

2/17/85
85-004

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

City of Columbus

Case No. 84-UR-09-1958

OPINION

DAY, Chairman

I

This case involves management practices claimed to be unfair in violation of R.C. 4117.11(A)(A)(5). The issues in the case have been heard by a hearing officer. His report has been exposed to the parties' exceptions. The parties presented oral argument to the State Employment Relations Board (SERB or Board).

The parties are three. They are the City of Columbus, Ohio (respondent or city), Capital City Lodge #9, Fraternal Order of Police (intervenor), and the State Employment Relations Board (SERB, or Complainant or Board).

The issues are in part procedural and in part substantive. Summarized in question form, these are:

1. Procedural:

- a. "Was the complaint properly issued?"
- b. "Was there any necessity for a Board order to bargain before the statutory impasse commands became operative?"

2. Substantive:

- a. "Are the 'public safety officers' involved in this case members of a police department?"
- b. "~~Have the parties to this litigation agreed on a mutual dispute settlement process which supersedes the statutory impasse procedures in R.C. 4117.14?~~"
- c. "Is there an employer (respondent) refusal to bargain in the instant case?"

3. Remedial:

- a. "Assuming the unfair labor practices claimed in this case are proven, what remedial action should be enforced by SERB?"

II

Rather than summarizing under one section all the facts pertinent to the issues, the facts relevant to each will be reviewed where necessary to the discussion.

III

- a. "Was the complaint properly issued?"

When an unfair labor practice charge is filed, the Board under its statutory responsibilities directs an investigation to be made. This investigation is the basis for a probable cause judgment. If probable cause is found, the Board issues a complaint [R.C. 4117.12(B); Rule 4117-7-02(A)].

SERB has the power to appoint an executive director to assist in the performance of its duties. It may also prescribe the duties of that agent-director. In the present case, after a determination of probable cause, the Board resolved by unanimous vote that a complaint be issued under the certification of its executive director. The statutory and rule processes were followed. A complaint issued over the signature of the executive director. He acted under the Board's express direction. Thus his actions were simply an implementation of the Board's resolution.

For some inexplicable reason the city relies upon State, ex. rel. Republic Steel Corporation, v. Ohio Civil Rights Commission (1975) 44 Ohio State 2nd 178, for the proposition that the Board members should have signed the complaint. In fact, the Republic case turned on a jurisdictional issue peculiar to the O.C.R.C.'s governing statute and had nothing whatever to do with the signing issue. The Administrative Procedure Act at 4112-3-05(B) does require O.C.R.C. commissioners to sign complaints. Because

that requirement is specifically related to that particular agency and has nothing to do with SERB, the city's reliance remains a mystery. Obviously, Republic has no relevance to the present case.

SERB has complied with the procedures required of it pursuant to its governing statutes and rules. The contention that the complaint in this case was improperly issued is without merit.

The question under III a. is answered, "Yes."

b. "Was there any necessity for a Board order before the statutory impasse commands became operative?"

The statute imposes mandatory duties on parties to a public sector collective bargaining process and directory duties on the Board. Nothing more is required than the existence of the statute to activate the respective responsibilities of all three. The parties are obligated to bargain and in the event of impasse are required to utilize the statutory impasse procedures unless they mutually agree to a superseding one. Where the impasse procedure of the statute is utilized, there are specific points at which the Board is directed to intervene to make or facilitate appointment of a mediator and/or fact finders [R.C. 4117.14(C)(2) and (3); Rule 4117-9-05]. There is no necessity for a Board order to initiate the statutory commands to bargain. Fact finding is a feature of bargaining and therefore is compulsory. The statute is self-executing in that respect. No Board order was compelled or appropriate under the impasse subsections of the statute and the rule. Whether the parties to the present case were under the governance of a mutually agreed procedure superseding the statute will be addressed at another place in this opinion.¹

¹If there is a mutually agreed superseding impasse procedure (MAD), it is not clear from the statute what effect that has on the Board's obligations. If there are any, the statute does not say what they are or how or when they become active. Neither is there any indication what the Board's responsibility is should the parties specifically attempt to involve the Board in its MAD. In short, there is no definition of the details of the responsibility even if it can be imposed by the parties.

