

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

OHIO ASSOCIATION OF PUBLIC)	CASE NO. 08CV002428
SCHOOL EMPLOYEES (OAPSE)/)	
AFSCME LOCAL 4, AFL-CIO, <i>et al.</i>)	JUDGE EUGENE A. LUCCI
)	
Plaintiffs)	
)	
vs.)	<u>ORDER GRANTING MOTION</u>
)	<u>FOR JUDGMENT ON THE</u>
MADISON LOCAL SCHOOL)	<u>PLEADINGS AND PARTIALLY</u>
DISTRICT BOARD OF EDUCATION,)	<u>GRANTING MOTION TO DISMISS</u>
<i>et al.</i>)	
)	
Defendants)	

INTRODUCTION

{¶1} This matter came on for consideration upon: (1) Plaintiff Ohio Association of Public School Employees (OAPSE)/AFSCME Local 4, AFL-CIO's Complaint, Request for Declaratory Judgment, Breach of Contract, Other Torts, and Request for Injunctive Relief, filed July 30, 2008; (2) Defendants Madison Local School District Board of Education, Matthew J. Chojnacki, and James J. Herrholtz's Motion for Judgment on the Pleadings, filed April 9, 2009; (3) Defendant Community Bus Services, Inc.'s Motion to Dismiss Under Civil Rule 12(B)(1), filed April 10, 2009; (4) Plaintiffs' Memorandum Contra Motion for Judgment on the Pleadings of Defendants Madison Local S.D., Matthew J. Chojnacki, and James J. Herrholtz, filed May 12, 2009; (5) Plaintiffs' Memorandum Contra Motion to Dismiss of Defendant CBS, Inc., filed May 12, 2009; (6) Defendant Madison Local School District Board of Education, Matthew J. Chojnacki, and James J. Herrholtz's Reply to Plaintiffs' Memorandum Contra Defendants' Motion for Judgment on the Pleadings, filed May 18, 2009; and (7) the oral arguments made in support of and contra these motions on September 25, 2009.

PROCEDURAL HISTORY

{¶2} The plaintiffs in this case are the Ohio Association of Public School Employees ("OAPSE"), a labor union and exclusive bargaining representative for various classifications of employees of the Madison Local School District Board of Education

and thirty-seven (37) school bus drivers, bus assistants, and school bus mechanics represented by OAPSE. Defendants are the Madison Local School District Board of Education, and James J. Herrholtz and Matthew J. Chojnacki, who were employed at all times relevant to this complaint as Board Superintendent and Assistant Superintendent, respectively, (sometimes herein collectively, "Board") and Community Bus Services, Inc. ("CBS"), an Ohio corporation engaged in business activities in Northeast Ohio.

{13} OAPSE and Board were parties to a collective bargaining agreement (CBA) effective July 1, 2006 through June 30, 2008.¹ CBS's president, Terry Thomas, contacted Chojnacki in January 2008 regarding having CBS provide transportation services to Board.² Plaintiffs allege that Herrholtz and Chojnacki wished to end Board's relationship with its bus employees because those employees filed numerous grievances and charges of unfair labor practices against Board. In February 2008, CBS was hired to perform an internal audit of Board's transportation efficiency and effectiveness, which analysis was completed in May 2008.³ Upon review of this analysis, Chojnacki told Herrholtz that if CBS was hired to provide transportation services, CBS would contractually guarantee Board annual savings of \$150,000 to \$200,000.⁴ On May 29, 2008, Herrholtz sent a copy of a proposed new contract for school bus personnel to OAPSE's field representative.⁵ This contract was characterized by Herrholtz as an "all or nothing" offer, and in a follow-up letter, Herrholtz told the field representative that if the proposed contract was accepted without change, Board would not contract out its bus services.⁶ OAPSE rejected this contract on June 16, 2008.⁷ The next day, Board voted to contract with CBS for its bus services for five years beginning on July 1, 2008, and Herrholtz signed this contract shortly thereafter.⁸ OAPSE bus personnel were notified on June 19, 2008 that "for reasons of economy and efficiency" their employment with Board would end on June 30, 2008 when the CBA

