

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

Urbana Firefighters Association, IAFF Local 1823, *et al.*,

Respondents.

Case Nos. 2010-ULP-09-0365 through 2010-ULP-09-0374

**ORDER
(OPINION ATTACHED)**

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

On September 13, 2010, the City of Urbana ("City") filed unfair labor practice charges against the Urbana Firefighters Association, IAFF Local 1823, *et al.* ("Respondents" or "Union"). On December 2, 2010, the State Employment Relations Board ("Board," or "Complainant") determined that probable cause existed to believe that Respondents had committed or were committing unfair labor practices in violation of Ohio Revised Code ("O.R.C.") § 4117.11(B)(3), authorized the issuance of a complaint, and referred the matter to hearing.

On December 16, 2010, a complaint was issued. In lieu of an evidentiary hearing, the parties agreed to submit proposed stipulations of fact, joint exhibits, and legal briefs on March 14, 2011. The parties further agreed to submit the record directly to the Board for a decision on the merits. On March 17, 2011, the Board issued a Directive transferring the case from the Hearings Section to the Board.

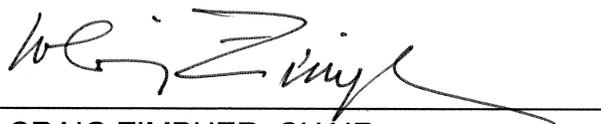
On June 16, 2011, the Board issued a Directive ordering the parties to appear for an evidentiary hearing to take testimony and evidence regarding the issue of whether the bargaining-unit members who circulated a petition seeking to amend the City of Urbana's Charter regarding wages, hours and other terms and conditions of employment were acting as agents of the Union. The evidentiary hearing before the full Board was held on August 4, 2011.

After reviewing the unfair labor practice charges, complaint, answer, proposed joint stipulations of fact, legal briefs, testimony, and documentary evidence, and all other filings in this case, the Board issues a Board Opinion, incorporated by reference, with supporting Findings of Fact and Conclusions of Law, finding that Respondent Urbana

Firefighters Association, IAFF Local 1823 did not violate Ohio Revised Code § 4117.11(B)(3) when it circulated a petition seeking to amend the City of Urbana's Charter regarding wages, hours, and terms and conditions of employment.

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 17th day of November, 2011.



ERIN E. CONN, ADMINISTRATIVE ASSISTANT

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OPINION

ZIMPHER, Chair:

This matter comes before the State Employment Relations Board (“Board,” “Complainant,” or “SERB”) upon the City of Urbana’s (“City” or “Employer”) unfair labor practice charges filed against the Urbana Firefighters Association, IAFF Local 1823, *et al.* (“Respondents” or “Union”), alleging violations of Ohio Revised Code (“O.R.C.”) §§ 4117.11(B)(2) and (B)(3). On December 2, 2010, the Board determined that probable cause existed to believe that Respondents had committed unfair labor practices in violation of O.R.C. § 4117.11(B)(3) but not (B)(2), authorized the issuance of a complaint, and referred the matter to an evidentiary hearing before an administrative law judge. In lieu of an evidentiary hearing, the parties agreed to submit proposed stipulations of fact, joint exhibits, and their respective legal briefs on March 14, 2011. The parties further agreed to submit the record directly to the Board for a decision on the merits.

Upon review of the information submitted by the parties, the Board determined that further information was needed. Accordingly, the Board issued a Directive on June 16, 2011, directing the parties to appear for an evidentiary hearing to take testimony and evidence regarding the issue of whether the bargaining-unit members who circulated a petition seeking to amend the City of Urbana’s Charter regarding wages, hours and other terms and conditions of employment were acting as agents of the Union. The evidentiary hearing was held before the full Board on August 4, 2011.

For the reasons that follow, we find that Respondents did not violate O.R.C. § 4117.11(B)(3) when it circulated a petition seeking to amend the City of Urbana's Charter regarding wages, hours, and terms and conditions of employment.

