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I. Introduction

R.C. 4117.11(B)(8) makes it an unfair labor practice for public employee organizations or public employees to engage in informational picketing without giving ten days' notice to the State Employment Relations Board and the public employer. Appellants, SERB and the Mahoning County Board of Developmental Disabilities, argue R.C. 4117.11(B)(8) is a constitutionally permissible time, place, and manner restriction on speech. They contend the law does not regulate speech based on the identity of the speaker, or its subject matter, and that it is not a prior restraint.

Contrary to Appellants' arguments, the following examples show R.C. 4117.11(B)(8) regulates speech based on both the identity of the speaker and the subject-matter of the speech, and that it is a prior restraint.

- **Example 1:** An Ohio school board is in contract negotiations with its teachers. On Monday night, Joy, whose daughter is in kindergarten, sends out an e-mail to other parents saying, "I'm going to picket outside the school board meeting tomorrow and I'm going to carry a sign saying 'Give our teachers a fair contract!!!' Who will join me?" The next day, Joy and nine other parents engage in a peaceful picket outside the school board meeting, all carrying signs saying "Give our teachers a fair contract!!!"

The following week, the school board has another meeting and ten teachers picket outside that meeting carrying the same signs the parents had used. The teachers did not provide ten days' notice as required by R.C. 4117.11(B)(8).

The teachers in this example have violated Ohio law. They have committed an unfair labor practice because they have engaged in picketing related to a labor issue without giving ten days' notice. The parents, on the other hand, have not violated any Ohio law. So R.C. 4117.11(B)(8) regulates speech based on the identity of the speaker—the teachers are forbidden to do that which the parents may lawfully do. This example also shows R.C. 4117.11(B)(8) is a prior restraint. The parents can immediately engage in picketing, but the statute requires the teachers to give notice and then wait ten days.

- **Example 2:** Ten teachers picket a school board meeting carry signs saying “Support our Troops!!!” They do not provide SERB or the school board ten days' notice.

In Example 2, because the message on the signs has changed to something unrelated to labor issues, the teachers have not committed an unfair labor practice. This shows R.C. 4117.11(B)(8) regulates speech based on subject-matter, *i.e.*, the message on the signs.

II. Statement of Facts

The Mahoning County Board of Developmental Disabilities (“Developmental Disabilities Board”) is a “public employer” as defined by R.C. 4117.01(B). (Stipulation 1.) The Mahoning Education Association of Developmental Disabilities (“MEADD”) is an “employee organization” as defined by R.C. 4117.01(D) and is the exclusive representative for a bargaining unit of the Developmental Disabilities Board’s employees. (Stipulation 2.)

The Developmental Disabilities Board and MEADD were parties to a collective bargaining agreement effective from September 1, 2004 through August 31, 2007. Negotiations over a successor agreement were ongoing, and MEADD had not engaged in a strike or given written notice of an intent to strike. (Stipulation 5.)

Beginning at 6:00 P.M. on November 5, 2007, the Developmental Disabilities Board held a public board meeting pursuant to R.C. 121.22 at a facility known as "The Centre at Javit Court." (Stipulation 7.) The Centre at Javit Court is owned by the Commissioners of Mahoning County, Ohio. During its normal hours of operation, *i.e.*, weekdays from 7:30 a.m. to 3:30 p.m.,¹ the facility is not usually open to the general public, but is used primarily as an habilitation center for medically fragile clients of the Developmental Disabilities Board and is the site of a retirement program for senior citizens who are developmentally disabled, both of which are operated by the Developmental Disabilities Board. The Javit Court location is also one of locations at which public meetings of the Developmental Disabilities Board are held three to four times a year. (Stipulation 8.)

Immediately prior to the Developmental Disabilities Board's November 5, 2007 meeting, MEADD, through its agents or representatives, engaged in informational picketing related to the successor contract negotiations outside of the meeting. The MEADD picketers expressed their desire for a fair contract and their dissatisfaction with the progress of negotiations with their employer, the Developmental Disabilities Board. The picketing was peaceful and the picket signs contained messages such as "Settle Now" "MEADD Deserves A Fair Contract" and "Tell Superintendent Duck to Give us a Fair Deal." The informational picketing took place in the driveway outside the main entrance to Javit Court. Members of the general public who were attending the meeting could see the picketers. (Stipulation 9.) MEADD did not give written notice to the Developmental Disabilities Board or to SERB prior to engaging in the informational picketing. (Stipulation 10.)

¹ Because the picketing occurred at 6:00 P.M., the Centre at Javit Court was not being used for habilitation services or for senior citizen programs.

The Developmental Disabilities Board filed an unfair labor practice charge with SERB, alleging MEADD had violated R.C. 4117.11(B)(8) by engaging in informational picketing at a Developmental Disabilities Board meeting without having given ten days' notice. In defense of the charge, MEADD challenged the constitutionality of R.C. 4117.11(B)(8). (Stipulation 3.)

SERB determined probable cause existed and authorized the issuance of a complaint, referred the matter to hearing, and directed the parties to unfair labor practice mediation. (Stipulation 4.) The parties agreed to waive an evidentiary hearing and submitted the case to SERB on the briefs and stipulations. (SERB Order, p.1.)

SERB found MEADD violated R.C. 4117.11(B)(8) "by engaging in picketing related to negotiations for a successor collective bargaining agreement without providing a written ten-day notice as required by this statute." (SERB Order, p.2.) SERB did not consider, and thus rejected, MEADD's defense that R.C. 4117.11(B)(8) is unconstitutional. *In re Mahoning Edn. Assn. of Developmental Disabilities*, SERB 2010-008 (3-24-10), ("SERB Opinion"), p.9.) It found that, as an administrative agency, it lacked authority to declare R.C. 4117.11(B)(8) unconstitutional. (SERB Opinion, p.9.)

MEADD appealed the decision to the Mahoning County Common Pleas Court, arguing R.C. 4117.11(B)(8) was unconstitutional under the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, and under Section 11, Article I, Ohio Constitution. MEADD challenged the constitutionality of the statute both on its face and as applied.

The common pleas court held the statute was constitutional and MEADD appealed to the Seventh District Court of Appeals, making the same arguments.

The Seventh District Court of Appeals found R.C. 4117.11(B)(8) violates the First Amendment because it disfavors speech based on the identity of the speaker. SERB appealed that decision to this Court.

III. Law and Argument

Proposition of Law: R.C. 4117.11(B)(8) is unconstitutional, on its face and as applied, under the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, and under Section 11, Article I, Ohio Constitution.

1. **R.C. 4117.11(B)(8) is a subject-matter² based regulation so it is subject to strict scrutiny.**
 - A. **A law is content-based if it regulates speech based on its subject-matter.**

A law that regulates speech based on its subject-matter “slips from the neutrality of time, place, and circumstances into a concern about content.” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 99, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), quoting, Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup.Ct.Rev. 1, 29. See, also, *Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm. of New York*, 447 U.S. 530, 536, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980). A constitutionally permissible time, place, or manner restriction cannot be based upon either the content or the subject-matter of speech. *Id.* at 536.

In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), Justice Kennedy, concurring, wrote, “After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.” *Id.* at 448 (Kennedy, J., concurring.)

² Courts use the terms “content-based” and “subject-matter based” synonymously. Because “subject-matter based” more accurately describes R.C. 4117.11(B)(8), that term is used in this brief.

R.C. 4117.11(B)(8), by its very terms, applies to only one subject—labor speech. It makes it an unfair labor practice for a public employee organization, its agents, or representatives, or public employees, to “[e]ngage in any picketing, striking, or other concerted refusal to work without giving written notice to the public employer and to the state employment relations board not less than ten days prior to the action.” R.C. 4117.11(B)(8).

The only other court to consider the constitutionality of R.C. 4117.11(B)(8) found it applies only to labor picketing and is, therefore, a subject-matter based regulation. *United Electrical, Radio & Machine Workers of Am. v. State Emp. Relations Bd.*, 126 Ohio App.3d 345, 710 N.E.2d 358 (8th Dist. 1998).

