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# **Collective Bargaining in Difficult Economic Times**

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**Presented By Jonathan J. Downes  
December 8, 2010**



## **INTRODUCTION – JONATHAN J. DOWNES**

**Jonathan J. Downes** is a partner in the Columbus firm of Downes Fishel Hass Kim LLP with over 30 years experience in numerous facets of employment law. Mr. Downes received his law degree from Case Western Reserve University and a Bachelor of Science degree in Business Administration from Virginia Tech. Jonathan is AV rated by Martindale-Hubbell and certified by the Ohio State Bar Association as a Specialist in Labor and Employment Law. Mr. Downes has been selected by his peers for inclusion in Best Lawyers in America® 2010 and named one of Central Ohio Top Lawyers 2009. Annually, since 2004, his peers in Ohio have voted Mr. Downes a “Super Lawyer” in

Employment and Labor Attorneys. Mr. Downes has argued cases before the Ohio Supreme Court and the United States Sixth Circuit of Appeals. Jonathan has extensive experience at collective bargaining, arbitration, litigation, administrative matters, civil rights, and civil service law. He served on the Civil Service Review Commission for the State of Ohio, authored “Civil Service Law in Ohio” and edits the annual publication of the Ohio Civil Service and Collective Bargaining Laws Annotated. He is a member of the Ohio Management Lawyer’s Association and a charter member and past president of the Ohio Public Employers Labor Relations Association. Jonathan volunteers in his community in various capacities including serving on boards of a public library and two charter schools and advises a high school mock trial team.

## **DOWNES FISHEL HASS KIM LLP**

Downes Fishel Hass Kim LLP defends business entities, public officials, and the owners and boards of these entities, and private individuals. The philosophy of the firm is to provide services that promote the development of systems and human resource management to maximize the goals and direction of the organization and to avoid and minimize conflict. This may include employee and supervisory training, the development and implementation of policies and procedures, and consultation. Vigorous representation is the first concern with consideration to both the short and long term effects. Services are provided to unionized, non-unionized, and mixed unionized/non-unionized clients. The firm's perspective is pro-management.

The firm also represents clients in pretrial, trial and appellate stages of litigation in both federal and state court and related administrative matters. Our litigation practice includes the defense of discrimination and harassment suits, Constitutional matters, professional partnerships and small business litigation, corporate dissolutions and shareholder disputes, wrongful termination, wage and hour, Family Medical Leave, Fair Labor Standards Act, and other civil actions.

The firm’s defense philosophy is proactive, while maintaining a balance between appropriate defenses without unnecessary discovery or discovery disputes. The firm focuses on both the short-term and long-term impact of litigation. A concerted effort is placed on determining issues of liability as early as possible in litigation, allowing the client to make informed decisions concerning case resolution. The firm is flexible as to services based on clients' needs and wishes. The attorneys regularly work in conjunction with all levels of management staff, legal advisors, officers, and directors providing advice, background information, research and/or consultation on specific issues.

**Table of Contents**

**Page No.**

I.	Introduction – What is the “New Normal” .....	1
II.	Identify Current Economic Conditions.....	1
III.	Examine the Economic Trends that Drive the Local Economy.....	1
IV.	Identify Trends of Local Funding – Short Term and Long Term.....	1
V.	Economy, Budget, and Employees – Balancing the Economic Realities.....	1
VI.	Policy Considerations: Quality of Life Considerations and Public Services.....	2
VII.	Economic Realities in the Community .....	2
VIII.	Local Budget Basis and Comparability .....	4
IX.	Issues to Consider Outside Collective Bargaining.....	5
X.	Communications with Employees - Educate and Understand.....	5
XI.	Obligation to Bargain.....	5
XII.	Traditional Non-Economic Items of Contracts to Consider for Change .....	5
XIII.	Economic Items of Contracts to Consider for Change .....	6
XIV.	Operational Modifications for Employers, “Best Practices” Programs.....	8
XV.	Case Law Update .....	9

## **Using Economic Stress to Change Contract Language**

### **I. Introduction – What is the “New Normal”**

#### A. Historical Context

“All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted unto the public service”