I. FINDINGS OF FACT

1. The City of Urbana ("Employer" or "City") is a charter municipality with home-rule authority as provided by the Ohio Constitution.
2. The City is a "public employer" as defined by O.R.C. § 4117.01(B).
3. The Urbana Firefighters Association, IAFF Local 1823 ("Union" or "Respondent") is an "employee organization as defined by O.R.C. § 4117.01(D) and is the deemed-certified exclusive representative for a bargaining unit of the Employer's firefighters. The Union is also the Board-certified bargaining representative for the Employer's Fire Department employees who are captains.
4. During all times relevant to this case, Christopher Jones, David M. Torsell, John D. Dale, Phillip D. Kellenberger, Dean Douglas Edwards, Christopher Logan, Christopher W. Massie, Mark E. Keller, and James R. Lyons ("Respondents" or "Charged Parties") were employed by the City of Urbana, were public employees pursuant to O.R.C. § 4117.01(C), and were members of IAFF Local 1823.
5. All charges regarding Captain David M. Torsell were withdrawn and he is no longer a party to this unfair labor practice charge.
6. During all times relevant to this case, Bruce Evilsizor has been employed by the City of Urbana as Director of Administration. Mr. Evilsizor presented testimony at the August 4, 2010 evidentiary hearing.
7. On September 13, 2010, the City of Urbana filed ten unfair labor practice charges with SERB, pursuant to and in accordance with O.R.C. § 4117.12(B) and O.A.C. Rule 4117-7-01.
8. On December 2, 2010, SERB determined that probable cause existed for believing that the Union committed or was committing unfair labor practices, consolidated the individual unfair labor practice charges, authorized the issuance of a complaint, and referred the matter to hearing.

9. In lieu of an evidentiary hearing, the parties agreed to submit proposed joint stipulations of fact, joint exhibits, and their respective legal briefs on March 14, 2011. The parties further agreed to submit the record directly to the Board for a decision on the merits. The record was developed further via an evidentiary hearing held on August 4, 2011.

10. The City and the Union are parties to a current collective bargaining agreement ("CBA"), effective from November 15, 2008 through November 14, 2011. The CBA contains a grievance-arbitration process that culminates in binding arbitration.

11. The City and the Union have not negotiated a successor agreement.

12. Article 3 of the parties' CBA sets forth a Management Rights clause that specifically reserves as exclusive management rights, *inter alia*, the right to determine the size and duties of the work force, staffing patterns, and to discontinue any department or division.

13. In early 2010, the City conducted Labor/Management meetings with the exclusive representatives of the City's bargaining-unit members to address the City's budget shortfall. The City sought wage and benefit concessions of 10% from each of its divisions during the first six month period of 2010.

14. On June 16, 2010 and July 8, 2010, Labor/Management meetings were held to address the budget reduction process for the second six month period (August 2010 through January 2011), which involved IAFF labor units working under the anticipated layoff notice issued by the City in December 2009.

15. On July 12, 2010, Bruce Evilsizor issued a Memorandum concerning: "Budget Reduction Process for 2nd Six Month Period (August 2010 through January 2011)." The memorandum was issued to "Firefighters c/o Jason Croker" and "Fire Captains, IAFF c/o Mark Keller."

16. The July 12, 2010 Memorandum was a follow-up to the Labor/Management meetings of June 16, 2010 and July 8, 2010, and it set forth a timeline for implementation of the continued 10% budget reduction, including the layoffs within the IAFF labor units.

17. During all times relevant to this case, Jason Croker has been President of Firefighters IAFF Local 1823. In 2010, Mr. Croker formed a committee named the "Firefighters Charter Amendment Committee." The Firefighters Charter Amendment Committee was funded by the International Association of Firefighters in the amount of \$2,887.55. The Firefighters Charter Amendment Committee sought to circulate a

petition to place on the November 2010 ballot an amendment to the City of Urbana's Charter that would require the City to establish a Fire Division to provide fire, emergency, medical, and rescue services and to "be the sole and exclusive, publicly-funded enterprise providing these services." The amendment would also have required the City to: (1) employ no fewer than twenty-three employees; (2) employ all as full-time employees; and (3) fill vacancies within ninety days.

18. Approximately two weeks after the June 16, 2010 Labor/Management meeting with IAFF Local 1823, eight of the bargaining-unit members listed in paragraph 4 wore Union t-shirts while circulating the Firefighters Charter Amendment Committee's petition to amend the City's Charter to require the City to establish a Fire Division to provide fire, emergency, medical, and rescue services and to "be the sole and exclusive, publicly-funded enterprise providing these services." The amendment would also require the City to: (1) employ no fewer than twenty-three employees; (2) employ all as full-time employees; and (3) fill vacancies within ninety days.

19. The petition circulated by Respondents was successful and the proposed Charter Amendment was placed on the ballot for the November 2010 election. The amendment did not pass.

II. DISCUSSION

The issue in this case is whether Respondents violated O.R.C. § 4117.11(B)(3). Specifically, the Union is alleged to have circumvented its duty to bargain in good faith through the actions of Union members who circulated a petition to place on the November 2010 ballot an amendment to the City of Urbana's Charter regarding wages, hours, and other terms and conditions of employment, thereby bypassing the public employer's designated bargaining representative. O.R.C. § 4117.11(B)(3) provides, in pertinent part:

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

* * *

(3) Refuse to bargain collectively with a public employer if the employee organization is recognized as the exclusive representative or certified as the exclusive representative of public employees in a bargaining unit.

