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## Senate Bill 5: Granting New, Broad Powers to Break a Collective Bargaining Agreement

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### An Analysis

#### Research Overview

Senate Bill 5 grants substantial and unchecked power to the Governor, Auditor of State and Board of Regents to suspend public employee salaries, benefit increases and modify or terminate collective bargaining agreements. In fact, the ease in which any of these entities may declare fiscal emergency or watch, allowing the elimination of specific contractual provisions within the agreement, undermines the collective bargaining agreement. All provisions advocated for by the employee organization, and reluctantly agreed to by the public employer, may be targeted, thereby ignoring the sanctity of the contract and allowing the public employer to retroactively repeal provisions of the agreement they could not suppress through the bargaining process.

Not only does SB 5 grant the Governor, Auditor of State and the Board of Regents the broad and ill-defined power to declare fiscal watches and/or emergencies and thereby open the door to the modification and/or termination of existing collective bargaining agreements, it also *denies* public employees any recourse to challenge those actions.

#### New Ohio Revised Code 4117.104

While the Senate removed those provisions of Section 3 of SB 5 that stood in likely violation of both the Ohio and US constitutions' protections against retroactive legislation<sup>1</sup> and state encroachment upon contracts,<sup>2</sup> SB 5 still contains language from Section 3 that provides a stealth mechanism by which the Governor, the Auditor of State and Board of Regents, acting unilaterally, or in cooperation with public employers across the state, will be able to substantially modify or terminate existing collective bargaining agreements for public employees.

Substantial portions of Section 3 have been re-incorporated into the as-passed version of SB 5 by the Senate as new ORC §4117.104.<sup>3</sup> New ORC §4117.104 represents a substantial grant of bargaining power by the General Assembly to Governor, Auditor of State and Board of Regents:

#### **ORC §4117.104**

- (A) Notwithstanding any provision of section 4117.08 or 4117.10 of the Revised Code to the contrary, **no agreement entered into under this chapter** on or after the effective date of this section **shall prohibit a public employer that the auditor of state has declared to be in a state of fiscal watch from serving a written notice** pursuant to section

4117.14 of the Revised Code **to modify a collective bargaining agreement so that salary or benefit increases, or both, are suspended.**

- (B) Notwithstanding any provision of section 4117.08 or 4117.10 of the Revised Code to the contrary, **no agreement entered into under this chapter** on or after the effective date of this section **shall prohibit a public employer that the governor or auditor of state has declared to be in a state of fiscal emergency or in the case of a state university or college, that a conservator has been appointed for, from serving a written notice to terminate, modify, or negotiate a collective bargaining agreement** pursuant to section 4117.14 of the Revised Code.
- (C) **Each agreement entered into under this chapter on or after the effective date of this section shall contain a statement that the agreement may be terminated, modified, or negotiated in accordance with this section.**
- (D) If the public employer sends a notice as described in this section, the parties may collectively bargain and enter into a new collective bargaining agreement pursuant to section 4117.14 of the Revised Code.

### The Power of Fiscal Watch and Emergency

The power granted is magnified by the fact that the legal mechanisms available to declare fiscal watches and/or emergencies run from being so ill-defined (the Governor's authority under Ohio Revised Code 126.05) as to be without meaning and susceptible to manipulation, to so inclusive by exhaustive definition (the Auditor of State's Authority to declare a fiscal watch under ORC §118.022 or fiscal emergency under ORC § 118.03) that any scenario can be shoe-horned to fit.

For example, under ORC § 126.05, the Governor may declare a fiscal emergency for the state simply upon a determination "that the available revenue receipts and balances in any fund or across funds will likely be less than the appropriations for the year."<sup>4</sup> The discretion given to a Governor under ORC §126.05 to declare a fiscal emergency is amazingly broad. ORC § 125.05 does not require the actual certification of any true deficiency – only an assertion that one will be *likely*. Moreover, ORC §126.05 does not attempt to tie the declaration of a fiscal emergency to any measure of severity in terms of scope or time – no guidelines are set for the amount or duration of the actual or speculative shortfall that can trigger a declaration. Additionally, ORC §126.05 provides that the deficiency allowing for the fiscal emergency declaration may exist in *any* of the state's numerous funds.

