

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

In the Matter of

Cleveland Metropolitan School District Board of Education,

Employer,

and

Service Employees International Union, District 1199, AFL-CIO,

Employee Organization.

Case No. 2013-MED-01-0024

**ORDER GRANTING MOTION TO DEEM FACT FINDING REPORT AGREED UPON
(OPINION ATTACHED)**

Before Chair Zimpher, Vice Chair Schmidt, and Board Member Brundige:
February 20, 2014.

This case comes before the State Employment Relations Board (“Board” or “SERB”) upon the Cleveland Metropolitan School District Board of Education’s (“CMSD” or “Employer”) “Motion to Deem Fact Finder’s Recommendation Agreed Upon; Invalidate the Vote of SEIU District 1199, and Other Appropriate Relief.”

On January 10, 2013, the Employer filed a Notice to Negotiate pursuant to Ohio Revised Code (“O.R.C.”) § 4117.14 and Ohio Administrative Code (“O.A.C.”) Rule 4117-9-02. The Employer properly served Service Employees International Union, District 1199, AFL-CIO (“SEIU District 1199” or “Union”) with the Notice to Negotiate. The parties engaged in negotiations for a successor agreement but were unable to reach an agreement. The parties proceeded to fact finding and selected SERB Neutral Nels E. Nelson as the fact finder.

October 31, 2013, Mr. Nelson issued his fact-finding report. On November 7, 2013, the Employer filed its certification of fact-finding vote, wherein it accepted the October 31, 2013 Fact-Finding Report. On November 8, 2013, the Union filed its certification of fact-finding vote.

On November 18, 2013, the Employer filed a “Motion to Deem Fact Finder’s Recommendation Agreed Upon; Invalidate the Vote of SEIU District 1199, and Other Appropriate Relief.” On November 27, 2013, the Union filed a “Memorandum in Opposition to the Employer’s Motion to Deem Fact Finder’s Recommendation Agreed

Upon; Invalidate the Vote of SEIU District 1199, and Other Appropriate Relief.” On December 9, 2013, the Employer filed “District’s Reply to Union’s Memorandum in Opposition of District’s Motion to Deem Fact Finder’s Recommendation Agreed Upon; Invalidate the Vote of SEIU District 1199, and Other Appropriate Relief.”

Pursuant to O.R.C. § 4117.14, O.A.C. Rule 4117-1-01, and O.A.C. Chapter 4117-9, SERB directed this matter to an inquiry based upon the allegations contained in the Employer’s motion concerning the propriety of the election procedures established by SEIU District 1199 for the CMSD November 2013 fact finding vote.

On December 16, 2013, SERB’s Office of General Counsel issued a Notice of Inquiry Date/Procedural Order, notifying the parties of the inquiry date and the issues to be addressed. Subsequently, the parties filed evidentiary motions. On January 8, 2014, SERB’s Office of General Counsel issued a Procedural Order addressing those motions. The inquiry was held before SERB’s staff attorney on January 14, 2014, at which time testimony and documentary evidence was presented. Subsequently, the parties filed post-inquiry briefs.

On January 30, 2014, SERB’s staff attorney submitted an Inquiry Report and Recommendation to the Board, recommending that the Board: (1) find SEIU District 1199’s election procedures violated O.R.C. § 4117.14(C)(6)(a) and O.A.C. Rule 4117-9-05; (2) grant CMSD’s motion finding the November 2013 fact-finding vote of SEIU District 1199’s CMSD bargaining unit rejecting the October 31, 2013 Fact-Finding Report invalid; and (3) deem the October 31, 2013 Fact-Finding report agreed upon.

After reviewing the pleadings of the parties, the Inquiry Report and Recommendation, post-inquiry briefs, and the evidence contained in the record, the Board hereby: (1) adopts, in its entirety, the staff attorney’s Inquiry Report and Recommendation in this matter, which is attached hereto and incorporated by reference herein; and (2) grants the Employer’s November 18, 2013 motion and finds the November 2013 fact-finding vote of SEIU District 1199’s CMSD bargaining unit rejecting the October 31, 2013 Fact-Finding Report invalid and deems the October 31, 2013 Fact-Finding Report agreed upon.

