IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

State ex. rel. Service Employees International Union, District 1199	)	Case No. 22CV007569
Relator,	)	Judge Jeffrey M. Brown
-v-	)	
State Employment Relations Board, *et al.*,	)	
Respondents.	)	

Reply Brief of Relator SEIU District 1199

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I. Argument

A. Implementation of BWCs is a mandatory subject of bargaining.

In responding to Relator's argument that ODRC was required to bargain the implementation of BWCs just like the employer was required to bargain the implementation of surveillance cameras in non-public parts of a firehouse in *Sharonville*, Respondents argue that, unlike in that case, here the CBA states that members should have no expectation of privacy and the cameras only record during qualifying events. Both arguments must fail, demonstrating *Sharonville's* applicability to the facts here.

Respondents' argument regarding the privacy clause is misplaced for several reasons. First, SERB has previously made clear that "the waiver of a statutory right to bargain over mandatory subjects of bargaining must be established by a clear and unmistakable action by the waiving party." *In re City of Akron*, 1997 OH SERB LEXIS 6, *16 (1997). To establish a possibility of waiver, the contract must have "precise terminology" waiving the right. *In re Ohio Department of Transportation*, 1993 OH SERB LEXIS 5, *29-30 (1993). In contrast, there is no dispute that the CBA here contains no specific language waiving members' rights to bargain over BWCs. Indeed, BWCs are not even mentioned in the agreement. Therefore, the "precise terminology" needed for the "clear and unmistakable" waiver is absent—leaving the right to bargain intact.

Moreover, Respondents' argument fails since SERB has previously explicitly found the exact privacy clause here does not waive rights under Chapter 4117 such as the right to protected communications with a member's union. *See generally In re ODRC*, 2010 OH SERB LEXIS 78 (2010). There, the union filed a ULP after ODRC reviewed emails between a member and a union representative then used those emails against the member at arbitration. ODRC raised the same argument there as it does here: that members

waived their privacy rights under the CBA. But SERB rejected that argument and found that the privacy clause did not allow ODRC to read a member's emails if ODRC knew the emails were with a union representative and regarded union business, nor could ODRC use such emails against the member at arbitration. *Id.* at 18-21. Doing so, SERB found, violated Chapter 4117. *Id*. at 22.

Next, there is no dispute from either Respondent that notwithstanding the privacy clause in the CBA, members do enjoy an expectation of privacy while, for instance, using the restroom, changing or showering in a locker room, or having a protected conversation with a grievance representative or an attorney. Not only does the Employer not dispute this, *the Employer's own BWC policy explicitly states that members have privacy rights in such situations*. CR Part 1, p. 64. Thus, the concern in *Sharonville* that members' protected conversations would be captured applies with equal force here.

Likewise, Respondents are incorrect that the BWCs record only during "qualifying events" and therefore are not like the constantly recording surveillance cameras in *Sharonville*. If the BWC is powered on, then it is recording. CR Part 1, p. 66-67. Moreover, members must power-on their BWC at the start of each shift. *Id*. at 65. Therefore, unless the camera is powered off or manually placed into sleep mode, a member's entire shift is video recorded. *Id.* at 66-67. Currently, under ODRC's policy, the BWC records 18 hours of footage before that content is overwritten. *Id*. at 66. While it is true that ODRC currently only requires a member to make a manual recording during a "qualifying event," everything that happens before and after that manual activation will also be captured under the video recall feature if the BWC is on. In other words, the BWCs here create many more opportunities for the footage to be used for disciplinary purposes or even a

criminal prosecution than the cameras in *Sharonville*—majorly impacting terms and conditions of employment.

Thus, all of the facts that resulted in finding that implementing stationary surveillance cameras were a mandatory subject of bargaining in *Sharonville* are also present here.

B. Even if ODRC had the right to implement BWCs, it was still obligated to bargain the effects of doing so.

Respondents have argued that the facts here more closely resemble those in *City of Cleveland*, where SERB found that an employer was obligated to bargain the effects of installing dash cameras in ambulances. But Respondents argue that case does not apply since here members have waived their rights to privacy or to challenge the adoption of technology and any discipline imposed from a camera recording can be grieved. These arguments must fail.

First, as addressed above, ODRC concedes in its own policy that members enjoy privacy rights notwithstanding the privacy clause in the CBA. Likewise, SERB has found that clause does not trump members' statutory rights to, for example, have protected conversations with their union. In other words, members' privacy rights concerning such matters are not covered by the agreement and are ripe for negotiation.

