. *SERB v. Pickaway Human Services Dept.*, 1995 SERB 4-46 (4th Dist. Ct. App., Pickaway, 12-7-95); *In re Tuscarawas Township Board of Trustees, Stark County*, SERB 2009-001 (8-31-2009). A violation will be found if, under the totality of the circumstances, it can be reasonably concluded that there was interference with, restraint of, or coercion in the exercise of rights under O.R.C. Chapter 4117. *In re Hamilton County Sheriff*, SERB 98-002 (1-23-98), aff'd sub nom. *Hamilton County Sheriff v. SERB* No. A98-00714 (Mag. Dec., CP, Hamilton, 10-9-98); *In re Tuscarawas Township Board of Trustees, Stark County, supra.*

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). 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 his Proposed Order, the Administrative Law Judge concluded that the actions of the Sheriff's Office on December 9 and 13, 2011 did not violate O.R.C. §§ 4117.11(A)(1) or (A)(5). Based upon the analysis of the evidence and the relevant case law set forth below, we agree with the Administrative Law Judge's conclusion that there was no violation of O.R.C. § 4117.1(A)(1) with respect to Deputy Zimmann's rights under O.R.C. § 4117.03(A)(5); however, we reach a different conclusion regarding whether the conduct of the Sheriff's Office violated O.R.C. §§ 4117.11(A)(1) and (A)(5) with respect to OPBA's rights as exclusive representative.

There are three issues to address: (1) whether the Sheriff's Office violated O.R.C. § 4117.11(A)(1) by interfering with Deputy Zimmann's right to union representation during the December 9, 2011 investigatory interview; (2) whether the Sheriff's Office violated O.R.C. §§ 4117.11(A)(1) and (A)(5) with respect to OPBA's rights as exclusive representative when it refused to allow the OPBA attorney to review

the MOU/LCA before the document was presented to Deputy Zimmann for her signature on December 13, 2011 and when it failed to negotiate the terms and conditions of the MOU/LCA with OPBA before the document was presented to Deputy Zimmann; and (3) whether the Sheriff's Office violated O.R.C. § 4117.11(A)(1) with respect to Deputy Zimmann's decision to sign the MOU/LCA on December 13, 2011 without review by the OPBA attorney.

1. The Sheriff's Office did not violate O.R.C. § 4117.11(A)(1) because it did not interfere with Deputy Zimmann's right to union representation during the December 9, 2011 investigatory interview.

With regard to the first issue, we note that the Administrative Law Judge correctly found no O.R.C. § 4117.11(A)(1) violation because the evidence showed that Deputy Zimmann had union representation at the December 9, 2011 investigatory interview that was in accordance with the standards established by case law. In *In re Davenport*, SERB 95-023, (12-29-95), SERB held that "...upon an employee's request, representation by an employee organization is required at investigatory interviews (the *Weingarten* standard) which the employee reasonably believes could lead to discipline and at grievance meetings." See *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 88 L.R.R.M. 2689 (1975).

In *In re City of Cleveland*, SERB 97-011 (6-30-97), SERB determined that the role of the union representative during an investigatory interview is to provide assistance to the employee by acting as a witness to the proceedings, conferring with the employee prior to the meeting, assisting the employee in providing information, bringing out extenuating factors, and helping a fearful or inarticulate employee respond to requests for information. *Id.*

The evidence contained in the record established that Deputy Zimmann was represented by OPBA Director Greg Ruskey prior to and during the December 9, 2011 investigatory interview. The testimony established that Deputy Ruskey acted as a witness to the proceedings, conferred with Deputy Zimmann prior to the meeting, and

assisted Deputy Zimmann as needed. The testimony established that Deputy Zimmann regarded Deputy Ruskey as her union representative from the time she received the initial telephone call from the Sheriff's Office on December 9, 2011, throughout the December 9, 2011 investigatory interview, and throughout December 13, 2011 meeting.