B. SERB’s enforcement of R.C. 4117.11(B)(8) shows it applies the statute as a subject-matter based restriction.

If there was a question as to whether R.C. 4117.11(B)(8) imposes a subject-matter based regulation on speech, SERB’s prior opinions, its decision in this case, and its brief to this Court, eliminate that question. SERB has long held that R.C. 4117.11(B)(8) applies only to picketing related to labor issues. In *In re University of Akron*, SERB 86-010 (March 14, 1986), SERB held that an allegation of picketing related to job action or a labor dispute was necessary to support a finding of a violation of R.C. 4117.11(B)(8)’s notice requirement. In *In re Ohio Civil Service Employees Assn., Local 11, AFSCME*, SERB 94-009 (May 26, 1994)

SERB determined:

*** purely informational picketing related to First Amendment rights not intended to be regulated by Chapter 4117, such as in support of political candidates or general social issues not related to a labor relations dispute involving a public employer or public employee rights under Chapter 4117, is not subject to the notice requirements of §4117.11(B)(8). *Id.*; *In re Summit Cty. Bd. of Mental Retardation and Developmental Disabilities*, 25 OPER ¶443, (Nov. 24, 2008.)³

³ As discussed below, SERB also rejected the saving construction it now advances here.

SERB has rejected an unfair labor practice charge under R.C. 4117.11(B)(8) because the picketing was directed at the General Assembly's proposed budget cuts, *i.e.*, the picketing had no nexus to a labor dispute and was directed at the government as a legislative body rather than as an employer. *In re OCSEA, AFSCME Local 11*, SERB 2002-004 (Oct. 30, 2002).

In this case, SERB, citing its prior decisions reiterated that:

Purely informational picketing related to First Amendment rights not intended to be regulated by O.R.C. Chapter 4117, such as in support of political candidates or general social issues not related to a labor relations dispute involving a public employer or public employee rights under O.R.C. Chapter 4117, is not subject to the notice requirements of O.R.C. §4117.11(B)(8). (SERB Opinion p.8.)

In its brief to this Court, SERB continues to maintain that R.C. 4117.11(B)(8) applies only to labor speech, as it points to this line of cases to support its argument. (Merit Brief of Appellant State Employment Relations Board ("SERB Brief"), pp.2-3.)

C. The Supreme Court of the United States has found laws like R.C. 4117.11(B)(8) to be unconstitutional subject-matter based regulations.

Chicago once had an ordinance that generally prohibited picketing near public schools; but the ordinance specifically allowed picketing of a public school involved in a labor dispute. The Supreme Court of the United States found Chicago's ordinance unconstitutional because it described "permissible picketing in terms of its subject matter." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). The Court recognized that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, *its subject matter*, or its content." (Emphasis added.) *Id.*

In another case, the Court found unconstitutional a statute that generally prohibited residential picketing but allowed picketing of places of employment (including residences)

involved in a labor dispute: *Carey v. Brown*, 447 U.S. 455, 457, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). The Court wrote:

Nor can it be seriously disputed that in exempting from its general prohibition only the "peaceful picketing of a place of employment involved in a labor dispute," the Illinois statute discriminates between lawful and unlawful conduct based upon the content of the demonstrator's communication. On its face, the Act accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated, but discussion of all other issues is restricted. The permissibility of residential picketing under the Illinois statute is thus dependent solely on the nature of the message being conveyed. (footnotes omitted.) *Id.* at 460-461.

R.C. 4117.11(B)(8) is the mirror image of the regulations at issue in *Mosley* and *Carey*. It too regulates labor picketing, but while the laws in *Mosley* and *Carey* favored labor picketing, R.C. 4117.11(B)(8) disfavors it. Ohio affords preferential treatment to all subject-matters of speech except public-sector labor speech. Thus, under Supreme Court precedent, R.C. 4117.11(B)(8) is a subject-matter based regulation.

D. State courts have found laws like R.C. 4117.11(B)(8) to be unconstitutional subject-matter based regulations.

In *French v. Amalgamated Local Union 376, UAW*, 526 A.2d 861 (Conn. 1987), the Supreme Court of Connecticut considered the constitutionality of a statute, which, much like the statute at issue in *Carey*, generally prohibited residential picketing but allowed picketing related to a labor dispute. *Id.* at 862. The Connecticut court found the statute was an unconstitutional subject-matter based regulation. *Id.* at 865, 867.

Similarly, a Colorado statute made it an unfair labor practice to picket the home of employees. The Colorado law stated:

"It is an unfair labor practice for an employee, individually or in concert with others, to ... [c]oerce or intimidate an employee in the enjoyment of his legal rights ... or to intimidate his family or any member thereof, *picket his domicile*, or injure the person or property of such employee or his family or

of any member thereof....” (Alterations and ellipses in original.) *CF&I Steel L.P. v. United Steel Workers of Am.*, 23 P.3d 1197, 1200, (Col.,2001), quoting 8-3-108(2)(a), 3 C.R.S. (2000.)

Notably, like R.C. 4117.11(B)(8), the Colorado statute did not explicitly refer to labor picketing. Nonetheless, the Supreme Court of Colorado found the statute was an unconstitutional subject-matter based restriction on speech because the statute applied only to labor picketing:

As in *Carey*, there is no doubt that the ban on residential picketing we are considering in this case applied only to labor disputes. The provision, of course, is part of the Labor Peace Act, which was enacted to declare “[t]he public policy of the state as to employment relations and collective bargaining.” § 8-3-102(1), 3 C.R.S. (2000). The Act is intended to “establish standards of fair conduct in employment relations.” § 8-3-102(1)(e), 3 C.R.S. (2000). It recognizes that the three major interests involved in any labor dispute are the employer, the employee and the public, and declares that the legislature intends to protect and promote each interest. § 8-3-102(1)(a), 3 C.R.S. (2000). The definition of “employee” is tied to labor disputes and unfair labor practices. § 8-3-104(11), 3 C.S.R. (2000). The provision we are interpreting, section 8-3-108(2)(a) makes it an “unfair labor practice” for an employee to picket the domicile of another employee. The Act provides both a process to adjudicate alleged unfair labor practices as well as remedies for unfair labor practices. § 8-3-110, 3 C.R.S. (2000). Given the statutory language and the context, we conclude that the prohibition against residential picketing was intended to cover only picketing related to labor disputes. Thus, because section 8-3-108 of the Labor Peace Act discriminates between lawful and unlawful picketing based on the subject of the picket, it not content-neutral on its face. *Id.* at 1201-1202.

The same analysis applies to R.C. 4117.11(B)(8). Like the Colorado statute, R.C. 4117.11(B)(8) is contained in Ohio’s Public Employee Collective Bargaining law, R.C. Chapter 4117. That Chapter’s purpose is to promote orderly and constructive relationships between public employers and public employees. R.C. 4117.22. The definition of “public employee” and “employee organization” are tied to labor relations and unfair labor practices. R.C. 4117.01(B) and (C), 4117.11(B). R.C. 4117.11(B)(8) defines an “unfair labor practice.” And R.C. Chapter 4117 contains provisions for the adjudication of, and remedies

for, unfair labor practices. R.C. 4117.12. Thus, R.C. 4117.11(B)(8)'s terms and its context establish that the notice-before-speech requirement applies only to picketing related to a labor dispute, or other matters regulated by R.C. Chapter 4117. *CF&I Steel L.P.*, 23 P.3d at 1201-1202.

Not only is that conclusion supported by the statute's language and context, it is consistent with SERB's application of the ten-day notice requirement. In this case, MEADD engaged in informational picketing related to a labor dispute. (SERB Order, p.2.) But, as SERB acknowledged, had MEADD engaged in informational picketing about a non-labor issue, it would not have been found to have committed an unfair labor practice. (SERB Opinion, p.8.) How then, can R.C. 4117.11(B)(8) be something other than a subject-matter based regulation? As SERB has repeatedly made clear, R.C. 4117.11(B)(8) is a subject-matter based regulation of speech, just as were the laws at issue in *Mosley*, *Carey*, *French*, and *CF&I Steel*.