1 Exhibit 1 of the Plaintiffs' Complaint

2 Exhibit 2 of the Plaintiffs' Complaint.

3 Exhibits 3, 4, and 9 of the Plaintiffs' Complaint

4 Exhibit 10 of the Plaintiffs' Complaint

5 Exhibit 13 of the Plaintiffs' Complaint.

6 *Id.*, and Exhibit 14 of the Plaintiffs' Complaint

7 Exhibit 18 of the Plaintiffs' Complaint.

8 Exhibit 19 of the Plaintiffs' Complaint.

between Board and OAPSE expired.⁹ On July 2, 2008, Herrholtz notified OAPSE's field representative that he would neither hear nor accept grievances from bus personnel regarding their terminations.¹⁰ Finally, on July 17, 2008, Chojnacki formally denied all grievances from bus personnel.¹¹

{14} Plaintiffs filed a Complaint, Request for Declaratory Judgment, Breach of Contract, Other Torts, and Request for Injunctive Relief and a Motion for Injunctive Relief on July 30, 2008. The complaint alleges ten causes of action against various combinations of defendants. The State of Ohio, Governor Ted Strickland and the State of Ohio, Attorney General Nancy H. Rogers were also named as defendants. On August 13, 2008, Defendants Board filed a Motion to Dismiss Plaintiffs' Motion for Injunctive Relief. On August 15, 2008, respective counsel for Board and CBS filed a Notice of Removal to the United States District Court for the Northern District of Ohio, Eastern Division. On September 4, 2008, separate Motions to Dismiss Defendant Ohio Governor and Defendant Ohio Attorney General were filed. On January 26, 2009, the case was remanded from the United States District Court to the Lake County Court of Common Pleas, and the case was reactivated pursuant to a journal entry filed February 6, 2009. Defendants Governor Ted Strickland and Attorney General Nancy H. Rogers were dismissed from the case and Plaintiffs' Motion for Injunctive Relief was denied on March 13, 2009. On April 9, 2009, Defendants Board filed a Motion for Judgment on the Pleadings. On April 10, 2009, Defendant CBS filed a Motion to Dismiss Under Civil Rule 12(B)(1). The issues have been fully briefed by the parties and argued at oral hearing.

LAW

Civil Rule 12(B)(1) Motion to Dismiss

{15} "The standard of review for a dismissal pursuant to [Civil Rule] 12(B)(1), lack of subject matter jurisdiction, is whether the plaintiff has alleged any cause of action over which the court has authority to decide."¹² A court may consider any relevant evidence

9 Exhibit 20 of the Plaintiffs' Complaint
10 Exhibit 24 of the Plaintiffs' Complaint
11 Exhibit 26 of the Plaintiffs' Complaint.

12 *Bringheli v Parma City School Dist Bd of Edn* (Jun 25, 2009), Cuyahoga App No 91064, 2009-Ohio-3077, citing *McHenry v Indus Comm of Ohio* (1990), 68 Ohio App 3d 56, 62, 587 N E 2d 414, 418.

when determining its own jurisdiction.¹³ Therefore, Defendant CBS's Motion for Dismissal may be granted in its entirety only if after review of the complaint, the pleadings, and any supporting evidentiary materials, the court finds that it does not have jurisdiction over each of the plaintiffs' allegations.

Civil Rule 12(C) Judgment on the Pleadings

{16} Civ.R.12(C) motions are appropriate only for resolving matters of law.¹⁴ Judgments on the pleadings may be granted "where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief."¹⁵ Therefore, Defendant Board's Motion for Judgment on the Pleadings may be granted in its entirety only if the court determines that no material factual issues exist and that the movants are entitled to judgment as a matter of law as to each of the plaintiffs' allegations.¹⁶

FINDINGS AND CONCLUSIONS

First Cause of Action: the CBS contract is void or voidable because it is not a transportation services contract provided for in R.C. 3319.0810.