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Thus, if it is assumed that no mutually agreed impasse procedure (MAD) existed in this case, the statutory mode was in force. Under normal conditions this would have required SERB to assist fact finding procedures i.e., submit a list to the parties for alternative striking [R.C. 4117.14(C)(3); Rule 4117-9-05]. However, the impasse time points came and went without Board action. But in this case SERB had no obligation to submit a list. For the respondent had indicated unequivocally that it felt it had a superseding MAD² to which it intended to adhere without variance. Respondent's adamance was demonstrated when, through counsel, it advised SERB in a letter dated September 5, 1985:

"From the foregoing [i.e., R.C. 4117.14(E)], it is readily apparent that the Act expressly permits parties to agree upon any alternative dispute settlement procedure and, if they have so agreed, that procedure supersedes the statutory procedure." In the instant case, the parties have done precisely that. (Second emphasis and bracketed material added.)³ Counsel then quoted the "Mediation" clause from Article XXX, Section 2 of the collective bargaining agreement and added:

"From the foregoing, there can be no question that the parties' contracts expressly establish a procedure (mediation) for the resolution of any outstanding disputes. Moreover, this procedure (mediation) is one of the procedures specifically referred to in the statute [4117.14(C)(2)]." (Emphasis added.)⁴

²The city had not filed the MAD with SERB as the rules require, see Rule 4117-9-03. Neither had it notified the Board that it claimed a MAD under R.C. 4117.05(B) although a staff letter (Bd. Ex. 4) had suggested (mistakenly, see IV b. infra) that the parties might have one in place. Of course, the Board's judgment is not foreclosed by a staff estimate which turns out to be incorrect.

³St. Ex. 6. p.2.

⁴Id.

This intransigence is confirmed in the transcript of the hearing,⁵ and in the minutes of negotiations for August 21, 1984.⁶

This colloquy is recorded in the minutes:

"Weisman: Do you have a proposal?"

"Ferber: We're willing to go through the Mediation process. No problem. We're willing to go through the Fact Finding Process with the caveat that we won't be bound by those issues voted down by

Council. Again, once F.F.P. resolution is made Council may approve. Then we would never be confronted with the issue of Council voting down." (Emphasis added.)⁷

With the facts in this posture, the Board was not required to act. The law does not mandate obvious futility.⁸ When a party behaves as this respondent did, it does so at risk. It misjudges its legal responsibilities at its peril.⁹

The question under III b. is answered, "No."

IV

a. "Are the 'public safety officers'

involved in this case 'members of a police department'

as defined in Ohio Revised Code Section 4117.01(M)?"

The answer to this question depends on facts and the interpretation of

⁵See Tr. (11/6/84) 101-115, especially 105 and 108-113.

⁶Bd. Ex. 8

⁷Id. p. 1.

⁸For those who derive comfort from latin maxims: "Lex neminem cogit ad vana seu inutilia paragenda." (Loose translation - "The law compels no one to do vain or useless things.")

⁹Under current Board procedures the way to test the respondent's claim was by the filing of an unfair labor practice charge contending that the respondent refused to bargain. The intervenor took this course. The subsequent procedural path is described in I, supra.

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them. The facts most relevant to the status of a Public Safety Officer (PSO) are these:

1. The Director of Public Safety heads the Columbus Division of Police and is the PSO's appointing authority.

2. The Public Safety Bureau is composed of PSOs. It is within the special operations subdivision of the Division of Police. This subdivision is headed by a deputy police chief. He reports to the Chief of Police.

3. PSOs enforce the Columbus City Code and the Ohio Revised Code where applicable to city reservoirs, reservoir land, waterways, city-owned parks, city-owned land controlled by the Division of Airports and the Columbus Municipal Zoo.

4. PSOs acquired their present title sometime in 1977. The current title stems from a change in classification from Special Police Officer. The classification has three different grades: PSO-1, 2 and 3.

5. PSOs wear a uniform prescribed by the Uniform Committee of the Division of Police.

6. PSOs are required to obtain the Ohio Peace Officer Training Council Certificate. Approximately 300 hours of training must be accomplished to qualify for a certificate.

7. PSOs are identified as Columbus Police Officers by a patch on the uniform which states, "Columbus Police".¹⁰

¹⁰There are some differences between the PSO employment characteristics and those of conventional Police Officers listed within the division. For example, police officers are required to carry an approved firearm that is loaded at all times, except under stated conditions. PSOs and auxiliary officers are not authorized to carry firearms off duty without permission from the Chief of Police. Also police officers receive more than 800 hours of training at the Police Academy when they are first appointed. This contrasts with the 300 hours required for certification of a PSO. Sworn police officers and PSOs also have different medical requirements and belong to different pension systems.

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The conclusion from these facts is ineluctable. The recital demonstrates such a liaison of job elements and command nexus between PSO duties and those characteristic of officers in conventional police departments (in particular, the Columbus Police Department) that PSOs' membership in the department is beyond debate. A simple question underwrites this conclusion - if PSOs are not employees of the City of Columbus in its Police Department doing police work, where are they employed and what are they doing?