It is so ordered.

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



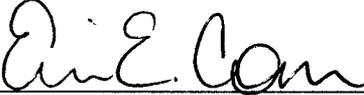
W. CRAIG ZIMPER, CHAIR

TIME AND METHOD TO PERFECT AN APPEAL

Any party that desires to appeal the order of the State Employment Relations Board shall file a Notice of Appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, setting forth the order appealed from and the grounds of the party's appeal. A copy of such Notice of Appeal shall also be filed with the Court of Common Pleas of Franklin County, Ohio. The aforementioned Notices of Appeal shall be filed within fifteen (15) calendar days after the mailing of the State Employment Relations Board's order, as provided in Section 119.12 of the Ohio Revised Code.

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 20th day of February, 2014.



ERIN E. CONN, ADMINISTRATIVE ASSISTANT

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

CLEVELAND METROPOLITAN SCHOOL DISTRICT BOARD OF EDUCATION,	:	CASE NO. 2013-MED-01-0024
	:	
Employer,	:	
	:	
and	:	<u>INQUIRY REPORT AND</u>
	:	<u>RECOMMENDATION</u>
SERVICE EMPLOYEES INTERNATIONAL UNION, DISTRICT 1199, AFL-CIO,	:	
	:	
Employee Organization.	:	
	:	

INTRODUCTION

This case comes before the State Employment Relations Board (“the Board” or “SERB”) upon Cleveland Metropolitan School District Board of Education’s (“Employer” or “CMSD”) “Motion to Deem Fact Finder’s Recommendation Agreed Upon; Invalidate the Vote of SEIU District 1199, and Other Appropriate Relief.” On December 13, 2013, the Board directed this matter to an inquiry based upon the allegations contained in the Employer’s motion, specifically, whether Service Employees International Union, District 1199, AFL-CIO (“Employee Organization” or “SEIU District 1199” or “Union”) conducted a proper election in November 2013 for its CMSD bargaining-unit members to vote on a fact-finding report.

The inquiry was held before SERB’s staff attorney on January 14, 2014, at which time testimonial and documentary evidence was presented. Prior to the presentation of evidence, the parties’ pending motions were addressed as follows: (1) SEIU District 1199’s motion to bifurcate the hearing and motion requesting SERB produce a witness to testify were denied and (2) CMSD’s motion to supplement the record and request an additional issue be added to the notice of inquiry was granted, in part. It is noted that the request for an additional item regarding the union’s election procedures was not necessary in view of SERB’s December 16, 2013 Notice of Inquiry Date/Procedural Order, which set forth all relevant issues and included a detailed request for information from SEIU District 1199 regarding its election procedures and tally of votes. It is further noted that SEIU District 1199 provided the information requested and a proper foundation was laid for its admission into evidence.