-Franklin D. Roosevelt

#### B. Civil Service Law

#### C. Envision the “New Normal”

#### D. Opportunity for Change

#### E. Anti - Tax Movement

### **II. Identify Current Economic Conditions**

#### A. National

#### B. Regional

#### C. State

#### D. Local

### **III. Examine The Economic Trends that Drive the Local Economy**

#### A. Economic

#### B. Demographic

### **IV. Identify Trends of Local Funding – Short Term and Long Term**

#### A. Counties

#### B. Municipalities

#### C. Libraries

#### D. School boards

#### E. Special districts

#### F. Townships

### **V. Economy, Budget, and Employees – Balancing the Economic Realities**

#### A. Relate the Local Economic Realities to the Budget Planning

#### B. Educate all Staff, Employees and the Public

## **VI. Policy Considerations: Quality of Life Considerations and Public Services**

- A. Basic Public Services Functions – Establish or Reexamine Priorities
- B. Develop Policy Review
  - 1. Short term
  - 2. Long term
- C. Develop Policy Priorities and be Willing to Make Hard Decisions
  - 1. Balance the demands of the public and employees
  - 2. Capital improvements vs. personnel costs
- D. Educate Staff, Legislative Bodies, and Public of all Costs
- E. “Shared Sacrifice” – State of Ohio, Office of Collective Bargaining Experience

## **VII. Economic Realities in the Community**

- A. Demonstrate to Employees the Economic Realities in the Community
  - 1. Unemployment and underemployment rates
  - 2. Layoffs
  - 3. Wage increases
  - 4. GDP growth
  - 5. CPI/CU
  - 6. Foreclosures
  - 7. Bankruptcies
  - 8. Housing values and starts
  - 9. Employment opportunities
  - 10. Real estate sales
  - 11. Poverty rates
- B. Population Trends
  - 1. Growth or decline
  - 2. Work force portion
  - 3. Service area population
  - 4. Crime statistics
  - 5. Age of workforce
  - 6. Employment trends - sectors
- C. Assessed Valuation
  - 1. Residential
  - 2. Industrial
  - 3. Utilities
  - 4. Other
- D. Business Activity
  - 1. Retail sales/tax
  - 2. Real estate
    - a. Residential
    - b. Commercial

3. Bankruptcies
4. Foreclosures
5. Layoffs
- E. Jurisdiction Workforce Evaluation
  1. Services provided
  2. Size
  3. Overhead
  4. Administration
  5. Efficiencies
  6. Consolidation
  7. Productivity
- F. Jurisdiction Economic Resource
  1. Budgets
  2. Tax/revenue sources
    - a. User fees
    - b. Income tax
    - c. Real estate taxes
    - d. Other
  3. Debt load and Bond Ratings
  4. Total tax burden
- G. Jurisdiction Economic Comparison
  1. Total revenues
    - a. Decline
    - b. Increase
  2. Carryover
  3. Trends
  4. Comparison to inflation
  5. Comparison to wage increases
  6. Rainy day funds
- H. Push - Back from Public
  1. Priorities
  2. Demand for services
  3. Willingness to pay
- I. Identify the Reductions in Pay and Benefits in the Community
  1. Layoffs
  2. Plant closures
- J. Determine the Local Income - Compare to Work Force
  1. AGI
  2. Per capita
  3. Household
  4. Median incomes
  5. Public assistance
  6. Private sector wages
- K. Explain Long Term Consequences of Failure to Balance Budget or Align Costs with Revenue

- L. Priorities of the Public - Identify Demand for Services, Competing Sources
  - 1. Consider survey of public for priorities
  - 2. Public attitude toward public service
  - 3. Consider function- specific tax
    - a. Safety forces: police, fire, EMS, dispatch
    - b. Recreation
    - c. Water/wastewater/refuse collection
    - d. Roads/bridges
    - e. Courts
    - f. Schools
    - g. Libraries