Returning to our examples, the teachers in Example 1 committed an unfair labor practice because they engaged in picketing related to a labor dispute without giving ten days' notice. The teachers in Example 2 did not commit an unfair labor practice because, while they did not give ten days' notice, they picketed about a non-labor issue. The applicability of R.C. 4117.11(B)(8) depends on the message on the sign.

E. Because R.C. 4117.11(B)(8) is a subject-matter based regulation it is subject to strict scrutiny.

Subject-matter based speech regulations are subject to strict scrutiny analysis. *Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A.*, 89 Ohio St.3d 564, 567, 2000-Ohio-488, 733 N.E.2d 1152. The government must show the regulation is narrowly tailored to achieve a compelling governmental interest. *Id.* Subject-matter based regulations are

presumptively unconstitutional. *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

F. The government cannot show R.C. 4117.11(B)(8) is narrowly tailored to serve a compelling governmental interest.

The government must present more than anecdote and supposition to meet its burden of establishing a compelling interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); it must prove an actual problem exists, and also that, as discussed below, the restriction is narrowly tailored to remedy the problem. *Id.* In *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994), the Court stated:

When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply “posit the existence of the disease sought to be cured.” *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434, 1455 (CA DC 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. *Id.* at 664, 114 S.Ct. 2445, 129 L.Ed.2d 497.

(1) There is no evidence of a compelling governmental interest.

The stipulations of the parties included no evidence of a compelling interest and Appellants do not urge the existence of a compelling interest here. Even the claimed substantial governmental interests Appellants do cite (in support of their argument that R.C. 4117.11(B)(8) is a constitutionally permissible time, place, and manner restriction) are mere supposition and conjecture—hardly the type of evidence the Court demands to support a subject-matter based regulation of speech. *Playboy Entertainment Group, Inc.*, 529 U.S. at 822, 120 S.Ct. 1878, 146 L.Ed.2d 86..

In the proceeding below, Appellants argued R.C. 4117.11(B)(8)’s notice-before-speech requirement served compelling interests because it allowed the parties time to

mediate or resolve the dispute; allowed the public employer time to provide security or take other steps; provided a cooling-off period; allowed the union time to work with employers to head off a confrontation or reflect on the most productive action; allowed the employer time to prepare a response to the publicity and media attention; and allowed time for SERB to intervene. But a “cooling off” period such as that imposed by R.C.

4117.11(B)(8) is not a compelling interest. *United Electrical, Radio and Machine Workers of Am. v. State Emp. Relations Bd.*, 126 Ohio App.3d 345, 356, 710 N.E.2d 358, 365 (1998). As that case stressed, “spontaneous expression, which is often the most effective kind of expression” is valued. *Id.* And this Court has stated, “An essential function of free speech is to invite dispute. ‘Speech may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.’” *City of Seven Hills v. Aryan Nations*, 76 Ohio St.3d 304, 308, 1996-Ohio-394, 667 N.E.2d 942, quoting *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).

(2) R.C. 4117.11(B)(8) is not narrowly tailored.

R.C. 4117.11(B)(8) burdens significantly more speech than would be necessary to protect any compelling interest. Courts have consistently rejected notice-before-speech regulations that required fewer days’ notice than does R.C. 4117.11(B)(8). For example, courts have invalidated a five-day application requirement, *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996); a one-business day notice requirement, *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981); and a one-hour notice requirement. *Robinson v. Coopwood*, 292 F.Supp. 926 (D.C. Miss. 1968). These cases recognize and give life to the principle that:

“spontaneous expression, which is often the most effective kind of expression,” is valued. *Grossman*, 33 F.3d at 1206. Advance-notice requirements prevent immediate response to immediate issues and thus have a chilling effect on the exercise of First Amendment rights. *Id.*; *Rosen*,

641 F.2d at 1249. *Douglas*, 88 F.3d at 1523, quoted Justice Harlan's concurrence in *Shuttlesworth v. Birmingham* (1969), 394 U.S. 147, 163, 89 S.Ct. 935, 945, 22 L.Ed.2d 162, 174: "Timing is of the essence in politics * * *. [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *United Elec., Radio & Mach. Workers of Am. v. State Emp. Relations Bd.*, 126 Ohio App. 3d 345, 356, 710 N.E.2d 358, 366 (1998.)

Courts have recognized that the delay inherent in advance notice requirements inhibit speech and outlaw spontaneous expression. *N.A.A.C.P. v. City of Richmond*, 743 F.3d 1346, 1355 (9th Cir.1984); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Straton*, 536 U.S. 150, 164, 167-168, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002).

In modern society, with its 24-hour news cycle, it is important for public employee organizations, and public employees, to be able to have their voices heard in a timely and effective manner. R.C. 4117.11(B)(8) prohibits them from doing so. The Eighth District noted the importance of spontaneous expression when it wrote:

On this point, we again emphasize the Ohio Supreme Court's recent endorsement of dispute as an essential function of free speech. Free speech is not served by imposing a delay of ten days. Rather, such a restriction disperses the drama of the moment and interrupts the natural momentum of events. *United Elec., Radio & Mach. Workers of Am. v. State Emp. Relations Bd.*, 126 Ohio App. 3d 345, 356, 710 N.E.2d 358 (1998).

Appellants and their *amici* argue the ten day notice requirement affords public employers the opportunity to control misinformation⁴ and manage the impact of the speech on the public at large. These are not valid reasons to restrict constitutionally protected spontaneous expression. They are the very reasons spontaneous expression is

⁴ *Amicus Curiae* Ohio Public Employer Labor Relations Assn., *et al.*, argue ten days' notice is required to allow the employer to respond to misinformation disseminated by picketers. Of course this assumes the picketers will disseminate misinformation. And it highlights the fact that R.C. 4117.11(B)(8) prohibits public employees from immediately responding to information disseminated by the public employer, but imposes no similar restriction on the public employer.

valued and protected. Spontaneous expression allows the speaker to convey his views without the control and management, *i.e.*, censorship of the government.

Further, as is discussed in more detail below, R.C. 4117.11(B)(8) is overbroad, because it applies even to the picketing of a single public employee. *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600, 614-615 (6th Cir.2005).

G. R.C. 4117.11(B)(8) is a disfavored-speaker regulation.

Regulations that favor one speaker over another are a subset of subject-matter based regulations. R.C. 4117.11(B)(8) makes it an unfair labor practice for “an employee organization, its agents, or representatives, or public employees” to engage in labor picketing without providing ten days’ notice. As the Seventh District held, this statute is an unconstitutional speaker-based restriction on speech. *Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Rel. Bd.*, 7th Dist. No. 11 MA 52, 2012-Ohio-3000, ¶21, 973 N.E.2d 322.

The Supreme Court of the United States has consistently struck down laws that impose speaker-based restrictions on speech. In *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011), the Court invalidated a law that disfavored the speech of pharmaceutical manufacturers. *Id.* at 2663. Similarly, in *Citizens United v. Federal Elections Comm.*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), the Court made clear the First Amendment prohibits restrictions that distinguish “among different speakers, allowing speech by some but not others.” 558 U.S. 310, 1130 S.Ct. at 898. This is so because “[a]s instruments of censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.” *Id.*

As the Seventh District found, R.C. 4117.11(B)(8) singles out public employee organizations and public employees and imposes restrictions only on them. *Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Rel. Bd.*, 7th Dist. No. 11 MA 52, 2012-Ohio-3000, ¶21, 973 N.E.2d 322. Anyone else can picket without notice. *Id.*

The soundness of the Seventh District's reasoning is shown in Example 1 in the introduction. In that example, the teachers committed an unfair labor practice, but the parents, who engaged in the same speech, had not violated any law. Thus, R.C. 4117.11(B)(8) is a speaker-based restriction because it distinguishes "among different speakers, allowing speech by some, but not others." *Citizens United*, 558 U.S. 310, 1130 S.Ct. at 898.