Another egregious example of the unchecked power granted under new ORC §4117 lies in the Auditor of State's ability to declare a fiscal watch under ORC §118.022(A)(4):

#### **ORC§ 118.022(A)(4)**

(4) Based on an examination of the financial forecast approved by the legislative authority of a municipal corporation, county, or township, the auditor of state certifies that the general fund deficit at the end of the current fiscal year will exceed one-twelfth of the general fund revenue from the preceding fiscal year.

Thus, under proposed ORC §4117.104, the very public employer that likely wants a reduction in outlays for public employee salaries and/or benefits (but who signed a pending collective bargaining agreement) can ask the Auditor of State of State to certify that a forecast prepared by that public employer shows a deficit; once that deficit is certified, the public employer can serve notice that public employee "salary or benefit increases, or both, are suspended."

As noted below, no appeal of this certification is provided for under law. Moreover, neither the type of “certification” given by the Auditor, nor the process used to grant that certification, is outlined or clarified in either the Ohio Revised Code or the Ohio Administrative Code. No guidance is provided as to what, if any, financial conditions must be proven, or economic forecast justified, by the public employer seeking fiscal watch status and the breaking of the collective bargaining agreement. As the Auditor of State’s website makes clear, “To determine if an entity qualifies for fiscal watch or emergency,” the Auditor of State need only conduct “an *initial* review of entity finances.”<sup>5</sup>

### **SB 5 Denies Public Workers’ Appeal Rights**

Not only does SB 5 grant the Governor, Auditor of State and the Board of Regents the broad and ill-defined power to declare fiscal watches and/or emergencies and thereby open the door to the modification and/or termination of existing collective bargaining agreements, it also *denies* public employees any recourse to challenge those actions.

ORC §118.022(A)(1) to (4) sets forth the grounds for declaring a fiscal watch for a municipal corporation, county, or township.<sup>6</sup> The Ohio Revised Code does not appear to provide for an appeal of the determination by the Auditor of State that grounds exist for the declaration of a fiscal watch.

ORC § 118.03(1)to (6) sets forth the conditions under which a fiscal emergency may be declared by the Auditor of State for a municipal corporation, county or township<sup>7</sup>; Ohio Revised Code Section 118.04(C) provides that such a determination by the Auditor of the State of the existence of financial emergency conditions is “final and conclusive and not appealable,” and may be appealed only under limited circumstances by the affected mayor, or a majority of the respective council, commissioners or trustees.<sup>8</sup>

ORC § 3316.03(B)(1) to (5) sets forth the conditions under which the Auditor of State must declare a school district to be in a state of fiscal emergency.<sup>9</sup> ORC § 3316.01(E) states that such a determination by the Auditor of State that a fiscal emergency condition exists in a school district is “final and conclusive and not appealable” except by the board of education of the school district affected.<sup>10</sup>

ORC § 3345.74(A) provides that the determination by the Ohio Board of Regents that such sufficient financial difficulties exist at a state college or university to warrant the appointment of a conservator by the Governor is “final and conclusive and not appealable.”<sup>11</sup>

ORC §125.06 does not specifically provide for any appeal of a Governor’s determination of a fiscal emergency for the State. Additionally, all challenges to ORC §126.05 gubernatorial actions heard by the Supreme Court, prior to introduction of SB 5, have demonstrated the Court’s willingness to show great deference to the actions of the executive under the concept of separation of powers.<sup>12</sup>

Clearly the mechanism set up by the interplay between new ORC §4117.104 and the various Ohio Revised Code fiscal watch and fiscal emergency provision puts the fox in charge of the henhouse. If appeal rights are even provided, they are provided solely to the employer – the very entity who would be looking to suspend public employee salary or benefit increases

and/or break the collective bargaining agreement. Those public employees actually impacted by the declaration of the fiscal watch or emergency – those employees whose salaries or benefits are frozen or whose contracts are rolled back—are denied any express relief in the courts or in any administrative process.