### **VIII. Local Budget Basis and Comparability**

- A. Budget History and Projections
  - 1. Accuracy of projections
  - 2. Year-over-year
    - a. Receipts
    - b. Expenditures
- B. Revenue Sources (trends)
  - 1. Unrestricted
  - 2. Restricted
- C. Expenses
  - 1. Debt load (bond rating)
  - 2. Mandated
  - 3. Payroll
  - 4. Payroll-related
- D. Comparative Charting (examples)
  - 1. Revenue vs. expenditures
  - 2. Carryover or year-end balance
  - 3. Revenues vs. personnel services costs
  - 4. Permissive sales and use tax
  - 5. Revenue trends
  - 6. Expenditure trends
  - 7. Authorized staffing
- E. Previous Fact-Finding and Conciliation Awards and Settlements
- F. CAFR - Comprehensive Annual Financial Report
- G. GFOA - Government Finance Officers Association Standards and Guidelines

## **IX. Issues to Consider Outside Collective Bargaining**

- A. Consider Reconstructive/Reorder of Structures
  - 1. Combine functions and broadband classifications
    - a. e.g. Consolidate support staff
  - 2. Consolidate dispatch functions and 911 operations
  - 3. Merge/combine agencies and departments
    - a. e.g. Cleveland suburbs fire departments
- B. Study & Consider Other Personnel Driven Costs
  - 1. Health insurance, HSA's, wellness programs
  - 2. Risk management costs and impact
  - 3. Worker's compensation
  - 4. Retirement benefits
  - 5. Timekeeping and records
  - 6. Leave banks

## **X. Communications with Employees - Educate and Understand**

- A. Address the Fears and Concerns of Employees
  - 1. Health insurance costs
  - 2. Retirement
- B. Increased Work Load Due to Decreased Staffs – Broadband Classifications
- C. Spousal Loss of Employment
- D. Engage the Employees and Unions in Identifying Solutions but Do Not Transfer Ownership Without Responsibility

## **XI. Obligation to Bargain**

- A. Utilize the Labor-Management Process
- B. Meetings with Employees
- C. Invite Employees and Unions to Suggest Cost Savings Methods

## **XII. Traditional Non-Economic Items of Contracts to Consider for Change**

- A. Bargaining Unit Classifications
  - 1. Consider collapsing/combining classifications - broadbanding
  - 2. Rewrite position descriptions, broaden duties
  - 3. Delete obsolete classifications
  - 4. Finding work in non-traditional areas, cross-train
- B. Grievance and Arbitration
  - 1. Utilize grievance-arbitration for discrimination claims
  - 2. Expedited arbitration
- C. Hours of Work (see also economic)
  - 1. Flex hours



- 2. Eliminate paid lunch
- 3. Work at home option
- D. Management Rights Clauses
  - 1. Eliminate past practice provisions
  - 2. Eliminate/streamline contracts for administration
- E. Staffing Provisions (Minimum Manning)
  - 1. Classroom size
  - 2. Workforce allocations/staffing ordinances (contract provisions)
  - 3. Use of part-time employees, reserve officers
- F. Non-Mandatory Bargaining Topics, Remove or Streamline
- G. Performance Evaluations – Productivity Impact
- H. Grant Administration Services

### **XIII. Economic Items of Contracts to Consider for Change**

- A. Wages and Retirement Benefits
  - 1. Freeze scale
  - 2. Freeze steps
  - 3. Freeze/eliminate longevity
  - 4. Lower entry rates of pay
  - 5. Delay pay increases
  - 6. Increase employee contributions to retirement system
  - 7. Eliminate ranks in safety focus (e.g. South Bend Indiana Police)
  - 8. Merit pay plans
- B. Pay Supplements
  - 1. Call out pay
  - 2. Court pay
  - 3. On-call pay
- C. Shift Differential
  - 1. Reduce or eliminate
  - 2. Rotate shift assignments
- D. Hours of Work
  - 1. Shorten work day
  - 2. Lengthen work day
  - 3. Eliminate paid lunch
  - 4. Modify work schedules
- E. Uniform and Equipment Payments/Allowances
  - 1. Reduce schedule/list of uniform items provided
  - 2. Modify provisions to replace “as needed”
  - 3. Eliminate certain allowances
  - 4. Reduce payments/allowances