H. Because R.C. 4117.11(B)(8) is a disfavored-speaker law, it is subject to strict scrutiny.

Speaker-based restrictions are also subject to strict scrutiny. *See, Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2664, 180 L.Ed.2d 544 (2011), citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

I. The government cannot show R.C. 4117.11(B)(8) is narrowly tailored to serve a compelling governmental interest.

For the reasons set forth above, Appellants cannot show R.C. 4117.11(B)(8) passes the strict scrutiny test.

2. R.C. 4117.11(B)(8) is a prior restraint, subject to strict scrutiny.

A. R.C. 4117.11(B)(8) is a prior restraint.

"A 'prior restraint' refers to a regulation 'that operate[s] [sic] to forbid expression before it takes place.'" Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits*

are Permitted? 56 Drake L. Rev. 381, fn.21, quoting, Smolla and Nimmer on Freedom of Speech §15:1 (2007). This Court has defined "prior restraint" as a judicial order or administrative rule that forbids expression before it takes place. *State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas*, 125 Ohio St.3d 149, 153, 2010-Ohio-1533, ¶20, 926 N.E.2d 634, citing 2 Smolla and Nimmer on Freedom of Speech 15-4, §15:1 (2009).

Another author has described a prior restraint as:

legislative restraints which make unlawful publication or other communication unless there has been previous compliance with specific conditions imposed by legislative act. In this situation, no approval of an executive or judicial official is involved. * * * Enforcement of the control is normally by criminal prosecution or other legal proceeding for failure to meet the condition. Emerson, *The Doctrine of Prior Restraint*, 20 Law and Contemporary Problems, 648, 656, (1955).⁵

R.C. 4117.11(B)(8) is a prior restraint because it makes it unlawful for a public employee organization and public employees to engage in labor picketing unless they comply with the legislatively imposed condition of providing ten days' notice to SERB and the employer. That condition is enforced through R.C. Chapter 4117's unfair labor practice charge mechanism.

Any system of prior restraint bears a heavy presumption against its constitutionality. *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1975); *State ex rel. Toledo Blade Co. v. Henry Cty. Common Pleas Court*, 125 Ohio St.3d 149, 153, 2010-Ohio-1533, ¶21, 926 N.E.2d 634; *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317, 100 S.Ct. 1156 (1980), quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *N.A.A.C.P. v. City of Richmond*, 743 F.2d 1346, 1354 (9th Cir.1984). Prior restraints are the most serious and least tolerable of First

⁵ Available http://digitalcommons.law.yale.edu/fss_papers/2804.

Amendment infringements. *State ex rel. Toledo Blade Co. v. Henry Cty. Common Pleas Court*, 125 Ohio St.3d 149, 153, 926 N.E.2d 634, 2010-Ohio-1533, ¶21.

Advance notice requirements such as those contained in R.C. 4117.11(B)(8) substantially inhibit speech. *N.A.A.C.P. v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984). “The simple knowledge that one must inform the government of his desire to speak *** discourages citizens from speaking freely.” *Id.* Advance notice requirements also outlaw spontaneous expression.

Courts have regularly invalidated advance notice requirements, even where the requirement granted government officials no discretion to allow or forbid the noticed speech. In *N.A.A.C.P. v. City of Richmond* the court found a content-neutral city ordinance that required twenty-day advance notice of a parade unconstitutional. Courts have also invalidated, as prior restraints, laws that required advance registration before demonstrating or leafleting in an airport terminal, *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir.1981); before soliciting membership in a labor union, *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945); one-hour advance notice before a march or protest, *Robinson v. Coopwood*, 292 F.Supp. 926 (D.C.Miss.1968); that required a permit to demonstrate in a park, *Grossman v. Portland*, 33 F.3d 1200 (9th Cir.1994); and that required a five-day notice before a parade. *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996).

The court in *United Electrical, Radio & Machine Workers of Am. v. State Emp. Relations Bd.*, 126 Ohio App.3d 345, 710 N.E.2d 358 (1998) relied upon these cases when it determined R.C. 4117.11(B)(8) is a prior restraint. *Id.* at 365. It also rejected SERB’s argument that a prior restraint exists only when a public official has the authority to grant or deny permission to exercise First Amendment rights. *Id.* It found as has the United States

Supreme Court, that a law requiring only notice, with no authority to allow or forbid the speech, is a prior restraint. *Id.*

Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945), struck down a Texas law that required labor organizers to register with the secretary of state before soliciting membership. The secretary of state was then required to issue the labor organizer an identification card. *Id.* at 519, fn.1. Notably, the statute was a simple registration requirement; it did not give the secretary of state any discretion to issue or reject the registration. *Id.* The State of Texas went so far as to characterize its law as “merely a previous identification requirement.” *Id.* at 538. (SERB makes the same argument here.) The Court found the Texas law an unconstitutional restriction on the First Amendment rights of labor organizers. The Court’s reasoning bears quoting at length:

As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.

We think the controlling principle is stated in *De Jonge v. Oregon*, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278. In that case this Court held that ‘consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime.’ And ‘those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such

offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.'

If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment. *Id.* at 539-540, 65 S.Ct. at 327.

SERB repeatedly characterizes R.C. 4117.11(B)(8) as "*merely* [sic] a notice requirement, with no other restriction of any kind connected to the notice." (SERB Brief, p.7; SERB Brief pp.,11, 12.) SERB goes so far as to say "The law does not limit labor picketing. In fact, it permits labor picketing *at any time* and place of the union's choosing." (Emphasis added.) (SERB Brief, p.1); and "A law can hardly be targeted at disfavoring a particular speaker when it allows that speaker to say whatever she wishes at any time." (SERB Brief, p.11.) SERB says the law imposes "no other restriction of any kind connected to that notice." (SERB Brief, p.7.) It characterizes the law as having no "restrictive aspect." (SERB Brief, p.7.) Even were SERB's characterizations accurate, R.C. 4117.11(B)(8) is still an unconstitutional prior restraint under the cited authority.

But R.C. 4117.11(B)(8) is much more than a "mere" notice requirement. It clearly does not allow "labor picketing at any time ***" as SERB contends. SERB implies a labor union president could pick up the telephone, call SERB and the public employer, and then she and her fellow union members could go picket. That is not what R.C. 4117.11(B)(8) requires or allows. The law requires written notice ten days before picketing. So it is an

outright ban on labor picketing absent notice, and it is an outright ban on labor picketing for ten days after the notice is given—that is much more than a “mere notice requirement.”

In that respect, R.C. 4117.11(B)(8) is similar to part of the federal law at issue in *Citizens United v. Fed. Elections Comm.*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). There, the Court considered a federal law that prohibited, among other things, certain election communications within 30 days of a primary election and 60 days of a general election. 130 S.Ct. at 897. The law allowed such communications at all other times. The Court characterized the federal law as an “outright ban.” *Id.*

Example 1 of the introduction shows R.C. 4117.11(B)(8) is a prior restraint. The parents in that example were able to lawfully organize a picket and engage in picketing immediately. The teachers, on the other hand, were sanctioned for failing to abide by the ten-day notice requirement.

B. Because R.C. 4117.11(B)(8) is a prior restraint, it is subject to strict scrutiny.

A prior restraint carries a heavy presumption of unconstitutionality. *Seven Hills v. Aryan Nation*, 76 Ohio St.3d 304, 307, 667 N.E.2d 942 (1996). Like subject-matter based restrictions, prior restraints are subject to strict scrutiny. *Id.* Appellants must show R.C. 4117.11(B)(8) is necessary to serve a compelling governmental interest and is narrowly tailored to achieve that end. *Id.*; *United Electrical, Radio & Machine Workers of Am. v. State Emp. Relations Bd.*, 126 Ohio App.3d 345, 710 N.E.2d 358 (1998).

C. The government cannot show R.C. 4117.11(B)(8) is narrowly tailored to serve a compelling governmental interest.

For the reasons set forth above, Appellants cannot show R.C. 4117.11(B)(8) passes the strict scrutiny test. *United Electrical, Radio & Machine Workers of Am.* 126 Ohio App.3d at 356-357, 710 N.E.2d 358 (1998).