It is critical to note that ORC §ORC 4117.104(D) does provide that when a fiscal watch and/or emergency is used to justify the suspension of salaries or benefits and/or the termination or modification of a contract, “the parties may collectively bargain and enter into a new collective bargaining agreement pursuant to section 4117.14 of the Revised Code.” Moreover, ORC §4117.14 *appears*<sup>13</sup> to contain some protection for public employees such as continuation of the existing contract during the notification period (60 to 90 days depending on situation), the intervention of the State Employment Relations Board upon impasse in negotiations, and the appointments of a mediator.

However, in another fox in charge of the henhouse provision, new language of ORC§4117.14(D)(1) provides the following mechanism for final resolution of any lingering dispute between the public employer and their representative as they negotiate the new collective bargaining agreement:

Upon the conclusion of the hearing, **the legislative body shall vote, within thirty days after the date of the collective bargaining agreement expires, to accept either the last best offer of the exclusive representative or the last best offer of the public employer.**<sup>14</sup>

Again, the employer (the legislative body that ultimately employs the public workers) is given all of the leverage and power to dictate the terms of the bargaining relationship.

## Summary

SB 5 has provided the Governor, Auditor of State and State Board of Regents with extraordinary powers to impact and shift the balance of bargaining power between public employers and employees in Ohio, unilaterally undermining good faith bargaining throughout the process.

Upon passage of SB 5, every collective bargaining agreement *must* contain language recognizing that any public employee salary or benefit increase, and/or an entire collective bargaining agreement, is subject to termination or modification upon declaration of a fiscal watch or emergency. Public employers will be empowered to take advantage of broad and vague statutory language to re-open contracts -- confident in the fact that public employees and their representatives will be unable to challenge their actions at every turn, and that ultimately, if all else fails, a final contract simply awaits their vote to impose their will.

In essence, under SB 5 and new ORC §4117.104 and revised ORC §4114.14, the defining feature of Ohio public employer/employee relations will no longer be a collective bargaining agreement reflecting the negotiation and accord of the parties, but rather, the whim of the public employer and the uncertainty of public employees.

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<sup>1</sup> See, e.g., *Smith v. Denihan*, 63 Ohio App. 3d 559, 571 (Ohio Ct. App., Franklin County 1990).

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<sup>2</sup> See e.g., *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, <http://www.sconet.state.oh.us/rod/docs/pdf/0/2003/2003-ohio-5849.pdf>.

<sup>3</sup> Sub. S.B. No. 5, as passed by the House Commerce and Labor Committee, page 350-351, lines 10915-10939, LSC 129 0241-9.

<sup>4</sup> ORC § 126.05 provides in pertinent part the following:

If the governor determines that the available revenue receipts and balances in any fund or across funds will likely be less than the appropriations for the year, the governor may declare a fiscal emergency and may issue such orders as necessary to the director of budget and management to reduce expenditures, or to the director of administrative services to implement personnel actions consistent therewith, including, but not limited to, mandatory cost savings days under section 124.392 of the Revised Code.

<sup>5</sup> <http://www.auditor.state.oh.us/services/lgs/fiscalwatch/government.htm> (emphasis added).

<sup>6</sup> <http://codes.ohio.gov/orc/118.022>

<sup>7</sup> <http://codes.ohio.gov/orc/118.03>

<sup>8</sup> <http://codes.ohio.gov/orc/118.04>

<sup>9</sup> <http://codes.ohio.gov/orc/3316.03>

<sup>10</sup> *Id.*

<sup>11</sup> <http://codes.ohio.gov/orc/3345.74>

<sup>12</sup> *State ex rel. AFSCME v. Taft*, (2004) 156 Ohio App. 3d 37.

<sup>13</sup> It is uncertain if all of the provisions of ORC §4117.14 (and not just the notice provisions) will apply to ORC §4117.104 actions taken by the Governor, Auditor of State or Board of Regents.

<sup>14</sup> Sub. S.B. No. 5, as passed by the House Commerce and Labor Committee, page 376, lines 11706-11710, LSC 129 0241-9.