- F. Paid Leaves
  - 1. Reduce statutory levels
    - a. Compare to private sector
  - 2. Cap or reduce maximum accruable amounts
  - 3. Suspend accumulation of paid leaves
  - 4. Reduce sick leave accrual
    - a. Short-term, long-term leave
  - 5. Use conversion of sick/leave to personnel leave to reduce balance and require scheduling of leave
  - 6. Cash in unused leaves
  - 7. Days off/holidays without pay
- G. Overtime and Compensatory Time-FLSA Considerations
  - 1. Change standard to “hours worked” from “hours paid”
  - 2. Reduce or eliminate compensatory time balances
  - 3. Designate when compensatory time may be scheduled modify work schedule to avoid overtime
  - 4. Allow for schedule “flexing” within work week
- H. Health Care - Understand and Examine Use
  - 1. Modify language to be able to control “plan design”
  - 2. Life insurance – consider self insuring
  - 3. AFSCME Care Plan or union supplemental plans
    - a. Examine for cost-effectiveness
  - 4. Shift costs to users
    - a. Schedule adjusted to employees with higher experience and usage
  - 5. Health savings accounts
- I. Plan Design Changes for Health Insurance
  - 1. Increase deductibles
  - 2. Increase co-pays
  - 3. Health savings accounts
  - 4. Cap on dental coverage
  - 5. Generic prescription plan
  - 6. Annual physical
  - 7. Eliminate opt-out provisions
- J. Additional Thoughts and Ideas for Health and Wellness
  - 1. Health fairs and health education
    - a. Include family members
  - 2. Use of health clinics
    - a. Provide incentives for use
  - 3. Wellness programs – include family members (health insurance)
    - a. Consider economic incentive
    - b. Personal health assessments
    - c. Smoking cessation programs
    - d. Weight control programs
    - e. Premium holidays for wellness program

- 4. Immunization programs
  - a. Hepatitis
  - b. Flu shots
- K. Layoff's and Furloughs
  - 1. "Cost savings days"
  - 2. Voluntary layoffs
  - 3. Voluntary furloughs
  - 4. Attrition for staff reductions
  - 5. Grant programs – positions dependent on continued funding from grant automatically eliminated
- L. Sick Leave Programs - Practical Approach to Contact Administration
  - 1. Reduce sick leave accumulation
  - 2. Track usage and inform employees and supervisors
  - 3. Provide incentives
  - 4. Wellness programs
  - 5. Reduce sick leave payouts at retirement or separation
- M. Retirement Benefits and Contributions

#### **XIV. Operational Modifications for Employers, "Best Practices" Programs**

- A. Lower/Raise Thermostats
- B. Reduce Hours of Operation
  - 1. Careful consideration for "public push-back"
- C. Discontinue unused phones, computers, etc.
- D. Reduce Vehicle Fleet – Reduce Take Home Vehicles
- E. Replace Equipment with Cost-Saving Equipment
  - 1. Copiers (maintenance contracts)
  - 2. Vehicles, tools, equipment
- F. Utilize New Software
- G. Remove Bottled Water
- H. Close/Sell Unneeded Properties/Buildings
- I. Consolidate Functions (e.g. Administrative, Purchasing)
- J. Job Sharing Between Departments
- K. Eliminate Supplements
- L. Reduce Retirement/Separation Pay-Outs
- M. Share Employees between Departments
- N. Reduce Cleaning Staff

## CASE LAW UPDATE

### Negotiated Agreements Affecting City-Wide Employment Decisions

In re: City of Wellston and FOP, OLC, FMCS No. 030411-08835-6 (Byrne, 2010)

In a case between the City of Wellston, Ohio, and the Fraternal Order of Police, Ohio Labor Council, peculiar collective bargaining agreement language led to arbitration over the order of layoffs City-wide, not just in the bargaining units covered by the agreement. The contested language, which the parties agreed to in 2003, is as follows:

All probationary, temporary, intermittent, part-time and seasonal employees **of the City** will be laid off before members of the Bargaining units. Furthermore, the City recognizes that safety force personnel are a priority need for the community and shall attempt to lay off all **non-essential employees** before safety force personnel and will not sub-contract out the services of these personnel.