OPBA argues, however, that the Sheriff's Office interfered with Deputy Zimmann's choice of union representation by pre-selecting Deputy Ruskey, by ordering her into the Sheriff's Office on a Friday evening for the investigatory interview, and by not allowing her to speak with the OPBA attorney during the interview. The evidence established that Deputy Ruskey was the sole OPBA union officer for the bargaining unit at the time of the incident; therefore, the Sheriff's Office did not pre-select him as Deputy Zimmann's representative. Furthermore, a review of Deputy Zimmann's testimony does not support OPBA's argument regarding inadequate union representation. Deputy Zimmann testified that she assumed that Deputy Ruskey would be contacted once the December 9, 2011 meeting was arranged. She further testified that she considered Deputy Ruskey to be a competent representative, that she consented to his representation, and that she never indicated in any manner that she wanted a different union representative prior to or during the investigatory interview. A review of the testimony reveals that while Deputy Zimmann may have wanted to speak with the OPBA attorney at some point, at no time did she testify that she was not satisfied with Deputy Ruskey's representation of her in this matter. Therefore, in considering the whole of the testimony, we find that the conduct of the Sheriff's Office with regard to the December 9, 2011 investigatory interview does not constitute a violation of O.R.C. § 4117.11(A)(1) with respect to Deputy Zimmann rights under O.R.C. Chapter 4117.

2. <u>The Sheriff's Office violated O.R.C. §§ 4117.11(A)(1) and (A)(5) with respect to OPBA's rights as exclusive representative when it interfered with OPBA's right to select its representative for the purpose of the adjustment of a grievance and when it failed to negotiate the terms and conditions of the December 13, 2011 MOU/LCA with OPBA.</u>

We now address the second issue of whether the Sheriff's Office violated O.R.C. §§ 4117.11(A)(1) and (A)(5) with respect to OPBA's rights as exclusive representative. Based on a review of the relevant case law and the evidence contained in the record, we find that the Sheriff's Office violated O.R.C. § 4117.11(A)(1) by interfering with OPBA's right to select its representative for the purpose of the adjustment of a grievance and O.R.C. § 4117.11(A)(5) when it failed to negotiate the terms and conditions of the MOU/LCA with OPBA.

Case law has established that a last chance agreement is not considered a form of discipline but rather a contract between union, employer, and employee whereby the employee retains employment in return for his agreement to commit no further work infractions. *Trumbull County Sheriff's Office. v. Ohio Patrolmen's Benevolent Ass'n* (12/31/2003), 2005 SERB 4-1, 2003-OHIO-7207 (10th) unreported; *Fouty v. Ohio Dept. of Youth Servs.*, 167 Ohio App.3d 08, 2006-Ohio-1977, 885 N.E.2d. 909 (10th Dist.). A last chance agreement is a settlement agreement, and a settlement agreement is a contract. *Link v. Dep't of Treas., 51 F.3d 1577, 1581 (Fed. Cir.1995)* (citing *Greco v. Dep't of the Army*, 852 F.2d 558,560 (Fed. Cir. 1988).

O.R.C. § 4117.03(A)(5) provides that public employees have the right to present grievances and have them adjusted, without the intervention of the bargaining representative, *as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment*. See *In re City of Jackson*, SERB 89-025 (10-5-89); *City of Jackson v. SERB* 1990 SERB 4-19 (CP, Vinton, 3-27-90), unreported ("SERB correctly notes in its opinion, that RC 4117.03(A)(5) gives the union the right to be present in settlement negotiations between the city and Stapleton.").

O.R.C. § 4117.08(A) provides that matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative. SERB has determined that the disciplinary process, including the procedure, manner and effect of

discipline, is a mandatory subject of bargaining. *SERB v. Swanton Local School Dist. Bd. of Ed.*, SERB 89-008 (4-12-89); *SERB v. Cuyahoga Cty. Sheriff's Dept.*, SERB 99-018 (6-17-99); *SERB v. City of North Ridgeville*, SERB 2000-008 (6-22-00).

In the present case, the evidence contained in the record established that the Sheriff's Office and OPBA are parties to a collective bargaining agreement that expires on December 31, 2013. The parties' collective bargaining agreement contains provisions for progressive discipline and a just cause standard and a grievance-arbitration procedure. The evidence further established that Deputy Zimmann emailed a topless photo of herself to a coworker and that this conduct was the subject of the Sheriff's Office December 9, 2011 investigatory interview with Deputy Zimmann and her OPBA representative, Deputy Ruskey.

