



# Cleveland State University

Department of Human Resources

October 8, 2013

Judy Knapp, Labor Relations Specialist  
State Employment Relations Board  
65 East Broad Street, 12<sup>th</sup> Floor  
Columbus, Ohio 43215-4213

***Re: Cleveland State University Chapter of the American Association of University Professors v. Cleveland State University, SERB Case No. 2013-ULP-08-0258***

Dear Ms. Knapp:

This letter represents the Employer's ("CSU" or "University") response to the above referenced charge. Charging Party claims that the Dean of the Cleveland-Marshall College of Law gave "union organizers" artificially low merit raises in the amount of \$666 in retaliation for their union activity and as a means of interfering, coercing or restraining them from engaging in protected activity. There is no evidence, only speculation and unsupported leaps of logic, to bolster such claims. Union organizers and non-union organizers alike received the third tier merit award in the amount of \$666. Some union organizers received a higher merit pay award than in the past. There is no evidence that any meaning was ascribed to the \$666 amount; the facts indicate that the \$666 number was the result of a decrease in the third tier merit award from \$727 following a decrease in the total merit pool. For the reasons stated below, CSU respectfully requests that the State Public Employment Relations Board ("SERB") dismiss the charge in its entirety.

## Procedural Issues

As an initial matter, it is unclear as to whom this proceeding is brought. The Charge indicates that Dean Craig M. Boise is the charged party, yet the charge is brought against the employer. Cleveland State University is listed in item 4, which distinguishes it from the charged

party in item 3. As a result, on the face of the charge it is unclear whether this matter is being brought against Dean Boise as an individual, or in the Dean's capacity as an agent of the University, or against the University.

Furthermore, the Charge does not meet the requirements SERB sets forth for the filing of charges. Ohio Administrative Code 4117-7-01 states:

*(B) A charge that an unfair labor practice has been or is being committed shall be in writing and signed by the charging party or the charging party's representative and shall contain the following:*

*...*

*(3) A clear and concise statement of the facts constituting the alleged unfair labor practice;*

*(4) A brief statement of any other information relevant to the charge . . . .*

The statement purported to be the basis of the charge merely contains unsupported speculation, conjecture and self-serving conclusions, which do not provide the University with sufficient information. In view of the multiple public records requests that the Charging Party or its agents have made in this matter, the Charging Party is in a position to provide substantive evidence upon which to ground its claim, if such evidence exists. However, even with the benefit of the extensive documentation the University supplied, the Charging Party can only provide allegations wholly lacking in substance. Based on this independent ground, the University respectfully requests that the Charge be dismissed in its entirety.

#### Statement of Facts

The University denies the Charge. At issue is the amount of merit pay, or an annual pay raise to faculty members, that is wholly within the discretion of the dean. Each year, the University provides the law dean with a fund of money to be distributed as merit pay awards. In this case, Craig M. Boise, Dean of the Cleveland-Marshall College of Law, was given \$2.5% of the total law faculty salary amount to divide amongst meritorious faculty members. As indicated in the affirmation of Dean Boise, his determination of merit-based pay is grounded in the traditional criterion that is woven into standards by which faculty members are evaluated; namely classroom teaching based upon student teaching evaluations, scholarship, and professional service.

As further described therein, Dean Boise employed a bifurcated process to determine merit increases. First, he determined the weighted average score of each faculty member's overall performance. As illustrated in Exhibit 1 attached hereto, the average scores were determined by the numeric value of a faculty member's academic contribution in scholarship, which comprised 35% of the score, teaching, which comprised 40% of the score, and Service, which comprised 20% of the score. For FY2014, scholarship contained an additional 5% for

non-traditional forms of scholarly impact, i.e., blogs, presentations, influence.<sup>1</sup> Next, faculty members were ranked by their weighted average scores. **It is important to note that subsequent to the final ranking determination, Dean Boise did not change the number of points originally given to any faculty member.**

The second part of the process matched merit dollars with weighted averages, based on the merit pool available. As indicated in the attached affirmation of Dean Boise, he originally planned to distribute the merit raise pool in two levels of merit raises—\$6,000 and \$3,000—only to top faculty members. This was part of a strategy to create a strong incentive structure with meaningful rewards for high performers, as opposed to providing lower merit awards to all or most faculty members. However, Dean Boise ultimately decided to reduce the first-tier award to \$5,000 in order to provide at least a modest merit increase to those faculty members whose performance ranked them in the lower third of the scale. This third-tier merit award was initially \$500 and matched the lowest tier of merit pay awarded in FY 13.

