

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

In the Matter of

State Employment Relations Board,

Complainant,

and

Cleveland Police Patrolmen's Association,

Respondent.

Case No. 2017-ULP-01-0022

**ORDER
(OPINION ATTACHED)**

Before Chair Zimpher, Vice Chair Schmidt, and Board Member Lumpe: October 12, 2017.

On January 23, 2017, the City of Cleveland ("City" or "Charging Party") filed an unfair labor practice charge against the Cleveland Police Patrolmen's Association ("Respondent," "Union," or "CPPA"), alleging that the Union violated Ohio Revised Code ("O.R.C.") §§ 4117.11(B)(1), (B)(4), (B)(5), (B)(6), and (B)(8). On April 20, 2017, the State Employment Relations Board ("SERB" or "Complainant," or "Board") found probable cause to believe that the Union had violated O.R.C. §§ 4117.11(B)(1) and (B)(5) and directed the matter to an evidentiary hearing before the Board. On June 6, 2017, the Board issued a Complaint and Notice of Hearing.

Upon further review of the information contained in the record, the Board determined that there were no material issues in dispute. Accordingly, the Board, through its Office of General Counsel, converted the August 16, 2017 evidentiary hearing to an oral argument. On August 6, 2017, SERB's Office of General Counsel issued a Procedural Order directing the parties to submit this case to the Board on stipulations and position statements, followed by oral argument and optional post-oral argument briefs. The Chief of Police, Calvin Williams, and the President of the Cleveland Police Patrolmen's Association, Stephen J. Loomis, were permitted to submit an optional "Statement of Testimony" regarding their respective positions concerning the unfair labor practice charge in this case.


On August 16, 2017, the parties' representatives appeared before the Board for oral argument. On September 6, 2017, the parties filed their respective post oral-argument briefs.

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After considering the unfair labor practice charge, answer to the complaint, the parties' stipulations and post-oral argument briefs, statement of testimony, oral arguments, and the entirety of the information contained in the record, the Board, for the reasons set forth in the attached Opinion, *incorporated herein by reference*, finds that the controversy giving rise to the underlying charge and subsequent complaint has been resolved by the parties. Accordingly, the Board hereby dismisses the unfair labor practice charge and complaint in Case No. 2017-ULP-01-0022 as moot.

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



W. CRAIG ZIMPHER, CHAIR

TIME AND METHOD TO PERFECT AN APPEAL

This is a final appealable Order. You are hereby notified that an appeal from this Order 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 12th day of October, 2017.



ERIN E. CONN, PROGRAM ADMINISTRATOR

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and

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Respondent.

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OPINION

ZIMPHER, Chair:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Board" or "Complainant") on joint stipulations and the position statements of Intervenor, City of Cleveland ("Employer" or "City" or "Charging Party"), and Respondent, the Cleveland Police Patrolmen's Association ("Union" or "CPPA" or "Respondent"), and on oral argument. For the reasons set forth below, we dismiss this case as moot.

I. JOINT STIPULATIONS

The Board adopts the parties' Joint Stipulations as set forth below:

1. The City of Cleveland (Employer" or "City" or "Charging Party") is a "public employer" as defined by O.R.C. § 4117.01(B). Joint Stipulation 1 (Jt. Stip. 1.)
2. The Cleveland Police Patrolmen's Association ("Union" or "CPPA" or "Respondent") is an "employee organization" as defined by O.R.C. § 4117.01(D). (Jt. Stip. 2.)
3. The Union is the deemed-certified bargaining representative for a certain group of employees employed by the City and identified in Article 1 (Recognition) of the parties' collective bargaining agreement. (Jt. Stip. 3); Joint Exhibit (Jt. Ex. 1.)