{17} R.C. 3319.0810(A)¹⁷ states that if all six conditions prescribed in R.C. 3319.0810(B) are followed, "[t]he board of education of any school district *** may terminate any of its transportation staff positions for reasons of economy and efficiency if the board instead of employing its own staff to transport some or all of the students enrolled in the district schools enters into a contract with an independent agent for the provision of transportation services for such students." OAPSE argues that the contract between Board and CBS does not provide economy and efficiency as required by the statute, and is not a transportation services contract. OAPSE bases the latter claim on the fact that Board retained ownership of their buses and responsibility for the cost of items such as fuel and insurance.

13 *Id* See, also, *Bryant v Witkosky* (Mar 29, 2002), Portage App No 2001-P-0047, unreported

14 *State ex rel Midwest Pride IV, Inc v Pontious* (1996), 75 Ohio St 3d 565, 569, 664 N E 2d 931, 936.

15 *Id*

16 *Id*

17 Interestingly, this statute first became effective on September 29, 2005 With the recent passage of H B 1, the state budget, this statute was repealed, effective October 15, 2009 According to the parties, there are no cases interpreting this statute, and no other instances are known where this statute has been employed

{¶18} OAPSE's contention that Board's contract with CBS does not provide economy is not supported by the plaintiffs' own exhibits. Board was informed that they would save between \$150,000 to \$200,000 annually by contracting with CBS for its bus personnel and other transportation services.¹⁸ Therefore, Board clearly achieved economy by hiring CBS to perform its bussing activities. Efficiency was also realized, because at a minimum, Board was freed from the burdens of processing payroll and human resource issues for bus drivers, and CBS became responsible for driving and maintaining the bus fleet. Finally, the wording of R.C. 3319.0810(A) does not support OAPSE's contention that the contract with CBS is not a transportation services contract. The statute does not require school boards to relinquish ownership of buses as a prerequisite to replacing transportation staff. "Transportation services" as used in the statute can be read to include only the transportation staff personnel because the statute says that the "transportation staff positions" may be terminated. Therefore, the court finds that plaintiffs' first cause of action is not well-taken and should be dismissed as to Defendants Board, Herrholtz, and Chojnacki.

Second Cause of Action: R.C. 3319.0810 does not apply to collective bargaining units wherein transportation service employees are included with other school district employee classifications.

{¶19} Plaintiffs argue that OAPSE represents many classes of employees other than transportation personnel under its CBA with Board. The contract with CBS severs transportation personnel from OAPSE's CBA. Under R.C. 4117.06(A), the Ohio State Employment Relations Board (SERB) has exclusive authority to determine the composition of bargaining units for purposes of collective bargaining. Thus, plaintiffs contend that R.C. 3319.0810 acts to improperly usurp authority reserved for SERB under R.C. 4117.06(A) by eliminating an approved class of employees from the CBA.

{¶110} Plaintiffs' second cause of action arises out of OAPSE's CBA with the Board. The CBA contains grievance procedures culminating in binding arbitration.¹⁹ R.C. 4117.10(A) mandates that if a CBA contains such a provision, all parties to the CBA "are subject solely to that grievance procedure." Under Ohio law, "[i]f a party asserts

¹⁸ Exhibit 10 of the Plaintiffs' Complaint. According to the parties in oral arguments, the savings to the taxpayers for the year July 1, 2008 to June 30, 2009 was \$300,000.

¹⁹ Exhibit 1, Article 12, Page 33 of the Plaintiffs' Complaint.

rights that are independent of R.C. Chapter 4117, then the party's complaint may properly be heard in common pleas court. However, if a party asserts claims that arise from or depend on the collective bargaining rights created by R.C. Chapter 4117, the remedies provided in that chapter are exclusive."²⁰ Therefore, this court lacks jurisdiction to hear this claim and plaintiffs' second cause of action is not well-taken and should be dismissed as to all defendants.²¹

Third Cause of Action: R.C. 3319.0810 is unconstitutional because it impairs and interferes with the obligation of contract.