3. R.C. 4117.11(B)(8) is not a valid time, place, or manner restriction.

A. Picketing is speech protected by the United States and Ohio Constitutions.

In *Seven Hills v. Aryan Nations*, 76 Ohio St.3d 304, 1996-Ohio-394, 667 N.E.2d 942, this Court reaffirmed that “picketing is a ‘pristine and classic’ exercise of First Amendment freedoms, striking at the core of our nation’s commitment to the principle that ‘debate on public issues should be uninhibited, robust, and wide-open.’” *Id.* at 306, 667 N.E.2d 946, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Picketing has an important history in the United States and restrictions on public issue picketing have been subject to strict scrutiny. *United Electrical, Radio & Machine Workers of Am. v. State Emp. Rel. Bd.*, 126 Ohio App.3d 345, 349, 710 N.E.2d 358 (1998).

While, as Appellants have pointed out, picketing is a hybrid form of communication, the United States Supreme Court in *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed.2d 1093 (1940) and this Court in *Seven Hills*, recognized that the speech element of picketing is fully protected by the First Amendment. And *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965), which SERB cites, does not hold otherwise. In fact, the section SERB cites was dicta, and merely pointed out that a state may impose content-neutral time, place, or manner restrictions for the purpose of such things as assuring the safety and accessibility of public streets and sidewalks. *Id.* at 554-556. The court

nonetheless struck down the ordinance in *Cox* because it provided local official unfettered discretion as to what public demonstrations to forbid or permit. *Id.* at 555-558.

B. R.C. 4117.11(B)(8) is not a valid time, place, and manner regulation because it is not subject-matter neutral.

Appellants argue R.C. 4117.11(B)(8) is a constitutionally permissible time, place, or manner restriction on free speech rights. However, to be valid, a time, place, or manner restriction must be content, *i.e.*, subject-matter, neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *Hill v. Colorado*, 530 U.S. 703, 719, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). Because R.C. 4117.11(B)(8) is not subject-matter neutral, the Court need not consider Appellants' argument. That said, even if R.C. 4117.11(B)(8) was a subject-matter neutral regulation, it is still unconstitutional under time, place, or manner analysis.

SERB relies on *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), and similar cases, but all are distinguishable. *Hill* involved a regulation that prohibited a person from approaching within eight feet of a person near a health care facility, without that person's consent, for purposes of displaying signs, engaging in oral protest, education, counseling, or hand-billing. Unlike R.C. 4117.11(B)(8), and the laws involved in *Mosley* and *Carey*, the statute at issue in *Hill* was content-neutral because it applied to all people, regardless of the message they intended to convey. In fact, the *Hill* Court distinguished *Carey*, noting that in *Carey*, it was the fact that the statute placed a prohibition on discussing particular topics that was constitutionally impermissible. The Court stated:

The Colorado statute's regulation of the location of protests, education, and counseling is easily distinguishable from *Carey*. It places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad category of communications

with unwilling listeners. Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries. Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so. *Id.* at 723, 120 S. Ct. 2480, 147 L. Ed. 2d 597.

So *Hill's* analysis is inapplicable to a statute like R.C. 4117.11(B)(8), which regulates speech based on its subject matter.

The other cases on which SERB relies are also distinguishable. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), was a challenge to an ordinance prohibiting public nudity. The Court found the ordinance content-neutral because it banned all public nudity, and not just public nudity accompanied by expressive activity, such as that containing an erotic message. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), upheld a zoning ordinance regulating adult entertainment establishments that was directed at the secondary effects of such establishments, such as higher crime rates. There is no evidence that R.C. 4117.11(B)(8) is directed at secondary effects; instead, it is a direct regulation of speech.

C. The test applicable to subject-matter neutral time, place, or manner regulations.

A valid time, place, or manner restriction must be subject-matter neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Even if R.C. 4117.11(B)(8) were subject-matter neutral, it is not narrowly tailored; does not serve significant governmental interest; and does not leave open ample alternative channels for communication of information.

D. R.C. 4117.11(B)(8) is not narrowly tailored.

To be narrowly tailored, a time, place, or manner restriction on speech must not burden substantially more speech than is necessary. *Ward*, 491 U.S. at 799, 109 S.Ct. 2746, 105 L.Ed.2d 661. It must target and eliminate only the source of harm it seeks to remedy. *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).

(1) R.C. 4117.11(B)(8) applies to even individual picketers.

R.C. 4117.11(B)(8) applies to public employee organizations and public employees. It applies to picketing of two public employees (and probably even to picketing by a single public employee.) As the Sixth Circuit recognized in *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600 (6th Cir.2005), “advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring.” *Id.*, at 608. This is so because application of such laws to small groups (or in R.C. 4117.11(B)(8), single individuals) does not advance any significant governmental interest. *Id. See, also, Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir.2009); *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir.1996);

(2) SERB has not shown that something less than ten days’ notice would not protect the interests it cites.

Appellants make no attempt to justify the length of the notice requirement, *i.e.*, ten days. Courts have struck down shorter notice requirements as set forth above. *Robinson v. Coopwood*, 292 F.Supp. 926 (D.C.Miss.1968), (one hour notice requirement); *Grossman v. Portland*, 33 F.3d 1200 (9th Cir.1994), (seven days’ notice); *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996), (five days’ notice.)

(3) R.C. 4117.11(B)(8) does not alleviate the problems SERB cites.

A speech regulation must alleviate the alleged harms in a direct and material way. *Turner Broadcasting Sys. Inc.*, 512 U.S. at 664. Appellants argue R.C. 4117.11(B)(8) is necessary because employers need advance notice of picketing to provide security or make other arrangements to protect property; to minimize a chance of violence; to prepare a response to publicity; to inform the users of public services and suppliers; and to prevent disruption of services.

But these alleged concerns are not exclusive to labor picketing. If Appellants arguments were valid, the same concerns would apply to any picketing. In other words all these potential concerns would arise from the parents picketing in Example 1 of the introduction; a truck driver who pulls up to a school to deliver supplies would not know if the picketers were parents or teachers; a person going to the Department of Veterans Services would not know if the picketers were employees or just private individuals. Yet these non-public employee picketers do not have to provide notice and wait ten days before they engage in informational picketing.

Further, Appellants concerns would exist even for public employees engaged in non-labor picketing, as in Example 2. Yet SERB agrees R.C. 4117.11(B)(8) has no applicability to non-labor picketing. R.C. 4117.11(B)(8) does not alleviate these alleged harms in any direct and material way; it does not alleviate them at all.

(4) R.C. 4117.11(B)(8) does not leave open ample alternative channels of communication.

The mere existence of an alternative channel of communication is not enough, the alternative must be ample and adequate. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1041, (7th Cir.2002). This determination must be made from the speaker's point of view. *Id.*

An alternative channel of communication is adequate only if it allows the speaker to reach his target audience; it is not enough that the alternative channel allows the speaker to reach other groups. *Id.*

In a similar case, a court overturned a regulation that prohibited students who were protesting apartheid from building shanties on the lawn in front of the Rotunda at the University of Virginia. *Students Against Apartheid Coalition v. O'Neil*, 660 F.Supp. 330 (W.D.Va.1987). The students had chosen that location because it was where the Board of Visitors for the university held their meetings. The university argued there were ample alternative channels of communication because the students were free to erect shanties at other locations on the campus. The court found this was not an ample alternative means of communication because it prevented the students from reaching their target audience. *Id.* at 339-340. The court also rejected the university's suggestions that the students use mail or other forms of communication and that these alternative forms were ample alternative means of communication. The court found:

These options involve more cost and less autonomy than the shanties, are less likely to reach the Board of Visitors who may not deliberately be seeking information about apartheid, and might be less effective for delivering the message that is conveyed by the sight of a shanty in front of the Rotunda. *Id.*

As SERB acknowledges, the purposes of picketing are to focus attention on the subject of the picket and to attract public attention. Picketing is also designed to gain the attention of those who use the services of the subject of the picket and those who might be in a position to influence the subject of the picket. From a picketer's point of view, there are no adequate alternatives to a picket because no other form of communication adequately accomplishes those things. The alternative channels Appellants suggest are not effective at reaching the target audience of a labor picket. *Id.*

E. R.C. 4117.11(B)(8) does not serve significant governmental interests.

Ohio is the only state that requires advance notice before informational labor picketing. Apparently the “significant governmental interests” SERB relies on are unique to Ohio.