FINDINGS OF FACT

1. The parties entered into a collective bargaining agreement effective July 1, 2010 through June 30, 2013. The agreement did not contain an alternative dispute settlement procedure ("MAD").
2. On January 10, 2013, CMSD filed a Notice to Negotiate pursuant to Ohio Revised Code ("O.R.C.") § 4117.14 and Ohio Administrative Code ("O.A.C.") Rule 4117-9-02. CMSD properly served SEIU District 1199 with the Notice to Negotiate.
3. Although the parties participated in a number of bargaining sessions for a successor agreement, they were unable to resolve all of their issues. Rather than request a fact-finding panel from SERB, the parties agreed to appoint Fact Finder Nels E. Nelson to conduct the fact-finding. Nels E. Nelson is a SERB neutral and appears on SERB's Roster of Neutrals, pursuant to O.A.C. Rule 4117-9-01. The parties notified Mr. Nelson of his appointment in July 2013. Mr. Nelson conducted a fact-finding hearing and mediation sessions with the parties in September and October 2013.
4. On October 31, 2013, Mr. Nelson issued his Fact-Finding Report, in accordance with O.A.C. Rule 4117-9-05(L). O.A.C. Rule 4117-9-05(M) provides a seven-day period for the parties to conduct an election to vote to accept or reject the fact-finding report. The seven-day period began November 1, 2013, and ended November 7, 2013. CMSD's election for the fact-finding report took place on November 6, 2013, at the scheduled CMSD School Board meeting. SEIU District 1199's fact-finding election took place on November 4, 5, 6, and 7, 2013.
5. On November 7, 2013, CMSD timely filed its certification of fact-finding vote, wherein it accepted the October 31, 2013 Fact-Finding Report within twenty-four hours after the vote count, in accordance with O.A.C. Rule 4117-9-05(M). On November 8, 2013, SEIU District 1199 timely filed its certification of fact-finding vote, wherein it rejected the report within twenty-four hours after the expiration of the seven-day voting period, in accordance with O.A.C. Rule 4117-9-05(M).
6. On November 18, 2013, CMSD filed its "Motion to Deem Fact Finder's Recommendation Agreed Upon; Invalidate the Vote of SEIU District 1199, and Other Appropriate Relief." On November 27, 2013, SEIU District 1199 filed a response opposing CMSD's motion.
7. On December 12, 2013, pursuant to its powers under O.R.C. § 4117.14 and O.A.C. Rule 4117-1-01, SERB directed this matter to an inquiry based upon the allegations contained in CMSD's November 18, 2013 motion.

8. At the inquiry, both CMSD and SEIU District 1199 admitted that their 2010-2013 collective bargaining agreement did not contain a MAD. The parties further admitted that they did not have a written MAD governing the fact-finding process during their 2013 negotiations for a successor agreement.
9. SEIU District 1199 called Joshua D. Norris as a witness. Mr. Norris has been employed by SEIU District 1199 for approximately six and one-half years, and he has held the position of Public Division Director for the past two and one-half years. Mr. Norris' previous positions with SEIU District 1199 include Administrative Organizer, State Team Organizer, and Public Division Coordinator. As Public Division Director, Mr. Norris is responsible for overseeing all public employee units represented by SEIU District 1199. His duties include overseeing all contract negotiations, including fact-findings. Mr. Norris has participated in both statutory fact-findings and fact-findings conducted pursuant to a MAD. Mr. Norris has a staff of nine organizers and one coordinator.
10. Mr. Norris was updated regularly on the parties' 2013 contract negotiations and was directly involved in the ratification process following the issuance of Fact Finder Nels E. Nelson's Fact-Finding Report on October 31, 2013.
11. Upon issuance of the October 31, 2013 Fact-Finding Report, SEIU District 1199 notified both full dues paying CSMD bargaining-unit members and fair share fee bargaining-unit members of the recommendations contained in the fact-finding report and the date of the fact-finding vote. Full dues paying members have more rights than fair share fee members. One such right afforded full dues paying members and not fair share fee members is the right to vote on union matters, including but not limited to, union bylaws and fact-finding reports. Fair share fee members may become eligible to vote immediately upon completing a union membership application.
12. Nicholas Speelman manages SEIU District 1199's database of members. At the inquiry, Mr. Speelman provided the lists for the CMSD bargaining unit's election on the fact-finding report. In managing the database, Mr. Speelman established that there were 570 active members at the time of the November 2013 fact-finding election. Mr. Speelman explained that the union's membership list is updated on a regular basis due to frequent changes in the composition of the membership. (SEIU District 1199 Exhibits 8, 13, 15, and 16)
13. In order to meet the three-fifths vote of its total membership to reject the October 31, 2013 Fact-Finding Report, as required by O.R.C. § 4117.14(C)(6)(a), SEIU District 1199 needed 342 vote-eligible members of the CMSD bargaining unit to vote in the November 2013 election.