The principal purpose of O.R.C. Chapter 4117, and therefore SERB, as the administrative and adjudicatory body created under said chapter, is to promote “orderly and constructive relationships between all public employers and their employees.” See O.R.C. § 4117.22. In light of this statutory mission, it is particularly incumbent upon SERB to protect vigilantly the lines of communication contemplated by the collective bargaining process described in O.R.C. Chapter 4117. Attempts to shortcut these lines not only contravene the duty to bargain in good faith, they undermine the very principles upon which the collective bargaining process is founded. *In re International Assn of Firefighters, Local 1267*, SERB 2006-009 (10-20-2006).

Good faith bargaining is determined on a case-by-case basis by the totality of the circumstances. *In re Dist 1199/HCSSU/SEIU*, SERB 96-04 (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).

As a threshold matter, we must determine whether the Union members who committed the alleged misconduct were acting as agents of the Union since a union does not manifest itself through the actions of all its members per se, but only those employees who are acting as agents of the union within the scope of their authority. See *In re Harrison Hills Teachers Ass’n*, SERB 2010-007 (3-31-2010), and *Kitchen Fresh, Inc.*, 716 F.2d 351, 355 (6th Cir. 1983). In *Kitchen Fresh, Inc.*, the court determined that in order to find that an employee is acting as an agent of a union, a party must show that the union actually “instigated, authorized, solicited, ratified, condoned or adopted” the employee’s actions or statements. See also, *Kux Mfg. v. NLRB*, 890 F.2d, 804, 809 (6th Cir. 1989).

The testimony and evidence presented before the Board established that certain Union members circulated a petition to amend the City’s Charter to permanently add, *inter alia*, a minimum manning provision for firefighters. The testimony and evidence further established that the Union members who circulated the petition to amend the City’s Charter did so under the encouragement of IAFF Local 1823 Union President Jason Croker, who organized and actively participated in the efforts by the firefighters to amend the City’s Charter. The evidence also established that, in early 2010, the City held a number of labor/management meetings with representatives of the City’s bargaining-unit members to address a budget shortfall. The City sought wage and benefit concessions of 10 percent from each of its divisions. During the budget reduction process, Mr. Croker established the “Firefighters Charter Amendment Committee.” The sole funding source for the committee was the International Association of Firefighters. On June 10, 2010, the City and the Union held a

labor/management meeting wherein the City notified the Union that layoffs within the firefighter bargaining units would proceed as announced in the City's December 2009 layoff notice. Approximately two weeks after the June 10, 2010 labor/management meeting, eight Union members wearing Union t-shirts individually circulated the Firefighters Charter Amendment Committee's petition to amend the City's Charter. As President of IAFF Local 1823, Mr. Crocker provided support for the petition to amend the City's Charter by writing a letter to the Editor of the Urbana Daily Citizen, by providing statements for an article regarding the amendment that appeared in the Springfield News-Sun, and by establishing a webpage encouraging voters to vote in favor of the amendment put forth by the Firefighters Charter Amendment Committee.

We find that the aforementioned evidence is more than sufficient to establish that the Union instigated, authorized, and condoned the actions of its members in the circulation of the petition to amend the City's Charter; therefore, the record supports the conclusion that these employees were acting as agents of the Union. Having established that Union members were acting as agents of the Union when they circulated the petition to amend the City Charter, we must now consider the alleged violation of O.R.C. § 4117.11(B)(3).

As previously noted, the unfair labor practice charge in this case involves the Union's attempt to change the parties' existing CBA during the term of the agreement by circulating a petition to amend the City's Charter to permanently add, *inter alia*, a minimum manning provision for firefighters. A review of Article 3 of the parties' CBA reveals that this agreement clearly states that the City has the exclusive right to determine the size of the work force.

As noted above, Ohio Revised Code Chapter 4117 generally provides for the duty to bargain before implementing change to an existing collective bargaining agreement. However, SERB has recognized that parties to an existing collective bargaining agreement must be able to respond to particular situations that arise during the term of the agreement. In *In re Toledo City School Dist Bd of Ed*, SERB 2001-005 (9-20-2001) ("*In re Toledo*"), SERB held that a party cannot modify an existing collective bargaining agreement without agreement of both parties *unless* immediate action is required due to "exigent circumstances" that were unforeseen at the time or legislative action by a "higher-level legislative body" after the agreement became effective that requires a change to conform to the statute. [Emphasis added.]

Although the Union's proposed amendment to the City's Charter was disapproved by the electorate, we find the mid-term bargaining standard set forth in *In re Toledo* helpful in determining whether the Union's actions with respect to the

circulation of the petition to amend the City's Charter violated O.R.C. § 4117.11(B)(3). The specific component of the *In re Toledo* standard relevant to this case is the legislative action taken by a "higher-level legislative body" after a CBA becomes effective that requires a change to the CBA to conform.