And invalidating R.C. 4117.11(B)(8)’s ten-day advance notice requirement will not cause the parade of horrors foretold by Appellants and their supporting *amici*. The suggestion that advance notice of picketing is essential for the safe management of public premises or to prevent disruption of services is factually baseless and legally unsustainable. We know this because R.C. 4117.11(B)(8) has been unconstitutional in Cuyahoga County (Ohio’s most populous county according to the 2010 census,⁶) since 1998. *United Electrical, Radio & Machine Workers of Am.*, Ohio App.3d at, 355, 710 N.E.2d 358; yet Appellants and their *amici* cite not one instance where the problems they foretell have occurred.

Further, R.C. 4117.11(B)(8) does not regulate by size of demonstration, location, or any other factor relevant to disruption. It impermissibly regulates based on the identity of the speaker and the subject-matter of the speech. In this case, there was no disruption at Javit Court, nor is there a shred of evidence that peaceful informational picketing poses any threat to public services.

SERB’s mischaracterization of “patrolling” and denial of entry as the defining features of picketing speaks volumes. No one is challenging the state’s right to protect access to facilities and services, and no one was denied access here. SERB has presented no

⁶ <http://usatoday30.usatoday.com/news/nation/census/profile/OH> (visited March 14, 2013.)

evidence (only speculation), as to any real harm attributable to unnoticed, peaceful informational picketing.

The horrors asserted by Appellants and their *amici* include examples like a disabled veteran unable to access services because of a peaceful picket, or students entering a school observing their teachers picketing. These examples cast the hard won and cherished right to freedom of speech as the threat to society. But the threat to society, as acknowledged by the very existence of the First Amendment, is government suppression of speech—the very thing R.C. 4117.11(B)(8) does.

SERB cites a federal law that makes it an unfair labor practice for a labor organization to picket a health care institution without giving ten days' notice. 29 U.S.C. §158(g).⁷ No court has ever considered a First Amendment challenge to 29 U.S.C. §158(g), and while the unique nature of a health care institution might arguably support the notice requirement, that statute is not before this Court. Further, the concerns that might be attendant to picketing a health care institution, where lives are in the balance, are not implicated by R.C. 4117.11(B)(8), which applies to all public employers.⁸ And one court has already determined the interests SERB cites in support of R.C. 4117.11(B)(8) are not compelling. *United Electrical, Radio & Machine Workers of Am.* 126 Ohio App.3d at 356, 710 N.E.2d 358.

⁷ Notably, in some ways 29 U.S.C. §158(g) is more narrowly tailored than R.C. 4117.11(B)(8) because the federal law applies to only a labor organization; it does not go so far as to forbid individual employees from picketing, as R.C. 4117.11(B)(8) does.

⁸ When this legislation was making its way through the General Assembly, the Senate version restricted the notice requirement to health care institutions but the House proposed the broad language at issue here. *In re Liberty Local School Dist. Bd. of Edn.*, SERB 85-063 (Dec. 6, 1985).

Further, SERB “must demonstrate that the recited harms are real, not merely conjectural, ***.” *Turner Broadcasting Sys., Inc.*, 512 U.S. at 664, 114 S.Ct. 2445, 129 L.Ed.2d 497. SERB has not met that burden. All the interests it cites are based on conjecture. As discussed above, even if these concerns were real, R.C. 4117.11(B)(8) does not alleviate them. The same concerns would apply to any type of picketing, but R.C. 4117.11(B)(8) restricts only labor picketing.

F. R.C. 4117.11(B)(8) is not susceptible to a constitutionally saving construction.

SERB urges this Court to accept a saving construction of the statute and apply it to only strike-related picketing. The statute is not susceptible to that construction; SERB has never applied that construction; and the National Labor Relations Board has rejected the same argument with respect to 29 U.S.C. §158(g).

SERB has consistently read R.C. 4117.11(B)(8) to apply to any labor picketing. In fact, SERB has rejected the very argument it advances here. In 1985, just two years after R.C. 4117.11(B)(8) was enacted, SERB declined to read the notice requirement narrowly; instead reading it to apply to all picketing. *In re Liberty Local School Dist. Bd. of Edn.*, SERB 85-063 (Dec. 6, 1985). SERB followed the same reasoning in *In re Ohio Civil Serv. Employees Assn., Local 11, AFSCME*, SERB 94-009 (May 26, 1994). In that case the respondent had engaged in an informational picket without providing the required notice. The respondent argued the notice requirement applied only to picketing related to a concerted refusal to work. SERB rejected that argument, relying on its earlier decision finding the word “picketing” is modified by ‘any’ but not by the disjunctive ‘or other concerted refusal to work.” *Id.* It also noted that “if picketing were only related to strike situations, the

additional word 'picketing' would have been unnecessary surplus language in the statute as the word 'striking' was also present in §4117.11(B)(8)." *Id.*

The National Labor Relations Board has followed the same reasoning and rejected the argument that 29 U.S.C. §158(g)'s notice requirement does not apply to purely informational picketing. *In re District 1199, National Union of Hosp. and Health Care Employees, RWDSU, AFL-CIO*, 232 NLRB No. 67, 96 L.R.R.M. (BNA) 1404 (Sept. 28, 1977). In that case, which involved informational picketing but not a strike or refusal to work, the NLRB stated:

We further find that the picketing here involved is proscribed by [§158](g) even though it did not result in a work stoppage or other disruption of the delivery of health services. [§158](g) prohibits, in the absence of timely notice, "any strike, picketing, or other concerted refusal to work" (Emphasis supplied.) [sic]. As Respondent and our dissenting colleague argue, the word "other" may be construed to modify "picketing" implying that the statute refers only to that picketing which constitutes a refusal to work. Alternatively, the word "any" indisputably modifies "picketing" and implies that the section covers all forms of picketing regardless of purpose or impact. While on the surface either reading of the phrase is tenable, the overall policy expressed in the health care amendments and the specific legislative history of the section lead us to conclude that [§158](g) was intended to apply to all forms of picketing and not just to that which involves a work stoppage. (Footnotes omitted.) *Id.*

R.C. 4117.11(B)(8) prohibits "any picketing" without notice, so it is not susceptible to the construction SERB advances here.

4. R.C. 4117.11(B)(8) is a legislative act. It is not an action of the government acting as employer.

R.C. 4117.11(B)(8) is a legislative act and the sanctions imposed for its violation are imposed by the state, acting as sovereign, not as an employer. R.C. 4117.02. Further, R.C. 4117.11(B)(8) applies, not just to public employees, but also to employee organizations, their agents, and representatives. R.C. 4117.11(B). So the statute is not limited to speech

occurring within the context of an employer/employee relationship. Nor does R.C. 4117.11(B)(8) concern disciplinary action taken by a public employer in response to the speech of a public employee.

Despite these obvious differences, the Developmental Disabilities Board argues this Court should analyze R.C. 4117.11(B)(8) under the line of cases dealing with the free speech rights of public employees who have been retaliated against or terminated by their employer for speech related conduct.

All of the cases cited by the Developmental Disabilities Board in support of its second proposition of law concern individual employees who were terminated or suffered some other adverse employment action allegedly as the result of their speech related activities. None of the cases support the Developmental Disabilities Board's argument here, because none involved a prior restraint and a sanction imposed by the state for failing to comply with the requirements of the prior restraint. The analysis proposed by the Developmental Disabilities Board is irrelevant to the determination of this case.⁹

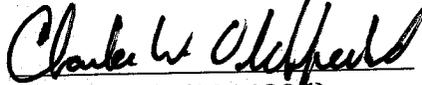
IV. Conclusion

R.C. 4117.11(B)(8) violates the First Amendment and Section 11, Article I, Ohio Constitution because it is a subject-matter based restriction and a prior restraint and the state cannot show the law is narrowly tailored to serve a compelling governmental interest. The statute also fails the test applicable to time, place, and manner restriction. The judgment of the Seventh District Court of Appeals should be affirmed.