14. At the inquiry, SEIU District 1199 submitted a copy of its election notice for the vote on the October 31, 2013 Fact-Finding Report. This notice was distributed to CMSD bargaining-unit members on October 31, 2013 via CMSD's email system and, on November 1, 2013, via CMSD's interoffice mail. The notice was sent to both full dues paying members and fair share fee members. Although the notice indicated that there were 774 full dues paying members as of October 31, 2013, that number erroneously included fair share fee members. SEIU District 1199's database manager, Nicholas Speelman, established that the correct number of full dues paying members who were eligible to vote at that time was 570. (SEIU District 1199 Exhibits 2, 3, and 13)
15. SEIU District 1199's October 31, 2013 election notice for the CMSD bargaining unit's fact-finding vote, reads, in relevant part:

SEIU District 1199 CMSD Chapter vote will take place on WEDNESDAY, NOVEMBER 6, 2013. Voting will be held at the Union Hall, 1771 E. 30th Street, Cleveland OH. Informational meetings and voting will be held as follows:

11:00 am - 12:00 pm, 3:30 pm - 4:30 pm, and 5:15 pm - 6:15 pm

Voting will only take place during these times. You must be a **full dues paying member** in order to cast a vote. If you are a fair share fee member, you will be given the opportunity to complete a Membership Application and cast a vote. **You must be present to cast a vote.** There will be no voting by proxy.

It is imperative that all SEIU District 1199 CMSD Chapter members attend these meetings and cast their vote. The outcome of the vote will determine whether or not the Fact Finder's Recommendation is accepted or rejected by the SEIU District 1199 CMSD Chapter members. In order for the Fact Finder's Recommendation to be rejected, 3/5 of the SEIU District 1199 CMSD Chapter full-dues paying members must reject the report....

16. In addition to the November 6, 2013 in-person vote, SEIU District 1199 provided CMSD bargaining-unit members with the option to vote electronically.
17. Josh Harris is the IT Data Coordinator for SEIU District 1199. Mr. Harris administered the electronic voting for CMSD bargaining-unit members through the online survey site "www.surveymonkey.com." At the inquiry, Mr. Harris described the online process and noted the settings on the survey that were established to preserve the secrecy of the ballot and to prevent double voting. Mr. Harris identified copies of the vote tally reports he generated from the online

site for SEIU District 1199's Public Division Director, Josh Norris. These reports provided the names of the CMSD bargaining-unit members who voted and a tally of the number of "accepted" and "rejected" votes. The reports did not identify how a particular member voted.

18. SEIU District 1199 Public Division Director Josh Norris identified copies of three email election notices sent by SEIU District 1199 to full dues paying CMSD bargaining-unit members, informing these members that they may vote either online via a designated email link or in person. (SEIU District 1199 Exhibit 4) The first notice regarding electronic voting was sent on November 4, 2013 at 6:43 p.m. to 539 recipients; the second notice was sent on November 5, 2013 at 9:17 a.m. to 47 recipients; and the third notice was sent on November 5, 2013 at 1:00 p.m. to 391 recipients. The content of the notices reads, in relevant part:

Members may vote online 11/4/2013 6:30pm until 11/6/2013
9:00am...

19. IT Data Coordinator Josh Harris testified that he sent a report of the vote tally at the close of electronic voting on November 6, 2013 to SEIU District 1199 Public Division Director Josh Norris. The vote tally showed a total of 38 online votes (37 rejected the report and 1 accepted). (SEIU District 1199 Exhibit 7)
20. Marquis Frost is the Administrative Organizer for SEIU District 1199. Ms. Frost was responsible for conducting the November 6, 2013 in-person vote for the CMSD bargaining-unit members. At the inquiry, Ms. Frost testified that the in-person voting ended at 6:15 p.m., at which time the votes were tallied. Ms. Frost confirmed that she sent the tally list with the total number of "accepted" and "rejected" votes to SEIU District 1199 in Columbus. The in-person tally revealed that 296 bargaining unit members voted (294 rejected the fact-finding report and 2 accepted the report). The total number of vote-eligible members of the CMSD bargaining unit who voted at the close of voting on November 6, 2013 was 334 (296 in-person and 38 online). (SEIU District 1199 Statement; Exhibits 7 and 8)
21. Approximately fifteen hours after the votes were tallied on November 6, 2013 and sent to Josh Norris at SEIU District 1199 in Columbus, SEIU District 1199 reopened electronic voting until 12:00 a.m. on November 7, 2013. SEIU District 1199 sent four email election notices to CMSD bargaining-unit members who had not yet voted. These notices read, in relevant part:

Our records indicate that you have not yet exercised your right to vote on this important decision regarding your future contract. The vote will remain open November 7, until midnight. You can vote by following the instructions below...

22. The first of the November 7, 2013 email election notices was sent at 2:57 p.m. to 170 recipients; the second was sent at 4:05 p.m. to 3 recipients; the third notice was sent at 4:32 p.m. to 2 recipients; and the fourth notice was sent at 5:01 p.m. to 155 recipients. At the close of voting at midnight on November 7, 2013, the total number of additional CMSD bargaining-unit members who voted electronically was 29. (SEIU District 1199 Exhibit 4)

ISSUE

The issue in this case, whether SEIU District 1199 properly rejected the October 31, 2013 Fact Finding Report, raises two questions: (1) did the parties have a MAD or were they required to follow the statutory dispute settlement procedures established in O.R.C. § 4117.14 and O.A.C. Rules 4117-9-03 and 4117-9-05 and (2) was the election process established by SEIU District 1199 for its CMSD bargaining unit's fact-finding vote proper?

DISCUSSION

1. Notwithstanding the Parties' Assertions, the Parties Did Not Have a MAD, and, therefore, were Required to Follow the Statutory Dispute Settlement Procedures Established in O.R.C. § 4117.14 and O.A.C. Rules 4117-9-03 and 4117-9-05.

O.R.C. § 4117.14 provides, in relevant part:

(C) In the event the parties are unable to reach an agreement, they may submit, at any time prior to forty-five days before the expiration date of the collective bargaining agreement, the issues in dispute to any mutually agreed upon dispute settlement procedure which supersedes the procedures contained in this section.

(1) The procedure may include:

(a) Conventional arbitration of all unsettled issues;

(f) Any other dispute settlement procedure mutually agreed to by the parties.

(E) Nothing in this section shall be construed to prohibit the parties, at any time, from voluntarily agreeing to submit any or all of the issues in dispute to any other alternative dispute settlement procedure . . .

O.A.C. Rule 4117-9-03(B) specifies the requirements for a MAD:

A mutually agreed-upon dispute settlement procedure shall be filed via electronic mail with the board within five days of its execution. Where a mutually agreed-upon dispute settlement procedure is a provision in an existing collective bargaining agreement, a copy of the provision shall be filed with the notice to negotiate...

It is well established that a legally binding MAD under O.R.C. § 4117.14 must be a mutually agreed upon written agreement that is unambiguous on its face and has a point of conclusion. See *In re Niles City of Bd of Ed*, SERB 91-010 (11-8-91) (if parties adopt a MAD, “they have a responsibility to write one that lends itself to the possibility of resolution and one that has finality”); *In re Weathersfield Local Bd of Ed*, SERB 91-009 (11-8-91) (a MAD is insufficient if it does not address the parties’ situation); *In re City of Cleveland*, SERB 2008-004 (8-27-2008) (SERB will intervene where a MAD is faulty and inoperative), citing *In re Weathersfield Local Bd of Ed*.

In this case, although the parties asserted that they had a MAD governing their November 2013 fact-finding, the evidence clearly establishes that they did not execute such an agreement under the requirements of O.R.C. § 4117.14. The parties admitted at the inquiry that their 2010-2013 collective bargaining agreement did not contain a MAD. The parties further admitted that they did not execute a written MAD.