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4. The parties' collective bargaining agreement expired on March 31, 2016, but was mutually extended by the parties. The parties' agreement contains a grievance-arbitration process that is final and binding. (Jt. Stip. 4.)
5. On January 23, 2017, the City filed an unfair labor practice charge against the Union, pursuant to and in accordance with O.R.C. § 4117.12(B) and Ohio Administrative Code 4117-7-01. (Jt. Stip. 5.)
6. On April 20, 2017, SERB determined that probable cause existed to believe that the Union had committed or was committing unfair labor practices, authorized the issuance of a complaint, and directed the matter to hearing. SERB also directed the parties to participate in unfair labor practice mediation. The parties met with a SERB mediator but were unable to resolve their differences. Subsequently, a Complaint was issued and the matter was set for hearing before the full Board. (Jt. Stip. 6.)
7. On or about December 15, 2016, the City's Division of Police issued "Divisional Notice 16-380" (DN-16-380) announcing the creation of the Neighborhood Impact Community Engagement Squad Detail ("NICE Squad/Detail"), which was created to proactively target violent crime areas. (Jt. Stip. 7 and Jt. Ex. 2.)
8. On December 16, 2016, Union President Stephen S. Loomis ("Union President Loomis" or "Mr. Loomis") issued a letter to Union members regarding the creation of the NICE Squad/Detail. (Jt. Stip. 8 and Jt. Ex. 3.)
9. On December 16, 2016, Union President Loomis sent a letter to the City's Deputy Chief of Police Wayne Drummond in which he objected to the creation of the NICE Squad/Detail. (Jt. Stip. 9 and Jt. Ex. 4.)
10. On December 20, 2016, Union President Loomis sent an email to CPPA members, asking them to refrain from volunteering for the NICE Squad/Detail. (Jt. Stip. 10 and Jt. Ex. 5.)
11. Union President Loomis sent a follow-up letter to CPPA members, dated December 21, 2016. (Jt. Stip. 11 Jt. Ex. 6).
12. Forty-four patrol officers applied for positions to the detail of the NICE Squad, but forty-one of these officers withdrew their applications after receiving the above emails and/or letters from Union President Loomis. (Jt. Stip. 12.)
13. On December 30, 2016, Union President Loomis sent a letter addressed to all officers who volunteered for the NICE Squad/Detail, including Patrol Officers Henderson, Lanier, and McGrath, again asking them to voluntarily withdraw their applications or face sanctions by the Union. (Jt. Stip. 13 and Jt. Ex. 8.)

14. Three police officers, Patrol Officer Lance Henderson, Patrol Officer Roscoe Lanier, and Patrol Officer Steven McGrath refused to withdraw their applications to the NICE Squad detail. (Jt. Stip.14.)
15. On or about January 11, 2017, the Executive Board of the CPPA voted to bring charges against Patrol Officers Henderson, Lanier, and McGrath. (Jt. Stip. 15.)
16. In separate letters dated January 18, 2017 and January 20, 2017, (one letter to Recording Secretary John Freehoffer, and other letters to Patrol Officers Henderson, Lanier, and McGrath), Union President Loomis advised these patrol officers of the charges being brought against them and requested that the CPPA Board of Directors empanel a Judicial Board to conduct hearings against them. (Jt. Stip. 16 and Jt. Ex. 10.)
17. On or about January 19, 2017, the Division of Police issued DN-17-014, which required seven (7) officers in addition to officers Henderson, McGrath, and Lanier to report to the NICE Squad effective January 26, 2017. (Jt. Stip. 17 and Ex. 9.)
18. On or about April 10, 2017, the Division of Police issued DN-17-99 regarding revised aspects of what was now called the NICE Unit and anticipated assignments to it. (Jt. Stip. 12 and Jt. Ex.12.)
19. On or about April 11, 2017, Union President Loomis sent a letter to all CPPA members, which, among other things, encouraged them to voluntarily request assignment to the NICE Unit. (Jt. Stip. 19 and Jt. Ex. 13.)
20. On or about April 20, 2017, the Division of Police issued DN-17-107 returning all ten officers previously participating in the NICE Squad to their previous duties effective April 24, 2017. (Jt. Stip. 20 and Jt. Ex. 15.)