⁹ And contrary to the Developmental Disabilities Board's argument, the United States Supreme Court has held that matters related to labor relations "are not matters of mere local or private concern." *Thornhill v. Alabama*, 310 U.S. 88, 103, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

Respectfully submitted,

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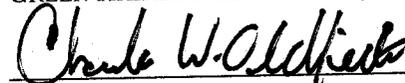
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Certificate of Service

I hereby certify that on March ~~25~~, 2013, a copy of the foregoing was served by regular U.S. Mail, postage pre-paid, upon Eugene P. Nevada, Clemons, Nelson & Associates, Inc., 6500 Emerald Parkway, Suite 100, Dublin, Ohio 43016; and Michael DeWine, Attorney General of Ohio, Alexandra T. Schimmer, Solicitor General, Stephen P. Carney, Deputy Solicitor, Lori J. Weisman, Michael D. Allen, Assistant Attorneys General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.

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Appendix

United States Code Annotated
Constitution of the United States
Annotated

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances
(Refs & Annos)

U.S.C.A. Const. Amend. I-Full Text

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<This amendment is further displayed in three separate documents according to subject matter>

<see USCA Const Amend. I, Religion>

<see USCA Const Amend. I, Speech>

<see USCA Const Amend. I, Assemblage>

U.S.C.A. Const. Amend. I-Full Text, USCA CONST Amend. I-Full Text
Current through P.L. 112-209 approved 12-18-12

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United States Code Annotated

Title 29. Labor

Chapter 7. Labor-Management Relations (Refs & Annos)

Subchapter II. National Labor Relations (Refs & Annos)

29 U.S.C.A. § 158

§ 158. Unfair labor practices

Currentness

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable¹ and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation

Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Credits

(July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705(a), 73 Stat. 525, 542 to 545; July 26, 1974, Pub.L. 93-360, § 1(c)-(e), 88 Stat. 395, 396.)

Notes of Decisions (316)

Footnotes

1 So in original. Probably should be “unenforceable”.

29 U.S.C.A. § 158, 29 USCA § 158

Current through P.L. 112-209 approved 12-18-12

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Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

OH Const. Art. I, § 11

O Const I Sec. 11 Freedom of speech

Currentness

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

Credits

(1851 constitutional convention, adopted eff. 9-1-1851)

Notes of Decisions (1839)

Const. Art. I, § 11, OH CONST Art. I, § 11

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Baldwin's Ohio Revised Code Annotated
Title XLI. Labor and Industry
Chapter 4117. Public Employees' Collective Bargaining (Refs & Annos)
Preliminary Provisions

R.C. § 4117.01

4117.01 Definitions

Effective: September 29, 2011
Currentness

As used in this chapter:

(A) "Person," in addition to those included in division (C) of section 1.59 of the Revised Code, includes employee organizations, public employees, and public employers.

(B) "Public employer" means the state or any political subdivision of the state located entirely within the state, including, without limitation, any municipal corporation with a population of at least five thousand according to the most recent federal decennial census; county; township with a population of at least five thousand in the unincorporated area of the township according to the most recent federal decennial census; school district; governing authority of a community school established under Chapter 3314. of the Revised Code; college preparatory boarding school established under Chapter 3328. of the Revised Code or its operator; state institution of higher learning; public or special district; state agency, authority, commission, or board; or other branch of public employment. "Public employer" does not include the nonprofit corporation formed under section 187.01 of the Revised Code.

(C) "Public employee" means any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer, except:

- (1) Persons holding elective office;
- (2) Employees of the general assembly and employees of any other legislative body of the public employer whose principal duties are directly related to the legislative functions of the body;
- (3) Employees on the staff of the governor or the chief executive of the public employer whose principal duties are directly related to the performance of the executive functions of the governor or the chief executive;
- (4) Persons who are members of the Ohio organized militia, while training or performing duty under section 5919.29 or 5923.12 of the Revised Code;

(5) Employees of the state employment relations board, including those employees of the state employment relations board utilized by the state personnel board of review in the exercise of the powers and the performance of the duties and functions of the state personnel board of review;

(6) Confidential employees;

(7) Management level employees;

(8) Employees and officers of the courts, assistants to the attorney general, assistant prosecuting attorneys, and employees of the clerks of courts who perform a judicial function;

(9) Employees of a public official who act in a fiduciary capacity, appointed pursuant to section 124.11 of the Revised Code;

(10) Supervisors;

(11) Students whose primary purpose is educational training, including graduate assistants or associates, residents, interns, or other students working as part-time public employees less than fifty per cent of the normal year in the employee's bargaining unit;

(12) Employees of county boards of election;

(13) Seasonal and casual employees as determined by the state employment relations board;

(14) Part-time faculty members of an institution of higher education;

(15) Participants in a work activity, developmental activity, or alternative work activity under sections 5107.40 to 5107.69 of the Revised Code who perform a service for a public employer that the public employer needs but is not performed by an employee of the public employer if the participant is not engaged in paid employment or subsidized employment pursuant to the activity;

(16) Employees included in the career professional service of the department of transportation under section 5501.20 of the Revised Code;

(17) Employees of community-based correctional facilities and district community-based correctional facilities created under sections 2301.51 to 2301.58 of the Revised Code who are not subject to a collective bargaining agreement on June 1, 2005.

(D) "Employee organization" means any labor or bona fide organization in which public employees participate and that exists for the purpose, in whole or in part, of dealing with public employers concerning grievances, labor disputes, wages, hours, terms, and other conditions of employment.

(E) "Exclusive representative" means the employee organization certified or recognized as an exclusive representative under section 4117.05 of the Revised Code.

(F) "Supervisor" means any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment, provided that:

(1) Employees of school districts who are department chairpersons or consulting teachers shall not be deemed supervisors;

(2) With respect to members of a police or fire department, no person shall be deemed a supervisor except the chief of the department or those individuals who, in the absence of the chief, are authorized to exercise the authority and perform the duties of the chief of the department. Where prior to June 1, 1982, a public employer pursuant to a judicial decision, rendered in litigation to which the public employer was a party, has declined to engage in collective bargaining with members of a police or fire department on the basis that those members are supervisors, those members of a police or fire department do not have the rights specified in this chapter for the purposes of future collective bargaining. The state employment relations board shall decide all disputes concerning the application of division (F)(2) of this section.

(3) With respect to faculty members of a state institution of higher education, heads of departments or divisions are supervisors; however, no other faculty member or group of faculty members is a supervisor solely because the faculty member or group of faculty members participate in decisions with respect to courses, curriculum, personnel, or other matters of academic policy;

(4) No teacher as defined in section 3319.09 of the Revised Code shall be designated as a supervisor or a management level employee unless the teacher is employed under a contract governed by section 3319.01, 3319.011, or 3319.02 of the Revised Code and is assigned to a position for which a license deemed to be for administrators under state board rules is required pursuant to section 3319.22 of the Revised Code.

(G) "To bargain collectively" means to perform the mutual obligation of the public employer, by its representatives, and the representatives of its employees to negotiate in good faith at reasonable times and places with respect to wages, hours, terms, and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, with the intention of reaching an agreement, or to resolve questions arising under the agreement. "To bargain collectively" includes executing a written contract incorporating the terms of any agreement reached. The obligation to bargain collectively does not mean that either party is compelled to agree to a proposal nor does it require the making of a concession.

(H) "Strike" means continuous concerted action in failing to report to duty; willful absence from one's position; or stoppage of work in whole from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in wages, hours, terms, and other conditions of employment. "Strike" does not include a stoppage of work by employees in good faith because of dangerous or unhealthful working conditions at the place of employment that are abnormal to the place of employment.