On October 1, 2009, the Auditor of State declared the City to be in Fiscal Emergency. Per the Ohio Revised Code, the City was required to develop and implement a Financial Recovery Plan. The City's Recovery Plan required various cost-cutting measures, including the City-wide layoff of personnel.

After the City laid off three patrol officers, the police union grieved. At arbitration, the Union presented two primary arguments: 1) the City did not first lay off all part-time fire-fighters as required; and, 2) the City did not lay off all non-essential personnel in the service departments before it laid off "safety force personnel." The arbitrator ruled for the City on both arguments.

First, the arbitrator found that the alleged "part-time" fire department employees were paid as on-call fire staff, worked no set schedule and were not required to respond to emergency calls. The WFD used an amalgam of 3 full-time firefighters, 20 paid on-call, 8 volunteers and mutual aid firefighters. Under the Union's argument, the City would be left with 3 full-time firefighters and 8 volunteers. The arbitrator found those staffing levels unacceptably low. It would be "tantamount to forcing the City to hire more full-time firefighters at a time when the City is in fiscal emergency and to decrease already sparse City budgets in other departments in order to fund increased Fire Department expenditures." The arbitrator found that the use of these unscheduled personnel to respond to emergencies and occasionally fill-in for the three full-time firefighters did not constitute a breach of the City's agreement with the police union.

The arbitrator also rejected the Union's argument that the City failed to lay off all non-essential personnel before safety force personnel. In anticipation of the Recovery Plan, the City began reducing service-department staff by attrition. Then, after the Recovery Plan, it continued reducing staff by layoff. For instance, the City eliminated the janitor position and agreed to contract the work to the same individual at a reduced rate. It also laid off employees in the water, streets, garbage, and cemetery departments, and in the Clerk's and Mayor's offices. The

arbitrator found that the City reasonably attempted to address its financial problems and cut many departments to the bone before laying off police officers.

While the arbitrator ruled for the City, the City-wide impact of the language is important to consider. For instance, the arbitrator stated that had the City kept the Parks Department open while it laid off police officers, he would have found a violation of the Agreement.

Further, the police Agreement required that the City lay off many City workers before laying off police. Many of the affected City workers were members of a different Union, with their own Agreement and layoff language. The police Agreement language, and its consequences, illustrate the importance of carefully scrutinizing collective bargaining agreement language during negotiations.

### **Conflicting Negotiated Agreements**

Zupp v. Columbus Municipal Civil Service Commission, 187 Ohio App.3d 614; 993 N.E.2d 281; 2010-Ohio-2614

Civil service employees were laid off from their classified civil service positions. The Negotiated Agreement with their Union stated that the Civil Service Commission is responsible for the establishment and enforcement of the rules governing layoffs. The Municipal Civil Service Commission Rule IXX (C) states that a laid off classified employee is entitled to avoid layoff by “bumping” a less senior employee holding a position in the same or lower class series or family as the more senior employee. The employees in this case attempted to bump less senior employees who were in the same class, but members of a different union. The Union’s collective bargaining agreement prohibited the bumping by non-bargaining unit employees. The Civil Service Commission heard the matter and held that the employees did not have the right to bump. The trial court affirmed.

The Court of Appeals reversed. The Court held that the Negotiated Agreement with the civil service employees was valid and enforceable. The civil service employees are entitled to enforce the bumping provisions of their Agreement, even though such provision directly conflicts with the City’s other Negotiated Agreement.

### **Unbalanced Conciliation Award Fuels Economic Crisis**

Ohio Patrolmen’s Benevolent Association v. Wayne Cty. Sheriff, (Nov. 9, 2009), SERB Case No. 09-MED-01-0052, 0053, 0054

Some conciliators are continuing to force public employers to foot the bill for hefty wage increases, despite the debilitating economic conditions that most counties in Ohio are facing. In Ohio Patrolmen’s Benevolent Association v. Wayne County Sheriff, a SERB conciliator recently adopted the union’s proposal and awarded a unit of sergeants, deputies, and lieutenants a 3.5% wage increase each year of a three year contract, a longevity pay increase, and an increase in the

wage differential for sergeants. The conciliator relied on the fact that the sheriff's office did not demonstrate the lack of ability to finance the union's demands.