In its post-inquiry brief, SEIU District 1199 argues that SERB lacks subject matter jurisdiction to consider this matter. SEIU District 1199 contends that because the parties deviated from SERB’s statutory fact-finding procedure, they created a MAD by operation of law. SEIU District 1199’s argument is premised upon: (1) its statutory reading of O.R.C. § 4117.14 and O.A.C. Chapter 4117-9; (2) its method of selection of a fact finder and the actions of that fact finder; and (3) the alleged actions of SERB. SEIU District 1199’s argument is not persuasive.

SEIU District 1199 relies upon a select number of code provisions in O.R.C. § 4117.14 and O.A.C. Chapter 4117-9 and SERB’s fact-finding guidelines to support its argument. With regard to SERB’s guidelines, it is important to note that all of these publications clearly state that the guidelines are not comprehensive and are not binding on SERB in its subsequent determination of procedural or substantive law. SERB’s Fact Finding Hearing and Report Guidelines also states that the parties continue to be responsible for knowing all statutory and rule provisions governing the statutory dispute settlement procedure. With regard to the statutory and rule provisions, it is important to note that SEIU District 1199’s select reading of the statutory provisions and administrative rules is misleading. O.R.C. § 4117.14 and O.A.C. Chapter 4117-9 provide a comprehensive and detailed dispute settlement procedure and these code provisions must be read *in pari materia* in order to properly apply the law. Such a reading reveals that a public employer and an employee organization serving as

exclusive representative under O.R.C. Chapter 4117 have only two options; they may follow the statutory dispute settlement procedures and administrative rules or execute a MAD that complies with the requirements in O.A.C. Rule 4117-9-03. Because the parties admitted that they failed to follow the applicable statutory procedures to create a MAD, their November 2013 fact finding is governed by the statutory dispute settlement procedures and the motion before the Board regarding SEIU District 1199's fact-finding election procedures is within SERB's exclusive jurisdiction to consider. See *State ex rel. Cleveland v. Sutula*, 127 Ohio St.3d 131, 2010-Ohio-5039 ("The State Employment Relations Board has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117").

Correspondingly, the parties' failure to follow the statutory procedures in their selection of a fact finder and the actions of that fact finder do not create a valid MAD under O.A.C. Rule 4117-9-03. Although Fact Finder Nels E. Nelson treated the parties' fact-finding as if they had a MAD and billed the parties more than is permitted by SERB in the case of statutory fact-finding procedures, it is noted that O.A.C. Rule 4117-9-03 allows parties to mutually agree to establish a rate of pay in excess of the rate established by the Board without entering into a MAD. More importantly, neither Fact Finder Nelson's understanding of the parties' fact-finding process, nor the parties' understanding establishes a MAD under O.R.C. § 4117.14 and O.A.C. Rule 4117-9-03. In fact, the parties' divergent opinions regarding the specifics of their purported unwritten agreement exemplifies the reason for the requirements in O.A.C. Rule 4117-9-03. See *In re Niles, supra* ("the Board cannot emphasize enough the importance of the parties own responsibility to draft a thoughtful and proper MAD"). *Id.* at 3-58.

With respect to SERB's actions, SEIU District 1199 contends that it was not required to follow the statutory dispute settlement procedures for the parties' 2013 fact-finding due to allegedly inaccurate information it received from SERB regarding the union's obligations under O.R.C. § 4117.14 and due to SERB's failure to publish the employee organization's vote to reject the October 31, 2013 Fact-Finding Report as required by O.R.C. § 4117.14(C)(6)(a). SEIU District 1199's Public Division Director Joshua Norris testified that upon receiving the October 31, 2013 Fact-Finding Report entitled "State Employment Relations Board Mutually Agreed Dispute Settlement Procedure Fact-Finding Report," he sought guidance from SERB regarding the union's obligations and purportedly received information that SERB does not intervene in a parties' fact finding if they have a MAD.