II. ADDITIONAL FINDINGS OF FACT

1. SERB takes official/administrative notice of SERB Case No. 2017-ULP-01-0008: On January 12, 2017, The Union filed an unfair labor practice charge against the City regarding DN-16-380 (SERB Case No. 2017-ULP-01-0008) and a grievance regarding the creation and staffing of the NICE Squad/Detail. (CPPA #103-16.)
2. After an investigation was conducted, SERB dismissed the Union's unfair labor practice charge in SERB Case No. 2017-ULP-01-0008, stating that: "...the matter is purely contractual encompassing no arguable statutory violations. The Union selected the correct venue for resolution of this matter when it filed its grievance. The grievance contains allegations identical to the ones in the instant charge.

The grievance is currently being advanced through the parties' final and binding grievance-arbitration procedures...."

3. The parties resolved their differences and moved forward with the creation and staffing of the NICE Squad. As a result, the City issued a new departmental notice (DN-17-99) that was agreed upon by both parties. The Union withdrew its grievance #103-16.

III. DISCUSSION

This case arises from a labor dispute between the City and the Union regarding the initial creation and staffing of the Police Division's NICE Squad/Detail in mid-December 2016. On January 23, 2017, the City filed an unfair labor practice charge against the Union alleging that the Union violated O.R.C. §§ 4117.11(B)(1), (B)(4), (B)(5), (B)(6), and (B)(8) when it opposed having its members volunteer for the NICE Squad. On April 20, 2017, SERB found probable cause to believe that the Union had violated O.R.C. §§ 4117.11(B)(1) and (B)(5) and directed the matter to an evidentiary hearing before the Board. On June 6, 2017, the Board issued a Complaint and Notice of Hearing.¹

A review of the record evidence in this case and the parties' presentations at oral argument demonstrate that the City and the Union were able to resolve their differences regarding the creation and staffing of the NICE Squad and move forward with its implementation. Therefore, since the controversy giving rise to the underlying charge and subsequent complaint has been resolved by the parties, this case is moot.

Black's Law Dictionary defines a "moot case" as: "A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights." *Black's Law Dictionary* (Eighth Ed. 2004). The question of mootness addresses whether an actual, live controversy exists at the time of litigation or whether an intervening event or agreement has settled the dispute. See *Coalition for Gov't Procurement v. Federal Prison Indus.*, 365 F.3d 435, 458 (6th Cir. 2004). See also *Mahoning County Board of Developmental Disability* (June 6, 2011),

¹ Upon further review of the information contained in the record, the Board determined that there were no factual issues in dispute. Accordingly, the Board, through its Office of General Counsel, converted the August 16, 2017 evidentiary hearing to an oral argument. On August 6, 2017, SERB's Office of General Counsel issued a Procedural Order directing the parties to submit this case to the Board on stipulations and position statements, followed by oral argument and optional post-oral argument briefs.

SERB 2011-022; *Streetsboro v. FOP, Ohio Labor Council*, 2004 SERB 4-44 (ND Ohio, 7-22-2004).

“The doctrine of mootness is rooted both in the ‘case’ or ‘controversy’ language of Section 2, Article III of the United States Constitution and *in the general notion of ‘judicial restraint.’*” *Bradley v. Ohio State Dept. of Job & Family Servs.*, 2011-Ohio-1388 (10th Dist Ct App, Franklin, 3-24-2011) citing *James A. Keller, Inc. v. Flaherty* (1991), 74 Ohio App.3d 788, 791 [NE (2d) 736]. “Although the Ohio Constitution has no counterpart to Section 2, Article III, Ohio courts have long refused to entertain moot questions.” *Id.* See also *OCSEA, Local 11 v ODOT*, 1995 SERB 4-17. (10th Dist Ct App, Franklin, 6-1-95) citing *James A. Keller, Inc., supra.*; See, also, *In re Mahoning County Bd of Developmental Disabilities*, SERB 2011-022 (6-6-2011). The case before us certainly meets both the textual and precedential criteria for “mootness.”