The Conciliator's award defined the meaning of the term "finance" to make it much more difficult for a public employer to show that a wage increase is inappropriate because it cannot be funded. One of the factors a conciliator is directed to consider is the ability of the public employer to finance the issues proposed. Past SERB and Ohio Supreme Court opinions have interpreted "finance" as referring to the employer's ability to pay for the proposed increases. The conciliator in Wayne County interpreted "finance" as the ability to acquire funds, which requires an employer to obtain additional funds to pay union member wage increases. Ultimately, the conciliator granted the union's proposal to increase wages because the sheriff's office did not demonstrate a lack of ability to finance (rather than the ability to pay for) the increase. Because the sheriff's office could not fund the increase, the conciliator ordered the county to provide additional funds to pay for the wage increases.

**What does this mean for employers?** Employers should be aware of this decision as it may be used by unions to show that the employer can afford wage increases even if there currently are not funds available. If the Conciliator's redefined version of "finance" is utilized in the future, it will become almost impossible to prove the lack of ability to finance an increase, as a county can always acquire additional funds by either raising taxes or assuming more debt.

### **Changing into Uniforms at Home is Non-Compensable**

Bamonte v. City of Mesa, (9<sup>th</sup> Cir. 2010), 598 F.3d 1217

If an employer does not require its employees to don and doff uniforms and related gear on or at the employer's premises, the employer is not required to compensate its employees for any time spent changing into uniform while off duty. The Ninth Circuit ruled that since the employer, the City of Mesa, did not require police officers to don and doff their uniforms and gear on the employer's premises, donning and doffing activities are not an essential aspect of the officers' principal duties, and therefore are non-compensable under the Fair Labor Standards Act.

### **Clerk of Courts Exemption Narrowed by SERB**

Teamsters Local Union No. 348 and Clerk of Courts, Stow Municipal Court District (2009), SERB Case No. 2008-REP-03-0047.

A recent State Employment Relations Board ("SERB") ruling greatly narrows the scope of the exception that exempts clerk of courts employees from collective bargaining. Chapter 4117 of the Ohio Revised Code provides that all "public employees" are entitled to representation for collective bargaining purposes. There are several exceptions to that rule. One exception in the Act excludes "employees of the clerk of courts who perform a judicial function."

In its opinion, SERB set forth a restrictive view of what it considered to be a “judicial function.” In determining which duties are properly classified as a “judicial function,” SERB stated that the proper test is (1) whether the function involved “independent judgment and discretion”, and (2) whether the function involved the “determination of a fact or legal principle affecting the rights of one or more parties.” Further, the Board added the requirement that, for a clerk of court employee to be exempt, he or she must perform a judicial function on a “substantial and regular basis.”

In applying this standard to the facts of the case, SERB gave guidance as to which duties are judicial functions as opposed to ministerial functions. SERB determined that issuing subpoenas, granting continuances (such as extending file deadlines), and administering oaths are not considered judicial functions for the purposes of determining whether clerk of court employees are exempt. The Board left open the possibility that signing arrest warrants *could* constitute a judicial function. However, because signing arrest warrants only made up 2-5% of the Clerk of Court’s employees’ duties in this case, the duties were not performed on a substantial basis. The employees did not qualify for the exemption.

In rendering its decision, SERB recognized this test “will likely result in very few judicial functions, if any, being delegated to clerk employees without running afoul of the Ohio Constitution, which prohibits a judge from delegating ‘any determination of a fact or legal principle upon which the rights of one or more of the parties before the court.’”

### **Defining “Employee Organization” and “Employee Representative”**

#### **SERB v. Cincinnati City School District Board of Education, SERB 2010-002 (2010)**

The Cincinnati City School District Board of Education (CPS) violated O.R.C. §§ 4117.11(A)(1), (A)(5), and (A)(8) when it refused to bargain with the Greater Cincinnati Building and Construction Trades Council (GCBTC) with regard to hours, wages, terms, and other general conditions of employment pertaining to its employee carpenters. GCBTC was not informed until negotiations had begun that a majority of the carpenters employed by CPS did not consider themselves to be represented by GCBTC and, further, that CPS would not allow GCBTC to act as the carpenters’ exclusive representative. GCBTC therefore was not given sufficient notice by CPS that it did not recognize GCBTC as the exclusive representative of the carpenters, or that it would not engage in collective bargaining with GCBTC regarding the terms and conditions of the carpenters’ employment. SERB previously certified GCBTC as the exclusive representative of a bargaining unit including numerous crafts, including carpenters, causing the parties to be bound by the provisions laid out in O.R.C. § 4117.