{¶11} Plaintiffs claim that R.C. 3319.0810 creates an unconstitutional impairment of contract in violation of Article I, Section 10 of the United States Constitution and Article II, Section 28 of the Ohio Constitution. In examining such claims, Ohio courts generally undertake a three-part analysis: "whether there is a contractual relationship, whether a change in law impairs that relationship, and whether the impairment is substantial."²² To claim legislation impairs the obligation of contracts, "a claimant must allege and establish that new legislation impaired an existing contract by a subsequent law. 'Contracts entered into on or after the effective date of the disputed statute are not impaired and thus not entitled to the protection of the Contracts Clause.'"²³

{¶12} Here, R.C. 3319.0810 became effective on September 29, 2005 and the CBA between OASPE and Board began on July 1, 2006.²⁴ R.C. 3319.0810 is not a retroactive law. Thus, Ohio case law does not support this allegation. Therefore, the court finds that plaintiffs' third cause of action is not well-taken and should be dismissed as to Defendants Board, Herrholtz, and Chojnacki.

Fourth Cause of Action: the Board failed to avoid conflicts of interest by invoking competitive bidding and/or their own policies and procedures for requesting bids and proposals.

20 *Bringheli*, citing *Franklin Cty Law Enforcement Assn v Fraternal Order of Police, Capital City Lodge No 9* (1991), 59 Ohio St.3d 167, 170-171, 572 N.E.2d 87, 91. See, also, *Bryant*

21 The parties advised the court at oral argument that the initial hearing before the administrative law judge of the State Employment Relations Board resulted in findings in favor of Board, which are now on appeal

22 *State ex rel Horvath v State Teachers Retirement Bd* (1998), 83 Ohio St 3d 67, 76

23 *E Liverpool Edn Assn v E Liverpool City School Bd Of Edn* (June 30, 2008), Columbiana App No 06-CO-61, unreported, citing *Aetna Life Ins Co v Shilling* (1993), 64 Ohio St 3d 164

24 The court finds that each renewal of a contract, even if no changes are made from the preceding continuous contract, constitutes a new contract. However, there was a change with the contract beginning July 1, 2006 – at a minimum, there was a wage increase

{¶13} Plaintiffs allege that Board ignored both state law and its own policies when it failed to conduct competitive bidding on the CBS contract. Plaintiffs state that R.C. 3313.46 requires school districts to conduct competitive bids in certain situations and that Board has procedures for soliciting bids on contracts in excess of \$25,000.

{¶14} R.C. 3313.46 requires school boards to conduct competitive bids for contracts over \$25,000 for building, repairing, enlarging, improving, or demolishing any school building. It does not require bids on contracts for transportation services. And although the plaintiffs aver that Board's own policies require competitive bids on contracts exceeding \$25,000, they present no evidence supporting this assertion. Certainly, Board policy may be changed at any time by Board, and if Board had acted differently under another policy, the current order of Board signals a change of that policy. Therefore, the court finds that plaintiffs' fourth cause of action is not well-taken and should be dismissed as to Defendants Board, Herrholtz, and Chojnacki.

Fifth Cause of Action: breach of contract

{¶15} Plaintiffs allege that Board breached its CBA with OAPSE in several ways, including: (1) entering into a contract with CBS while the CBA was still in effect; (2) terminating bus employees while the CBA was still in effect; (3) failing to notify OAPSE of their intent to contract with CBS, and failing to provide OAPSE with a rationale for doing so; (4) refusing to bargain with OAPSE; and, (5) refusing to accept or process grievances over the termination of bus employees.

{¶16} This court lacks jurisdiction over any of the claims alleged in plaintiffs' fifth cause of action. All of these claims arise out of plaintiffs' CBA with Board. As discussed above, that CBA contains a grievance procedure resulting in binding arbitration. Therefore, the plaintiffs' only means of recourse is to follow the grievance procedures laid out in the CBA and in R.C. 4117. Because this court lacks jurisdiction, plaintiffs' fifth cause of action is not well-taken and should be dismissed as to all defendants.