In this case, the parties resolved their differences regarding the NICE Squad and moved forward with its implementation. The City issued a new departmental notice (DN-17-099) that was agreed upon by both parties and the Union withdrew its grievance #103-16 regarding the creation and staffing of the NICE Squad. The Union President sent a letter to all CPPA members on April 11, 2017, notifying them that the parties were able to staff the new NICE Unit within the confines of the parties’ collective bargaining agreement and encouraging Union members to voluntarily request assignment to the NICE Unit. On or about April 20, 2017, the Division of Police issued DN-17-107 returning all ten officers previously participating in the NICE Squad to their previous duties effective April 24, 2017. The NICE Unit continues to be operational.

At oral argument, Charging Party and Complainant presented two primary arguments on the issue of mootness: (1) the unfair labor practice charge is not moot because there is no “global resolution” to all matters regarding the events surrounding the NICE Squad, and (2) the unfair labor practice charge is not moot because the present case falls within the recognized exception to the mootness doctrine, cases that present an issue “capable of repetition, yet evading review.” We disagree.

With regard to the first argument, we find that the implementation of the NICE Squad as described in the record and at oral argument are sufficient to resolve this matter. Therefore, the mootness doctrine is applicable.

With regard to the second argument, we note that the “capable of repetition, yet evading review” exception to the mootness doctrine applies only in extraordinary

circumstances where the following two factors are both present: "(1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *State ex rel. Calvary v. Upper Arlington et al.*, 89 Ohio St.3d 229 citing *Spencer v. Kemna* (1998), 523 U.S. 1, 17-18, 118 S.Ct. 978, 988, 140 L.Ed.2d 43, 56; see, also, *State ex rel. Beacon Journal Publishing Co. v. Donaldson* (1992), 63 Ohio St.3d 173,175; *State ex rel. Allstate Ins. Co. v. Gaul* (1999), 131 Ohio App.3d 419; *Napoleon Faculty Assn, OEA/NEA v. SERB*, 1996 SERB 4-31 (CP, Henry, 7-1-96); *Streetsboro v. FOP*, *supra*.

Although the challenged action in this case may be capable of repetition, it is not by its nature "too short in its duration to be fully litigated before its cessation or expiration." Here, if the parties had not resolved their differences regarding the implementation and staffing of the NICE Squad and the City had not issued a new departmental notice agreed upon by both parties, the issue would have been fully litigated before the Board. SERB's processes for the investigation and review of unfair labor practice charges under O.R.C. §§ 4117.12 and 4117.13 provide sufficient time to obtain review and final determination by SERB as well as judicial review if appealed. Given the opportunity for review provided by O.R.C. §§ 4117.12 and 4117.13, we find that the City's claim in this case does not meet the second prong of the exception to the mootness doctrine.

Moreover, we find that applying the mootness doctrine under the circumstances of this case is consistent with the goals behind O.R.C. Chapter 4117. Since SERB's creation by the General Assembly in 1984, its mission and overriding objective has been to promote orderly and constructive labor relations in Ohio's public sector. In every aspect of its statutory functions, the Board has consistently and unfailingly sought to ameliorate or prevent conflict from arising between labor and management. Therefore, since the parties in this case have resolved the controversy that gave rise to the underlying charge and subsequent complaint, we find that this case is moot and should be dismissed in the interest of promoting orderly and constructive labor relations between the parties.

V. DETERMINATION

For the reasons stated above, we dismiss with prejudice the unfair labor practice charge and complaint in Case No. 2017-ULP-01-0022 as moot.

Zimpher, Chair, Schmidt, Vice Chair, and Lumpe, Board Member, concur.