Exhibit 2, attached herewith, is the initial calculations of merit pay based upon the estimates of money available. Faculty members scoring 2.35 or above received \$5,000, faculty members scoring 1.40 or above received \$3,000, and faculty members, except for those with low productivity, received \$500, the same amount of merit pay that the lowest tier of faculty members received in FY 13, prior to protected union activity.

However, after two more rounds of calculations, a low-performing faculty member's raise was reduced by \$993, two high-performing faculty members' raises were increased by \$1,000, and \$769, and the third-tier merit raises were increased from \$500 to \$727. These were the amounts Jeane White, Director of College Budget and Administration, submitted to the Director of Fiscal Operations in the Provost's office. (Ex. 3)

On April 2, 2013, Dean Boise received information from one Mary Therese Koccevar in the University Budget Office that the merit pool for the Law College had been wrongly calculated, and that the pool was being reduced by \$3,067. A copy of the e-mail with that communication is attached hereto as Exhibit 4. As a result, three third-tier faculty members' raises were reduced from \$727 to \$0; one high-performing faculty member's raise was reduced by \$276; and the remaining reduction was allocated pro rata among the third-tier merit raise recipients. This reduced their merit raises by \$61 per individual, for a final merit pay amount per person of \$666. That final calculation is attached hereto as Exhibit 5.

There were three faculty members who did not receive FY14 merit, Professor Pamela A. Daiker-Middaugh, Professor Brian A. Glassman, and Professor Stephen Gard. Professors Glassman and Gard received a weighted average score, based on the applied criteria, of 0. As a result, they received no merit increase (they also had not earned merit increases in FY 2013). Professor Daiker-Middaugh, Clinical Professor and Director of the Pro Bono Program, while receiving a score of 1.40, so jeopardized the Legal Aid Clinic over which she had administrative responsibility, that it was in jeopardy of being removed from the Law College in FY14. This

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<sup>1</sup> Influence is a generally accepted attribute in higher education. It contains such characteristics as the number of times an article is cited, comments as an expert in legal and nationally recognized publications, and quotations from speeches and publications.

matter was discussed with her, is unrelated to any protected union activity, and is a valid basis to deny a merit increase.

### Legal Standards

To demonstrate a prima facie case of discrimination under § 4117.11(A)(3), the Complainant must establish the following elements: (1) the individual at issue is a public employee and was employed at relevant times by the Respondent, or the individual was an applicant for hire for a position as a “public employee”; (2) the individual engaged in protected activity under Chapter 4117, which fact was either known by the Respondent or suspected by the Respondent; and (3) the Respondent took adverse action against the individual under circumstances that could, if left un rebutted by other evidence, lead to a reasonable inference that the Respondent’s actions were related to the individual’s exercise of concerted, protected activity under Chapter 4117. *State Emp Relations Bd v. State of Ohio, Rehabilitation Services Comm’n*, SERB 2005-004 (4-21-2005).

“The analytical framework governing employment discrimination cases in the absence of direct evidence of discrimination is well established. Once the Complainant establishes a prima facie case, the burden shifts to the Respondent to offer a legitimate, non-discriminatory reason for the adverse employment action at issue. If the Respondent meets this burden, then the burden of production shifts back to the Complainant to demonstrate that the proffered reason is a pretext. When the burden shifts back to the Complainant, pretext can be demonstrated by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the challenged conduct, or (3) was insufficient to warrant the challenged conduct.” *In the Matter of State Employment Relations Board, Complainant, City of Rocky River, Respondent*, 2009 OHIO SERB HO 2009-ALJ-002.