Although the record indicates that SERB did not publish the union's vote rejecting the fact-finding report and may or may not have provided Mr. Norris with imprecise information regarding the applicable statutory requirements, this does not absolve SEIU District 1199 of its responsibility to ensure that the November 2013 fact-finding election procedures established for the CMSD bargaining unit were valid. This responsibility is particularly important in a situation where an employee organization, or an employer, contemplates implementing a process that is a significant departure from

specific and detailed statutory and administrative rules that govern the process. In considering the nature of this responsibility, it must be noted that the knowledge and experience of SEIU District 1199's Public Division Director cannot be overlooked. He testified that he is responsible for overseeing all public sector contract negotiations, including fact finding done as a result of a MAD or following the statutory process. If the Public Division Director was at all uncertain as to SEIU District 1199's legal obligations with respect to the CMSD fact-finding vote, he had the responsibility to seek advice from legal counsel before he made the decision to proceed with an election process that deviated considerably from the requirements set forth in O.A.C. Rule 4117-9-05.

Having determined that the parties did not have a MAD and therefore were required to follow the statutory dispute settlement procedures set forth in O.R.C. § 4117.14 and O.A.C. Rules 4117-9-03 and 4117-9-05, the Board must review the election procedures established by SEIU District 1199 for the CMSD bargaining-unit members to vote on the October 31, 2013 Fact Finding Report.

B. The Election Procedures Established by SEIU District 1199 for the Members of the CMSD Bargaining Unit to Vote on the October 31, 2013 Fact-Finding Report were not in Compliance with the Statutory Dispute Settlement Procedures set forth in O.R.C. § 4117.14 and O.A.C. Rule 4117-9-05.

O.R.C. § 4117.14(C)(6)(a) provides, in relevant part:

Not later than seven days after the findings and recommendation are sent, the legislative body, by a three-fifths vote of its total membership, and in the case of the public employee organization, the membership, by a three-fifths vote of the total membership, may reject the recommendation; if neither rejects the recommendation, the recommendation shall be deemed agreed upon as the final resolution of the issues ... If either the legislative body or the public employee organization rejects the recommendations, the board shall publicize the findings of fact and recommendation of the fact-finding panel. The board shall adopt rules governing the procedures and methods for public employees to vote on the recommendations of the fact-finding panel.

O.A.C. Rule 4117-9-05(M) sets forth the procedures for the conduct of an election upon an employee organization's receipt of a fact-finding report. It reads, in relevant part:

Immediately upon receipt, the exclusive representative shall make available, by posting or by other method reasonably

calculated to inform the members of the employee organization in the unit, the findings, recommendation, and summaries of the fact-finding panel together with a notice of the dates, times, and places where the employee organization's members in the unit may vote to approve or reject the recommendations of the fact finding panel. A secret ballot shall be conducted by the exclusive representative at the date, time, and places set forth in the notice....Each member of the employee organization in the unit shall at the time and place of election be issued a ballot containing a choice of "approve" and a choice of "reject" the recommendations of the fact-finding panel. There shall be no voting by proxy. The ballots shall be tallied immediately upon conclusion of the election.

In *In re Miami University*, SERB 86-030 (8-7-86), the Board noted that while an election of an employee organization on a fact-finding report is essentially an internal affair, "assuring the integrity of elections on fact-finding reports and protecting them from manipulation is one of SERB's responsibilities." In that case, the Board addressed a dispute between an employee organization and an employer regarding the employee organization's vote to reject a fact-finding report. The employee organization had tallied votes immediately upon the conclusion of the election and announced that they were one vote short of those needed for rejection. Subsequently, the employee organization allowed another officer, who had arrived five minutes late, to vote. In granting the employer's motion to deem the fact-finding report agreed upon, the Board found that the late vote was invalid because it jeopardized the safeguards established in O.A.C. Rule 4117-9-05. The Board noted that O.A.C. Rule 4117-9-05 requires an employee organization to conduct a fact-finding election by secret ballot at the date, time, and places set forth in the election notice sent to its union members. Ballots must be tallied immediately upon the conclusion of the election, and once the ballots have been tallied, the election process is concluded and closed to further balloting. *Id.* at 306.