(I) "Unauthorized strike" includes, but is not limited to, concerted action during the term or extended term of a collective bargaining agreement or during the pendency of the settlement procedures set forth in section 4117.14 of the Revised Code in

failing to report to duty; willful absence from one's position; stoppage of work; slowdown, or abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in wages, hours, terms, and other conditions of employment. "Unauthorized strike" includes any such action, absence, stoppage, slowdown, or abstinence when done partially or intermittently, whether during or after the expiration of the term or extended term of a collective bargaining agreement or during or after the pendency of the settlement procedures set forth in section 4117.14 of the Revised Code.

(J) "Professional employee" means any employee engaged in work that is predominantly intellectual, involving the consistent exercise of discretion and judgment in its performance and requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship; or an employee who has completed the courses of specialized intellectual instruction and is performing related work under the supervision of a professional person to become qualified as a professional employee.

(K) "Confidential employee" means any employee who works in the personnel offices of a public employer and deals with information to be used by the public employer in collective bargaining; or any employee who works in a close continuing relationship with public officers or representatives directly participating in collective bargaining on behalf of the employer.

(L) "Management level employee" means an individual who formulates policy on behalf of the public employer, who responsibly directs the implementation of policy, or who may reasonably be required on behalf of the public employer to assist in the preparation for the conduct of collective negotiations, administer collectively negotiated agreements, or have a major role in personnel administration. Assistant superintendents, principals, and assistant principals whose employment is governed by section 3319.02 of the Revised Code are management level employees. With respect to members of a faculty of a state institution of higher education, no person is a management level employee because of the person's involvement in the formulation or implementation of academic or institution policy.

(M) "Wages" means hourly rates of pay, salaries, or other forms of compensation for services rendered.

(N) "Member of a police department" means a person who is in the employ of a police department of a municipal corporation as a full-time regular police officer as the result of an appointment from a duly established civil service eligibility list or under section 737.15 or 737.16 of the Revised Code, a full-time deputy sheriff appointed under section 311.04 of the Revised Code, a township constable appointed under section 509.01 of the Revised Code, or a member of a township or joint police district police department appointed under section 505.49 of the Revised Code.

(O) "Members of the state highway patrol" means highway patrol troopers and radio operators appointed under section 5503.01 of the Revised Code.

(P) "Member of a fire department" means a person who is in the employ of a fire department of a municipal corporation or a township as a fire cadet, full-time regular firefighter, or promoted rank as the result of an appointment from a duly established civil service eligibility list or under section 505.38, 709.012, or 737.22 of the Revised Code.

(Q) "Day" means calendar day.

Credits

(2011 H 153, eff. 9-29-11; 2011 H 1, eff. 2-18-11; 2009 H 1, eff. 7-17-09; 2006 H 162, eff. 10-12-06; 2006 H 530, eff. 6-30-06; 2005 S 124, eff. 6-27-05; 2004 H 516, eff. 12-30-04; 2002 H 675, eff. 12-13-02; 1998 S 229, eff. 9-16-98; 1997 S 130, eff. 9-18-97; 1997 H 408, eff. 10-1-97; 1997 H 215, eff. 6-30-97; 1996 S 230, eff. 10-29-96; 1995 H 167, eff. 11-15-95; 1995 S 19, eff. 9-8-95; 1995 H 200, eff. 9-21-95; 1988 H 439, eff. 3-17-89; 1987 H 171; 1983 S 133)

Notes of Decisions (350)

R.C. § 4117.01, OH ST § 4117.01

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Baldwin's Ohio Revised Code Annotated
Title XLI. Labor and Industry
Chapter 4117. Public Employees' Collective Bargaining (Refs & Annos)
Unfair Labor Practices

R.C. § 4117.12

4117.12 Remedies

Effective: July 17, 2009

Currentness

(A) Whoever violates section 4117.11 of the Revised Code is guilty of an unfair labor practice remediable by the state employment relations board as specified in this section.

(B) When anyone files a charge with the board alleging that an unfair labor practice has been committed, the board or its designated agent shall investigate the charge. If the board has probable cause for believing that a violation has occurred, the board shall issue a complaint and shall conduct a hearing concerning the charge. The board shall cause the complaint to be served upon the charged party which shall contain a notice of the time at which the hearing on the complaint will be held either before the board, a board member, or an administrative law judge. The board may not issue a notice of hearing based upon any unfair labor practice occurring more than ninety days prior to the filing of the charge with the board, unless the person aggrieved thereby is prevented from filing the charge by reason of service in the armed forces, in which event the ninety-day period shall be computed from the day of the person's discharge. If the board dismisses a complaint as frivolous, it shall assess costs to the complainant pursuant to its standards governing such matters, and for that purpose, the board shall adopt a rule defining the standards by which the board will declare a complaint to be frivolous and the costs that will be assessed accordingly.

(1) The board, board member, or administrative law judge shall hold a hearing on the charge within ten days after service of the complaint. The board may amend a complaint, upon receipt of a notice from the charging party, at any time prior to the close of the hearing, and the charged party shall within ten days from receipt of the complaint or amendment to the complaint, file an answer to the complaint or amendment to the complaint. The charged party may file an answer to an original or amended complaint. The agents of the board and the person charged are parties and may appear or otherwise give evidence at the hearing. At the discretion of the board, board member, or administrative law judge, any interested party may intervene and present evidence at the hearing. The board, board member, or administrative law judge is not bound by the rules of evidence prevailing in the courts.

(2) A board member or administrative law judge who conducts the hearing shall reduce the evidence taken to writing and file it with the board. The board member or the administrative law judge may thereafter take further evidence or hear further argument if notice is given to all interested parties. The administrative law judge or board member shall issue to the parties a proposed decision, together with a recommended order and file it with the board. If the parties file no exceptions within twenty days after service thereof, the recommended order becomes the order of the board effective as therein prescribed. If the parties file exceptions to the proposed report, the board shall determine whether substantial issues have been raised. The board may rescind or modify the proposed order of the board member or administrative law judge; however, if the board determines that the exceptions do not raise substantial issues of fact or law, it may refuse to grant review, and the recommended order becomes effective as therein prescribed.

(3) If upon the preponderance of the evidence taken, the board believes that any person named in the complaint has engaged in any unfair labor practice, the board shall state its findings of fact and issue and cause to be served on the person an order requiring that the person cease and desist from these unfair labor practices, and take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of Chapter 4117. of the Revised Code. If upon a preponderance of the evidence taken, the board believes that the person named in the complaint has not engaged in an unfair labor practice it shall state its findings of fact and issue an order dismissing the complaint.

(4) The board may order the public employer to reinstate the public employee and further may order either the public employer or the employee organization, depending on who was responsible for the discrimination suffered by the public employee, to make such payment of back pay to the public employee as the board determines. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or require the payment to the employee of any back pay, if the suspension or discharge was for just cause not related to rights provided in section 4117.03 of the Revised Code and the procedure contained in the collective bargaining agreement governing suspension or discharge was followed. The order of the board may require the party against whom the order is issued to make periodic reports showing the extent to which the party has complied with the order.

(C) Whenever a complaint alleges that a person has engaged in an unfair labor practice and that the complainant will suffer substantial and irreparable injury if not granted temporary relief, the board may petition the court of common pleas for any county wherein the alleged unfair labor practice in question occurs, or wherein any person charged with the commission of any unfair labor practice resides or transacts business for appropriate injunctive relief, pending the final adjudication by the board with respect to the matter. Upon the filing of any petition, the court shall cause notice thereof to be served upon the parties, and thereupon has jurisdiction to grant the temporary relief or restraining order it considers just and proper.

(D) Until the record in a case is filed in a court, as specified in Chapter 4117. of the Revised Code, the board may at any time upon reasonable notice and in a manner it considers proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Credits

(2009 H 1, eff. 7-17-09; 1983 S 133, eff. 4-1-84)

Notes of Decisions (289)

R.C. § 4117.12, OH ST § 4117.12

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