Charging Party also alleges that CSU violated R.C. § 4117.11(A)(1), which explicitly prohibits conduct that interferes with, restrains, or coerces employees in the exercise of their rights under O.R.C. Chapter 4117. A violation of R.C. § 4117.11(A)(1) will be found if, under the totality of the circumstances, it can be reasonably concluded that the employees were interfered with, restrained, or coerced in the exercise of their O.R.C. Chapter 4117 rights by the public employer’s conduct. *In re Hamilton County Sheriff*, SERB 98-002 (1-23-98), *aff’d sub nom. Hamilton County Sheriff v. SERB*, No. A98-00714 (Mag. Dec., CP Hamilton, 10-9-98), *aff’d* No. C-990040 (1<sup>st</sup> Dist Ct App, Hamilton, 8-27-99). *In the Matter of State Employment Relations Board, Complainant, Hamilton County Commissioners and Ralph Linne, Respondents*, 2010 SERB 2010-010. SERB has previously held that “to establish an (A)(1) violation, the Complainant must demonstrate not only the reasonable tendency of the complained action to interfere with, restrain, or coerce employees in exercising their rights, but that the interference, restraint, or coercion outweighs any competing legitimate managerial right.” *In the Matter of State Employment Relations Board, Complainant, Harrison Hills City School District Board of Education, Respondent*, 2010 SERB 2010-011.

## Discussion

In view of the facts set forth above, the Charging Party's claim is baseless and fails to meet the applicable legal standards. First, CSU disputes that most of the faculty members listed in the Charge have been subjected to an adverse action. Five of the eight faculty members received the same or greater merit award increase as in the last year prior to union activity. Further, the Charging Party has not shown a nexus between the union organizers' protected activity and the amount of their merit awards. Moreover, Dean Boise's merit award determinations and calculations are legitimate, non-retaliatory bases for the award amounts. Finally, CSU has a managerial interest in awarding merit increases to high-achieving faculty member.

There are no facts to support the contention that Dean Boise attempted to "punish" union organizers by giving them decreased merit awards. First, Dean Boise added additional money to merit for faculty members in the third tier even though he originally planned not to provide any merit increase to those faculty members, some of whom include purported union supporters; Dean Boise added further merit money to the third tier in a second round of calculations; and Dean Boise made a minor correction to the individual amounts when money was lost to the merit pool. It is incredulous that a claim of unfair labor practices can be grounded on providing a merit increase to faculty members whose teaching, scholarship, and professional service was less than satisfactory.

In addition, the Charging Party's claim that Dean Boise effectively called AAUP's organizers and the AAUP "Satan" strains logic. The nature of this Charge appears to be a case of first impression, as it is difficult to see how the number 666, whose legend was born out of mythology and also has roots in theology and mathematics, grounds an unfair labor practice. Moreover, despite being provided with hundreds of pages of University records, including Dean Boise's email messages related to faculty merit pay and several drafts of his merit pay calculations, the Charging Party cannot point to a single directive, or even a reference, from the Dean to a "666" or satanic merit pay amount for certain allegedly union-active faculty members. The \$666 merit award was the result of mathematical division, not anti-union animus. As a result, based on this independent ground, the University respectfully requests that the Charge be dismissed in its entirety.

Dean Boise was unaware of any union organizers, other than Professor Gelman and Professor Wilson, as a result of the e-mails they had circulated, which he received. As a result, Dean Boise did not have the information by which to single out anyone. Moreover, other than those individuals, the Charging Party presents no evidence that Dean Boise had any knowledge of any union organizers. As you are aware, the election was conducted by secret ballot and neither Dean Boise, nor anyone else other than SERB staff, was privy to the votes cast by individual faculty members.

Second, the merit pay determination of CM Law faculty members is wholly within the discretion of the Dean. In this instance, Dean Boise devised a clear and rational set of criteria that he applied as a starting point to allocate the merit pool among faculty members. Contrary to the Union's position that there was a hidden factor, "other," which was logically included in

scholarship, this factor was based on and attached to activities in which 21<sup>st</sup> century scholars engage, including, for example, blogging in an area of specialty. In any event, the percentage was so small that it did not affect the rankings one way or another, which makes the Union’s argument moot.

Third, the criteria and ranking were applied uniformly and did not vary through the process. Merit amounts changed only based upon the amount of money allocated, and later, available. In fact, Dean Boise specifically reduced the \$6,000 merit award he initially intended to provide to higher-performing faculty members so that low-performing faculty could be provided merit increases of \$500.00. Dean Boise then subsequently increased this amount through two subsequent rounds of calculations to \$727. The individuals named in the Charge clearly were advantaged because of this. Indeed, the lowest denomination merit pay awarded last year, prior to the formation of the union, was \$500. Those CM Law faculty members who ultimately received \$666 in merit pay this year actually received an *increase* in merit pay as compared to the prior year.