On December 13, 2011, Deputies Zimmann and Ruskey met with the Sheriff and Chief Deputy Snivley. Deputies Zimmann and Ruskey did not know what to expect during the meeting as they did not receive any paperwork to review prior to the meeting. At the beginning of the December 13, 2011 meeting, Sheriff Beck presented the MOU/LCA to Deputy Zimmann as a settlement of this matter, in that she could either sign the agreement or face termination. The MOU/LCA changed the terms and conditions of Deputy Zimmann's employment by making her automatically subject to termination for certain conduct and by prohibiting Deputy Zimmann from using the grievance and arbitration procedure contained in the parties' collective bargaining agreement as an avenue of appeal in the event the Sheriff's Office terminates her employment in the future.

Therefore, because the December 13, 2011 MOU/LCA is a settlement of a potential grievance resulting from a proposed termination, OPBA had the right to select its representative for the purpose of the adjustment of the potential grievance presented to Deputy Zimmann on December 13, 2011. See *Link v. Dep't of Treas., supra.* However, the Sheriff's Office failed to notify OPBA in advance of the December 13, 2011 meeting that the Sheriff intended to present a last chance agreement to Deputy Zimmann, thereby precluding the OPBA attorney from being present at the meeting to review the agreement. Moreover, the Sheriff refused Deputy Ruskey's request to fax a

copy of the MOU/LCA to the OPBA attorney for review on December 13, 2011. Those actions violate O.R.C. § 4117.11(A)(1) *with respect to the OPBA's rights* under O.R.C. § 4117.03(A)(5). Additionally, since the settlement agreement modified the discipline and grievance provisions of the parties' collective bargaining agreement as to Deputy Zimmann, the Sheriff's Office violated O.R.C. § 4117.11(A)(5) when it failed to negotiate with OPBA over the terms of the MOU/LCA before the document was presented to Deputy Zimmann.

Although we have determined that a public employer has the duty to negotiate with the employee organization that serves as the exclusive representative of its employees regarding the terms of any last chance agreement that modifies terms and/or conditions of the parties' collective bargaining agreement, we caution public employers and employee organizations that engage in this particular type of negotiation that the negotiation process should be expeditious and should not be used as a tool to delay potential disciplinary action.

3. <u>The Sheriff's Office did not violate O.R.C. § 4117.11(A)(1) with respect to Deputy Zimmann's right to adjust her potential grievance when it presented the MOU/LCA to her on December 13, 2011.</u>

Lastly, we consider, as a separate issue, whether the Sheriff's Office violated O.R.C. § 4117.11(A)(1) with respect to Deputy Zimmann's right to adjust her potential grievance under O.R.C. § 4117.03(A)(5). The testimony presented at hearing failed to establish that the Sheriff's Office interfered with, restrained, or coerced Deputy Zimmann in the exercise of her rights under O.R.C. § 4117.03(A)(5) during the December 13, 2011 meeting. The testimony presented established that Deputies Zimmann and Ruskey were present at the December 13, 2011 meeting when Sheriff Beck handed the MOU/LCA to Deputy Zimmann. The Deputies took a moment to review the document and then asked to meet in private. During their private meeting, Deputy Ruskey called the OPBA attorney and, at her request, he asked Sheriff Beck to fax the MOU/LCA to her for review. Deputies Zimmann and Ruskey went back into the

meeting room and Deputy Ruskey requested that the MOU/LCA be faxed to the OPBA attorney. The Sheriff refused, stating that the MOU/LCA was "take it or leave it."

Deputy Ruskey left the room to call the OPBA attorney. Deputy Zimmann remained with Sheriff Beck in the room. While Deputy Ruskey was gone, Deputy Zimmann read the MOU/LCA and discussed her concerns with its terms and how the agreement would work going forward. Sheriff Beck answered all of her questions. Deputy Zimmann testified that she chose to sign the MOU/LCA without forwarding it to the OPBA attorney for review because she did not want her employment terminated.

No evidence was presented indicating that the Sheriff ordered Deputy Zimmann to stay in the room while Deputy Ruskey was not present or that he ordered Deputies Zimmann and Ruskey to cease discussing the matter and sign the document. Although Sheriff Beck did express his desire to have the matter concluded quickly, the evidence established that Deputy Zimmann could have waited for Deputy Ruskey to return to continue discussing the proposed agreement. Instead, she chose to discuss the MOU/LCA with the Sheriff and sign it while Deputy Ruskey was outside of the room. Therefore, in considering the totality of the circumstances, we find that the Sheriff's Office did not violate O.R.C. § 4117.11(A)(1) with respect to Deputy Zimmann's rights when she decided to sign the MOU/LCA without further review.