The question under IV a. is answered, "Yes."

b. "Have the parties to this litigation agreed on a mutual dispute settlement process which supersedes the statutory impasse procedures in R.C. 4117.14?"

This question raises two underlying ones which are of first impression under R.C. 4117.14. The first is whether the parties in the instant case have a MAD which supersedes the statutory impasse provisions? The second is can the parties have a superseding MAD which does not have terminal points?

The facts in this case indicate that the parties have never had anything more than a mediation provision in their collective bargaining agreements.¹¹ Mediation normally precedes and is intended to effect a settlement. It is not itself a method compelling disposition. Finality is not a characteristic.

The statute is quite clear that supersession becomes a factor only when there is an alternative settlement procedure which the parties have mutually agreed upon. The statutory purpose obviously contemplates finality. That prerequisite to a supersession of the statutory impasse procedure is not

¹¹It is unnecessary to consider whether safety officers could bargain away final and binding conciliation (arbitration). No evidence has been brought to the Board's attention supporting the elements of such a bargain. If claimed, apparently it is not proved.

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present in the instant case. It follows that no alternative impasse procedure exists between the parties here.

The question under IV b. is answered, "No."

This disposition of the first question implies the answer to the second and makes it unnecessary to answer what other necessary characteristics of an acceptable alternative procedure are. This case holds finality is one. Further delineation involves questions reserved for other cases on other days.

c. "Is there an employer (respondent) refusal to bargain in the instant case?"¹²

In the absence of a MAD, the parties are required to follow the statutory impasse procedures. These include mediation to begin not later than 45 days before the termination of the negotiation, or any existing contract whichever is later. No later than 31 days before termination, fact finding must begin. The respondent in this case was unwilling to begin fact finding and mistakenly assumed that it need not comply with the statutory process. Its implementation of its mistake by its clear forecast of refusal to go to fact finding constituted proof by a preponderance of the evidence of a refusal to bargain. These facts support the conclusion that the respondent is in violation of R.C. 4117.05(A)(1) and (A)(5).

The question under IV c. is answered, "Yes."

The Board conclusions of law are:

- a. The complaint in this case properly issued.
- b. A SERB order to bargain is not a necessary prerequisite before the statutory impasse commands become operative.
- c. The PSOs involved in this case are 'members of a police department.'

¹²The findings of fact of the hearing officer and stipulations of the parties are adopted by the Board and incorporated here by reference. This action is a necessary preface to the disposition of the issues in the case. [R.C. 4117.12(B)(3)]

- d. The parties to the litigation have not agreed on a mutual dispute settlement process which supersedes the statutory impasse procedures in R.C. 4117.14.
- e. There is an employer (respondent) refusal to bargain in this case.

v

- a. "Assuming the unfair labor practices claimed in this case are proven, what remedial action should be enforced by SERB?"

It has been determined that an unfair labor practice has been committed. SERB is authorized by the statute to order the miscreant party to cease and desist from the unfair labor practice and to take such affirmative action "as will effectuate the policies of 4117 of the Revised Code" [R.C. 4117.12(B)(3)].

The recommendations of the hearing officer with some modifications will meet the policy objectives. Accordingly, an order will issue reflecting these terms:¹³

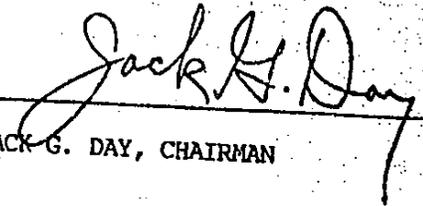
- a. Respondent will cease and desist from interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Chapter 4117, or refusing to bargain collectively with the employees representative, and from otherwise violating Ohio Revised Code Section 4117.11(A)(1) and (5).
- b. Respondent will post for 60 days in all City of Columbus Police Stations the Notice to Employees furnished by the Board stating that the Respondent shall cease and desist from the actions set forth in paragraph (a).
- c. Respondent and intervenor shall immediately engage in conciliation under R.C. 4117.14(D)(1) and (G).
- d. The order incorporating these mandates is effective as though issued on ~~December 31, 1984~~, and all cost items, if any, shall be effective retroactively to that date.

¹³Because of the passage of time due to respondent's recalcitrance, the parties will be ordered to go directly to conciliation.

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Sheehan, Vice Chairman, and Fix, Member, concur.



JACK G. DAY, CHAIRMAN

I hereby certify that this document was filed and a copy served upon each party on this 6th day of February, 1985.



KENNETH W. BARRETT
EXECUTIVE DIRECTOR