Sixth Cause of Action: tortious interference with contract and with employment

{¶17} Plaintiffs state that from July 1, 2006 through June 30, 2008, OAPSE had a CBA, and as part of that CBA, bus personnel had an employment contract with Board.

They allege Defendants Herrholtz, Chojnacki, and CBS knew these facts and had a duty to refrain from tortious conduct that would interfere with those contracts.

{¶18} Tortious interference with contract is recognized in Ohio.²⁵ To recover for such a claim, "one must prove (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages."²⁶ Tortious interference with an employment contract contains the same elements "except that the term 'contract' is substituted with the term 'employment contract.'"²⁷

{¶19} Plaintiffs unquestionably had contracts with Board. Herrholtz, Chojnacki, and CBS all knew this. But the CBA between Board and OAPSE contained a clause allowing Board to subcontract work out, provided the union was given notice of and a rationale for taking such action, and an opportunity to discuss the effects of such a decision.²⁸ On February 19, 2008, CBS's president addressed the school board about having his company conduct a Student Transportation Efficiency and Effectiveness Analysis.²⁹ Bus drivers and the union president attended this meeting.³⁰ After this analysis was completed, Board notified OAPSE that unless it agreed to several changes in its bus employees' contract, it would sever its relation with those employees.³¹ OAPSE was aware that Board believed it could save thousands of dollars by privatizing its transportation services, and it was given an opportunity to meet to discuss the proposed change.³² OAPSE elected not to do so.³³ For all these reasons, the subcontracting clause in the contract between OAPSE and Board was honored.

{¶20} Further, under the terms of R.C. 3319.0810(A)(1), Board could subcontract its transportation services sixty days prior to the CBA's expiration date. Board met that requirement when it signed its contract with CBS less than a week before the CBA with OAPSE expired. Also, OAPSE's contract with Board was in full force and effect for its

25 *Kenty v Transamerica Premium Ins Co* (1995), 72 Ohio St 3d 415, 417, 650 N.E.2d 863, 866.

26 *Id*

27 *Tobias v First Energy Nuclear Operating Co* (N.D. Ohio 2004), 302 F.Supp.2d 849, 854, citing *Doyle v Fairfield Machine Co* (1997), 120 Ohio App.3d 192, 216, 697 N.E.2d 677, 683.

28 Plaintiffs' Exhibit 1, Article I, Page 4

29 Plaintiffs' Exhibit 3.

30 Plaintiffs' Exhibit 7.

31 Plaintiffs' Exhibit 13

32 Plaintiffs' Exhibit 18

33 *Id*

stated term and bus personnel were employed and paid for their services for that same term. Therefore, Board fully complied with the requirements of R.C. 3319.0810, and neither OAPSE's CBA nor transportation personnel's employment contracts with Board were breached. Because there was no breach, tortious interference cannot be found against any of the defendants here.

{¶21} Further, assuming *arguendo* the contracts were breached, the plaintiffs cannot prove the element of lack of justification, because Board was guaranteed annual savings of \$150,000 to \$200,000 by contracting with CBS. Therefore, the court finds that plaintiffs' sixth cause of action is not well-taken and should be dismissed as to Defendants Herrholtz and Chojnacki.

Seventh Cause of Action: civil conspiracy

{¶22} Plaintiffs allege that Herrholtz, Chojnacki, and CBS purposely and willfully associated together and engaged in wrongful acts for the common objective of interfering with OAPSE's CBA with Board and with the employment of bus personnel. Plaintiffs further allege that this resulted in damages to both OAPSE and transportation personnel.