III. CONCLUSIONS OF LAW

1. The Williams County Sheriff's Office is a "public employer" as defined by O.R.C. § 4117.01(B).

2. The Ohio Patrolmen's Benevolent Association is an "employee organization" as defined by O.R.C. § 4117.01(D).

3. Michelle Zimmann is a "public employee" as defined by O.R.C. § 4117.01(C).

4. The Williams County Sheriff's Office violated O.R.C. § 4117.11(A)(1) with respect to OPBA's rights as exclusive representative when it refused to allow the OPBA attorney to review the December 13, 2011 memorandum of understanding/last

chance agreement before the document was presented to Deputy Michelle Zimmann for her signature on December 13, 2011.

5. The Williams County Sheriff's Office violated O.R.C. § 4117.11(A)(5) when it failed to negotiate the terms and conditions of the December 13, 2011 memorandum of understanding/last chance agreement with OPBA before the document was presented to Deputy Michelle Zimmann.

IV. REMEDY

Having concluded that Respondent has engaged in unfair labor practices that involve harmful action against an employee, the standard remedy would be for the Board to issue a cease and desist order and restore the status quo ante with respect to any unilateral action taken by the Respondent that was harmful to the employee. In the present case, we are dealing with a last chance agreement. As noted above, a last chance agreement is a contract between union, employer, and employee whereby the employee retains employment in return for his or her agreement to commit no further work infractions. Upon review of the testimony and evidence presented, we are not certain that the memorandum of understanding/last chance agreement signed by Deputy Zimmann was harmful to her. Therefore, we will issue a cease and desist order that orders the Sheriff's Office to rescind the December 13, 2011 memorandum of understanding/last chance agreement only if OPBA *and* Deputy Zimmann concur with this action.

Based upon the foregoing, an Order with a Notice to Employees will be issued ordering the Williams County Sheriff's Office to do the following:

A. Cease and desist from:

(1) Interfering with OPBA's selection of its representatives for the purposes of collective bargaining and the adjustment of grievances by refusing to allow OPBA's attorney to review a proposed memorandum of understanding/last chance agreement before the

document is presented to the affected employee, and from otherwise violating Ohio Revised Code § 4117.11(A)(1);

(2) Refusing to bargain collectively with the exclusive representative of its employees by failing to negotiate the terms and conditions of a proposed memorandum of understanding/last chance agreement with OPBA before the document is presented to the affected employee, and from otherwise violating Ohio Revised Code § 4117.11(A)(5).

B. Take the following affirmative action:

(1) With the agreement of OPBA and Deputy Michelle Zimmann, rescind the memorandum of understanding/last chance agreement signed by Deputy Michelle Zimmann on December 13, 2011, and negotiate another memorandum of understanding/last chance agreement with OPBA before the agreement is presented to Deputy Zimmann;

(2) Assure that OPBA is notified of and given an opportunity to review all future memorandums of understanding/last chance agreements before such agreements are presented to the affected employees;

(3) Post for sixty days (60) in all the usual and normal posting locations where bargaining-unit employees represented by OPBA work, the Notice to Employees furnished by the State Employment Relations Board stating that the Williams County Sheriff's Office shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative actions set forth in paragraph (B); and

(4) Notify the State Employment Relations Board via electronic mail within twenty (20) calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

V. CONCLUSION

For the reasons set forth above, we find that the Respondent, Williams County Sheriff's Office violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it refused to allow the OPBA attorney to review the December 13, 2011 memorandum of understanding/last chance agreement before the document was presented to Deputy Michelle Zimmann for her signature on December 13, 2011 and when it failed to

negotiate the terms and conditions of the memorandum of understanding/last chance agreement with OPBA before the document was presented to Deputy Michelle Zimmann on December 13, 2011. An Order with a Notice to Employees shall be issued to the Williams County Sheriff's Office.

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

SERB

"Promoting Orderly and Constructive Labor Relations Since 1984"

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John R. Kasich, Governor

Case No. 2011-ULP-12-0323

CERTIFICATION

I, the undersigned General Counsel 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 20th day of November, 2012.

Donald M. Collins
General Counsel

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