**What does this mean for employers?** Employers are required to bargain with the employee representative certified by SERB, unless otherwise instructed by SERB. A failure to comply with the bargaining obligations of Chapter 4117 may result in an unfair labor practice finding.



## **Taking Permissive Subject of Bargaining to Fact-Finding is Not an Unfair Labor Practice**

SERB v. Salem Fire Fighters, Local 283, IAFF, (Oct. 1, 2009), SERB Case No. 2008-ULP-09-0380

In SERB v. Salem Fire Fighters, SERB offered guidance as to how permissive (versus mandatory) subjects of bargaining should be treated during negotiations situation. This dispute arose as the City of Salem and the IAFF were negotiating a successor collective bargaining agreement. The City and the IAFF disagreed over a minimum manning provision in the current CBA, with the City seeking to eliminate the clause and the IAFF seeking to maintain the clause. The City alleged that the IAFF committed an unfair labor practice by submitting the dispute to fact-finding, as the minimum manning provision was a permissive subject of bargaining.

SERB held that pursuing a permissive subject of bargaining through the statutory process in R.C. § 4117.14 is not a violation of the duty to bargain in good faith. Further, the inclusion of a permissive subject of bargaining into a previous CBA alters its application in treatment. Once a permissive subject is included in a CBA, it is enforced and treated as a mandatory bargaining subject. SERB stated that a permissive subject of bargaining is a proper subject of fact-finding pursuant to R.C. § 4117.14(C)(3)(a), as the statute merely states that the fact-finder make recommendations as to “all unresolved issues.” Because the statute does not make a distinction between permissive or mandatory subjects of bargaining, SERB held that the plain language of the statute makes it clear that both types of bargaining subjects can be taken to fact-finding. Thus, a party “cannot commit an unfair labor practice by taking an unresolved issue to fact-finding, even if it is a permissive subject of bargaining.”

**What does this mean for employers?** Employers should remember when drafting a collective bargaining agreement that placing a permissive subject of bargaining in the agreement could mean that the issue becomes a mandatory subject of bargaining. Further, SERB has indicated that all unresolved issues, mandatory and permissive, are properly before a Fact Finder at impasse.

## **Termination of a “Supervisor” or “Management Level Employee”**

SERB v. Nimishillen Township Board of Trustees, Stark County, SERB No. 2010-004 (2010)

Township was interfering, restraining, and coercing their employees in the exercise of their rights under O.R.C. Chapter 4117 and was in violation of O.R.C. § 4117.11(A)(1) when a Township trustee met with bargaining-unit employees following the filing of a Request for Recognition, and asked the employees “what it would take to make the union go away.” The trustee also informed the employees that their health insurance costs would rise if a union was organized. Further, a “supervisor” and “management level employee” does not have any rights under O.R.C. Chapter 4117, so the Township did not violate O.R.C. § 4117.11(A)(3) when it terminated the Township’s Road Department Superintendent. When determining whether a position is covered by O.R.C. Chapter 4117, three factors must be considered: (1) whether an employee has the authority to perform one or more of the functions listed in the section, (2)



whether the employee actually exercises that authority, and (3) whether the employee utilizes independent judgment in doing so. (In re Mahoning County Dept. of Human Services, SERB 92-006 (6-5-92) at 3-19).

**What does this mean for the employer?** First, whenever a union files anything at SERB, avoid making any statement or comments that could be interpreted as interfering or coercive. Second, review job descriptions and employee job duties. Having an updated listing of employee job duties and job descriptions will allow an employer to more easily determine whether an employee is exempt from bargaining rights of Chapter 4117 as a “management-level” or supervisory employee.