In this case, the evidence establishes that SEIU District 1199 manipulated the CMSD bargaining unit's November 2013 fact-finding vote and failed to follow the election requirements set forth in O.A.C. Rule 4117-9-05. First, it should be noted that O.A.C. Rule 4117-9-05 does not provide for a combination of electronic voting and in-person voting that allows an employee organization to obtain vote tallies prior to the close of the voting period set forth in the employee organization's election notice. Second, O.A.C. Rule 4117-9-05 does not provide for multiple election notices with different information regarding dates, times, and places of the election. The October 31, 2013 election notice sent to SEIU District 1199's CMSD bargaining-unit members clearly stated that voting would only take place in-person on November 6, 2013 at the times and place specified in the notice. This election notice was sent to all CMSD bargaining-unit members via email on October 31, 2013, and via inter-office mail on

November 1, 2013. However, on November 4, 2013, SEIU District 1199 sent another election notice to full dues paying members of the CMSD bargaining unit that included the option to vote either in-person or online. The online voting period was from 6:30 p.m. on November 4, 2013, until 9:00 a.m. on November 6, 2013. SEIU District 1199 sent two additional election notices on November 5, 2013, indicating that the electronic voting option was available until 9:00 a.m. on November 6, 2013.

In addition to sending CMSD bargaining-unit members varied election notices, SEIU District 1199 received tallies of the electronic vote and the in-person vote after the close of voting at 6:15 p.m. on November 6, 2013. The vote tally revealed that the CMSD bargaining-unit membership vote total was 334 (296 in-person and 38 online). The vote tally was eight votes short of the 342 total membership vote needed to reject the October 31, 2013 Fact-Finding Report. After receiving these tallies, SEIU District 1199 sent another election notice to CMSD bargaining-unit members who had not yet voted. The November 7, 2013 election notice stated that the online vote would be open until 12:00 a.m. on November 7, 2013. SEIU District 1199 sent a total of four notices on November 7, 2013. The record shows that 29 CMSD bargaining-unit members voted electronically on November 7, 2013. The November 7, 2013 electronic vote added to the 334 vote tally from November 6, 2013 was sufficient to meet the three-fifths membership vote required by O.R.C. § 4117.14(C)(6)(a).

Although the evidence established that SEIU District 1199 failed to follow the safeguards established by O.A.C. Rule 4117-9-05 and manipulated the CMSD bargaining unit's November 2013 fact-finding vote, the union argues in its post-inquiry brief that it fulfilled the requirements imposed upon a statutory fact-finding under O.R.C. § 4117.14(C)(6) and O.A.C. Rule 4117-9-05(M). The evidence does not support SEIU District 1199's position in this regard. SEIU District 1199 created an election process not contemplated by the statutory dispute settlement procedures and used this process to manipulate the CMSD bargaining unit's vote to obtain the three-fifths membership vote required by the statute to reject the fact-finding report. As previously noted, SERB has the responsibility to assure the integrity of elections on fact-finding reports and protect them from manipulation. *In re Miami, supra*. Therefore, in order to protect the integrity of elections on fact-finding reports, the Board should find the SEIU District 1199 CMSD bargaining unit's November 2013 fact-finding vote invalid.

CONCLUSION

In conducting a combination of electronic voting and in-person voting, whereby the electronic voting was reopened after the ballots had been tallied at the conclusion of the voting period established in the October 31, 2013 election notice, SEIU District 1199 violated the provisions of O.R.C. § 4117.14(C)(6)(a) and O.A.C. Rule 4117-9-05 and manipulated the vote. Therefore, it is recommended that the Board grant CMSD's motion and find the November 2013 fact-finding vote of SEIU District 1199's CMSD

bargaining unit rejecting the October 31, 2013 Fact-Finding Report invalid and deem this fact-finding report agreed upon.

SERB

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Cleveland Metropolitan School District Board of Education
and
Service Employees International Union, District 1199, AFL-CIO
SERB Case No. 2013-MED-01-0024

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 February, 2014.



DONALD M. COLLINS
General Counsel