<b>Union Organizer<sup>2</sup></b>	<b>FY 2014 Merit Raise</b>	<b>FY 2013 Merit Raise</b>
Cherry, April L	666	0
Daiker-Middaugh, Pamela A	0	1000
Falk, Patricia J	666	1000
Gelman, Sheldon	666	1000
Glassman, Brian A.	0	0
May, Claire C. Robinson	666	500
Mika, Karin	666	500
Wilson, James G.	666	1000

While it is true that “union organizers” and professors Falk, Gelman, and Wilson each received \$334 less merit pay in 2014 as compared to 2013, three of the eight “union organizers” identified by Charging Party received a higher merit pay increase in 2014 than they did in 2013 (Cherry, May and Mika). One “union organizer”, Brian Glassman did not receive a merit award in 2013 or 2014. Professor Daiker-Middaugh was not awarded a merit increase in 2014 because of her mismanagement of the Legal Aid Clinic, having been spoken to on September 26, 2012.

Because it undermines Charging Party’s allegations, it failed identify the following faculty members who also received merit pay awards of \$666 or \$0 in fiscal year 2014, but who are not apparently identified as “union organizers”:

<b>Faculty Member</b>	<b>2014 Merit Raise</b>	<b>2013 Merit Raise</b>
Majette, Gwendolyn Roberts	666	500
Garlock, Peter	666	500
Hoke, Candice	666	500
David, Michael H	666	0
Gard, Stephen	0	0

<sup>2</sup> The “Union Organizer” designation is taken from the Charging Party’s *Statement of Facts*

These facts undermine Charging Party's interpretation of the merit pay awards because it does not make sense that if the lowest merit awards were designed to stigmatize faculty members who engaged in protected activity, the Dean would also bestow those awards upon faculty members who were not union organizers. Instead, the reasonable inference is that Dean Boise gave merit raises based on his assessment of the faculty's member's performance.

Finally, there is one fact that eviscerates the claim that Dean Boise intentionally demonized union organizers through the amount of their merit pay increase: the initial merit raises that Dean Boise approved and the CM Law Budget Officer submitted to the Provost contained a third tier amount of \$727, **not \$666**. University budget personnel informed Dean Boise that one faculty member's salary was incorrectly included in the 2.5% pool and it needed to be removed from the pool and the merit raises recalculated. The \$666 came about purely as a function of a mathematical calculation, nothing more and nothing less. In sum, the University respectfully requests that SERB dismiss this Charge in its entirety.

Thank you for your consideration of the materials provided on behalf of the University. If you require further information, please contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Jesse S. Drucker', with a long horizontal flourish extending to the right.

JESSE S. DRUCKER  
Assistant Vice President, Chief Human Resources Officer  
Cleveland State University

COPY TO:

William E. Froehlich, Esq.  
Muskovitz & Lemmerbrock, LLC  
Attorney for Charging Party  
1621 Euclid Avenue, Suite 1750  
Cleveland, OH 44115

cc. Craig Boise, Dean and Professor of Law  
Sonali Wilson, General Counsel  
Kelly M. King, Associate General Counsel  
Stephanie Y. McHenry, Vice President

BEFORE THE STATE EMPLOYEE RELATIONS BOARD

CLEVELAND STATE UNIVERSITY :  
CHAPTER OF THE AMERICAN :  
ASSOCIATION OF :  
UNIVERSITY PROFESSORS :

Charging Party,

v.

CLEVELAND STATE UNIVERSITY :

Respondent :

CASE No. 2013-ULP-08-0258

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CERTIFICATE OF SERVICE

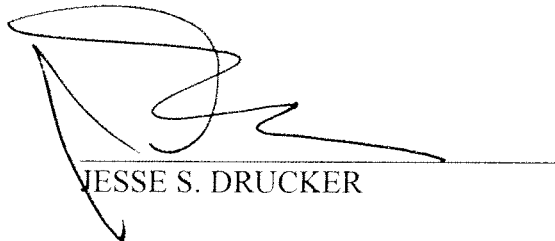
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I, JESSE S. DRUCKER, under the penalties of perjury, states:

I am the Assistant Vice President, Chief Human Resources Officer for Cleveland State University.

On October 8, 2013, I sent by e-mail, to the address [Froehlich@mllabor.com](mailto:Froehlich@mllabor.com), and by regular mail in a postage paid envelope, the enclosed Employer's response to the above captioned Unfair Labor Practice Charge.

Cleveland, Ohio  
October 8, 2013



JESSE S. DRUCKER