Respondents also argue that negotiation was not required since, in addition to the privacy clause, the CBA allows ODRC to implement technology and determine the type of equipment used. SERB already rejected that argument in *City of Cleveland*. There, the employer argued that under O.R.C. § 4117.08(C), it had the express management right to determine "utilization of technology," a right that the agreement did not restrict. On the one hand, SERB agreed that the employer had the management right to implement dash

cameras; however, SERB also found that a *Youngstown* analysis was needed since the implementation also affected terms and conditions of employment. *City of Cleveland* at 10-11. And under that analysis, the employer was obligated to bargain the effects of implementing dash cameras. *Id*. at 19.

Here, the CBA clauses which allow ODRC to make reasonable use of technology and determine the type of equipment mirror the management right to utilize technology found in O.R.C. § 4117.08(C). Therefore, just as in *City of Cleveland*, those clauses do not foreclose a *Youngstown* analysis. And as addressed in Relator's Amended brief, under such analysis ODRC must, at a minimum, negotiate the effects of BWCs. In fact, unlike the union in *City of Cleveland*—that opposed implementing BWCs—here SEIU does not oppose adoption. In other words, negotiation will in no way impede ODRC's mission. *Id*.

Respondents also argue that *City of Cleveland* is inapplicable since here members have a grievance procedure and may grieve or arbitrate any violation of the agreement. This is a curious argument as SERB explicitly notes in *City of Cleveland* that the collective bargaining agreement there "contain[ed] a grievance arbitration process that is final and binding." *City of Cleveland* at 4. Stated differently, the employer in that case was obligated to bargain the effects of installing dash cameras notwithstanding the grievance and arbitration procedure in the agreement. The result should be no different here. And indeed, as addressed above, unlike the dash cameras in that case, here the BWCs are constantly recording and are attached to the member, creating many more disciplinary opportunities and potential infringements on protected conversations.

C. There can be no dispute that the parties did not bargain BWCs.

Finally, Respondents argue that, even if ODRC was obligated to bargain any aspect of BWCs, it met that obligation when 1) it met with SEIU after it had already unilaterally

promulgated the BWC policy without any input from, or negotiation with, the Union; and 2) notwithstanding the fact that the Employer on each of those occasions announced it would not bargain BWCs and formally captured that sentiment when the Office of Collective Bargaining refused to bargain BWCs. CR Part 1, p. 6. This argument is misplaced and ignores bedrock precedent defining collective bargaining.

SERB's own case law on this issue is clear: a mere "meet and confer," in the absence of any intent to reach an agreement, is not bargaining as defined by Chapter 4117. *See State Emp. Rels. Bd. v. City of Cleveland*, 2004 OH SERB LEXIS 28, *8-11 (2004). Even if an employer is willing to reach an agreement, however, it does so in bad faith in violation of law if it first implements a mandatory subject of bargaining without negotiation with the union. *In re Mayfield City Sch. District Board of Educ.*, 1989 OH SERB LEXIS 33, *11 (1989) (citation omitted). Willingness to negotiate after already having implemented a mandatory subject is known as a *fait accompli*. *In re Dep't of Youth Services*, 1996 OH SERB LEXIS 2, *20 (1996).

Once again *City of Cleveland* is instructive. There, like here, the employer "offered to meet and confer with the [u]nion to review its concerns and suggestions" regarding the dash cameras. *City of Cleveland* at 13. But the union refused to meet since the employer had rejected its demand to bargain. That refusal to meet was permitted, SERB found, since the employer had already made clear it would not bargain the cameras. *Id*. at 22.

Here, there is no dispute from either Respondent that its BWC policy was implemented without any negotiation with SEIU. Indeed, the parties had not even met before the policy was instituted. CR Part 1, p. 75. Therefore, even if ODRC had been willing to negotiate—which it was not—it presented a *fait accompli* in violation of law. Under those circumstances, the Union was not obligated to serve a bargaining demand since

ODRC had already engaged in bad faith tactics. *Dep't of Youth Services* at 20. Nonetheless, the Union served a demand and ODRC formally rejected it. CR Part 1, p. 6. Further, the Union was under no obligation to respond to that rejection since doing so would have been futile. *Id*. Nor is there any dispute that on the two occasions the parties did meet after the BWC policy was instituted, there were no proposals or counterproposals introduced by either party; there was otherwise no give and take between the parties; and there was no written agreement reached by the parties. In short, the parties never bargained any aspect of BWCs.

II. Conclusion

By failing to find probable cause that ODRC violated Chapter 4117 by refusing to negotiate a mandatory subject of bargaining, SERB abused its discretion. The Union is therefore entitled to a writ of mandamus compelling a hearing, allowing SEIU— and the Employer, for that matter—the full opportunity to argue and brief this important issue so that SERB can make a ruling in conformity with the facts, law, and its own precedents.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this Reply Brief of Relator SEIU District 1199 was filed electronically with the Court this 21st day of February 2023. Copies of the foregoing will be served on the following via the Court's electronic filing system and electronic mail:

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