{¶23} A civil conspiracy is defined as "a malicious combination of two or more persons to injure another, in person or property, in a way not competent for one alone, resulting in actual damages."³⁴ Its elements are: (1) a malicious combination, (2) of two or more persons, (3) injury to a person or property, and (4) the existence of an unlawful act independent from the actual conspiracy.³⁵ This last element means that "[a]n underlying tort is necessary to give rise to a cause of action for conspiracy."³⁶

{¶24} As discussed above regarding plaintiffs' sixth cause of action, Herrholtz, Chojnacki, and CBS did not breach or cause a breach of OAPSE's contract, nor did they interfere with bus personnel's employment. Thus, there is no underlying tort giving rise to this cause of action. Therefore, the court finds that plaintiffs' seventh cause of action is not well-taken and ought to be dismissed as to Defendants Herrholtz and Chojnacki.

34 *Kenty v Transamerica Premium Ins Co*, 72 Ohio St 3d 415, 417, 650 N E 2d 863, 866

35 *Federal Insurance Co v Webne* (N D. Ohio 2007), 513 F Supp 2d 921, 927

36 *Stiles v Chrysler Motors Corp* (1993), 89 Ohio App 3d 256, 266, 624 N E.2d 238, 244

Eighth Cause of Action: refusal to bargain, discrimination, and violation of public policy

{¶25} Plaintiffs allege that Board acted in bad faith by failing to bargain with OAPSE in violation of R.C. 4117.11(A)(5), discriminated against bus personnel because they filed numerous grievances in violation of R.C. 4117.11(A)(3), and that Board's conduct violated public policy as set forth in R.C. 4117.11(A)(5). These are all allegations of unfair labor practices.

{¶26} R.C. 4117.12(A) states that violations of unfair labor practices as specified in R.C. 4117.11 are remediable by the state employee relations board (SERB). Ohio law mandates that "[t]he statutes pertaining to unfair labor practices do not provide for the filing of an original complaint in common pleas court."³⁷ Thus, SERB has exclusive jurisdiction to adjudicate unfair labor practice claims in Ohio. Therefore, this court lacks jurisdiction to hear this claim, and plaintiffs' eighth cause of action is not-well taken and should be dismissed as to all defendants.

Ninth Cause of Action: punitive damages from Herrholtz, Chojnacki, and CBS.

{¶27} Plaintiffs allege that because Herrholtz, Chojnacki, and CBS harmed both OAPSE and transportation personnel purposely, willfully, and wantonly, they are entitled to an award of punitive damages from those three defendants. However, as previously discussed, none of these defendants breached or caused a breach of OAPSE's CBA with Board. As a result, they are not liable for any damages. Therefore, the court finds that plaintiffs' ninth cause of action is not well-taken and should be dismissed as to Defendants Herrholtz and Chojnacki.

Tenth Cause of Action: Request for Injunctive Relief

{¶28} Plaintiffs request the court grant injunctive relief. This cause of action was dismissed pursuant to this court's journal entry filed March 13, 2009, and is thus moot.

ORDER

{¶29} The Motion for Judgment on the Pleadings filed by Defendants Board, Chojnacki, and Herrholtz is hereby granted as to all of the plaintiffs' causes of action. Defendant

37 Franklin Cty Law Enforcement Assn v Fraternal Order of Police, Capital City Lodge No 9, 59 Ohio St.3d 167, 169, 572 N E 2d 87, 90

CBS's Motion to Dismiss is hereby denied as to plaintiffs' first, third, fourth, sixth, seventh, and ninth causes of action, and granted as to the second, fifth, and eighth causes of action. As there remains no viable cause of action against CBS because of the court's ruling in favor of Board, Chojnacki, and Herrholtz on the first, third, fourth, sixth, seventh, and ninth causes of action, these causes of action are dismissed as to Defendant CBS also.

{¶30} IT IS SO ORDERED.



EUGENE A. LUCCI, JUDGE

- c: Thomas C. Drabick, Jr., Esq , Attorney for Plaintiffs
- David Kane Smith, Esq., Attorney for Defendants Madison Local School District Board of Education, James J. Herrholtz, and Matthew J. Chojnacki
- Jeffrey C. Miller, Esq., William Schmitz, Esq., & P.J. Malner, Esq., Attorneys for Defendant Community Bus Services, Inc.

FINAL APPEALABLE ORDER
Clerk to serve pursuant
to Civ.R. 53 (D)