SERB defined the term "higher-level legislative body" in *In re Cincinnati*, SERB 2005-006 (9-8-2005) ("*In re Cincinnati*"). In that case, Cincinnati's City Council placed an emergency ordinance amending the City's Charter with respect to a certain promotional process on an upcoming ballot to be voted on by the City's electors. The City also was attempting to remove a number of positions that had been placed in the classified service by the City Charter. SERB found that the voters of the City of Cincinnati constituted a "higher-level legislative body" under *In re Toledo*. SERB therefore concluded that the City did not have to bargain with the Union over the changes to the established promotional process. SERB reasoned as follows:

When the voters decide an issue at the ballot box, they are acting as a 'higher-level legislative authority' to the City under the second exception to the bargaining requirement set forth in *Toledo*. *Id.*

On appeal, the First District Court of Appeals reversed the Court of Common Pleas of Hamilton County, which had reversed SERB's Order. In upholding SERB's Order, the Court of Appeals stated that "if the citizens of Cincinnati, in passing a charter amendment, are not a 'higher-level legislative authority' then any charter amendment could never affect future collective bargaining. On its face, that is impossible – both the city and any union could simply ignore the charter, which is the highest authority in city governance." *State Emp. Relations Bd. v. Queen City Lodge No. 69 Fraternal Order of Police*, 174 Ohio App.3d 570, 2007-Ohio-5741

As previously noted, the issue in this case is whether the Union violated O.R.C. § 4117.11(B)(3) by circulating a petition seeking to amend the City Charter regarding wages, hours, and terms and conditions of employment, thereby bypassing the Employers' bargaining representative. Therefore, our focus is on the Union's actions in initiating the Charter amendment process.

In *In re Cincinnati*, SERB determined that although the City Council voted to authorize the placing of the Charter amendment on the ballot, it was not the City Council that enacted the change. Instead, the electorate was responsible for the change. In *In re Cincinnati*, SERB focused on the nature of the process that enables *the people* to make laws at the local level. The process of approving a Charter amendment involves first a

republican process of representatives of *the people* putting that amendment on the ballot, and then a democratic process of *the people* approving or disapproving the amendment. See Ohio Constitution, Article XVIII - Municipal Corporations § Section 18.09

In accordance with *In re Cincinnati*, we find that the Union did not have to bargain with the City in order to circulate a petition to place an amendment of the City's Charter on the ballot. Accordingly, the Union did not violate O.R.C. § 4117.11(B)(3) when it circulated a petition seeking to amend the City of Urbana's Charter regarding wages, hours, and terms and conditions of employment.

While we are mindful of the legal precedent cited above, we note that an adjudicatory agency, as any other body, has a duty, in light of certain circumstances and developments, to review and reevaluate prior decisions. SERB is not precluded from reconsidering prior opinions, especially if they should be inconsistent with practical or workable public policy.

In that vein, we note that as the adjudicatory agency charged with enforcing the collective bargaining laws set forth in Ohio Revised Code Chapter 4117, we are concerned that the type of conduct under review in the instant case has the potential to undermine the collective bargaining process by disrupting the lines of communication essential to this process. A legislative body is commonly understood, under the scheme of our system of democratically elected government, as a deliberative body of persons vested by the electorate with enacting laws, and executing other ministerial responsibilities, including, pursuant to Ohio Revised Code Chapter 4117, the ratification or rejection of collective bargaining agreements. The long established and accepted concept of delegated power to elected representatives bestows on such bodies authority and accountability, and implies that elected officials enjoy that delegated authority to set and execute the necessary functions entrusted to them by the larger body politic. Therefore, we caution both public employers and employee organizations that deal with public employers to be circumspect when considering taking any action to secure through a charter amendment terms and conditions of employment that are different from those in the parties' existing CBA. Such actions will be closely scrutinized in future unfair labor practice charges that come before the Board and the Board will make its determinations on a case-by-case basis.

III. CONCLUSIONS OF LAW

1. The City of Urbana is a “public employer” as defined by O.R.C. § 4117.01(B).
2. The Urbana Firefighters Association, IAFF Local 1823 is an “employee organization” as defined by O.R.C. § 4117.01(D).
3. The Urbana Firefighters Association, IAFF Local 1823 did not violate O.R.C. § 4117.11(B)(3) when it circulated a petition seeking to amend the City of Urbana’s Charter regarding wages, hours, and terms and conditions of employment.

IV. DETERMINATION

For the reasons stated above, we find that the Urbana Firefighters Association, IAFF Local 1823 did not violate Ohio Revised Code § 4117.11(B)(3) when it circulated a petition seeking to amend the City of Urbana’s Charter regarding wages, hours, and terms and conditions of employment.

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