

86-001

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Miamisburg Classroom Teachers Association,

Employee Organization,

v.

Miamisburg School District Board of Education,

Employer.

CASE NUMBERS: 85-UR-08-4018  
85-UR-08-4021  
85-MP-06-3806

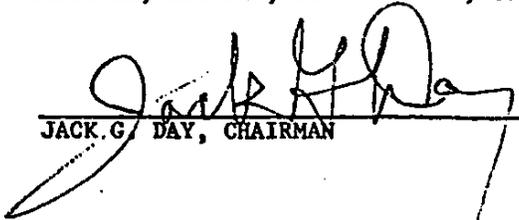
DISMISSAL OF UNFAIR LABOR PRACTICE CHARGE AND NOTICE TO NEGOTIATE  
(Opinion Attached)

Before Chairman Day, Vice Chairman Sheehan, and Board Member Fix; December 5, 1985.

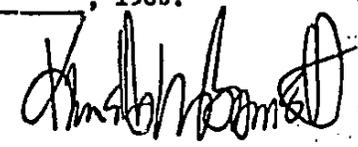
The Miamisburg Classroom Teachers Association (Charging Party) filed an unfair labor practice against the Miamisburg School District Board of Education (Charged Party) alleging that the Employer violated Ohio Revised Code Section 4117.11(A)(1) and (5) when it refused to bargain with the Employee Organization regarding a change in the length of the "student day." Pursuant to Ohio Revised Code Section 4117.12, the matter was investigated. Based upon this investigation and for the reasons stated in the attached opinion, incorporated by reference, the Board concludes that the issues raised in the charge properly are referred to resolution through the grievance procedure set forth in the parties' collective bargaining agreement. Therefore, the charge is dismissed. The Notice To Negotiate filed by the Employee Organization requesting the commencement of negotiations on this matter also is dismissed for the reasons stated in the attached opinion.

It is so directed.

DAY, Chairman; SHEEHAN, Vice Chairman; and FIX, Board Member, concur.

  
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JACK G. DAY, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 15<sup>th</sup> day of January, 1985.

  
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KENNETH W. BARRETT, EXECUTIVE DIRECTOR

STATE OF OHIO  
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In the Matter of

Miamisburg Classroom Teachers Association,

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and

Miamisburg City School District Board of Education,

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CASE NUMBERS: 85-UR-08-4018  
85-UR-08-4021  
85-MF-06-3806

OPINION

Day, Chairman:

These cases, at bottom, all involve controversies arising from a change in the student instructional day instituted by Miamisburg School District Board of Education (respondent). The Miamisburg Classroom Teachers Association (union or charging party) made a written request for bargaining about the change. The respondent refused the request.

The union filed a notice to negotiate with the State Employment Relations Board (SERB or Board). SERB's Bureau of Mediation, through its administrator, submitted a list of fact finders proceeding as though the impasse procedures of Ohio Revised Code Section 4117.14 had been properly invoked. A motion to dismiss the notice to negotiate was denied on August 20, 1985.

Meanwhile two unfair labor practice charges were filed alleging violations of Ohio Revised Code Sections 4117.11(a)(1) and (5) based on identical statements of fact.<sup>1</sup> In addition a grievance was lodged based

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<sup>1</sup>85-UR-08-4018 and 85-UR-08-4021.

on these same facts. The lodgment came after the notice to negotiate. The grievance has proceeded to the . . . of arbitration.

The conceded facts and procedural posture of this case raise two principal questions - the latter divisible into three parts.

- 1) Is the refusal to negotiate a grievance settlement, a proper subject for impasse processing under Ohio Revised Code Section 4117.14?

The question is answered, "No."

- 2) If the facts of a controversy make it susceptible to resolution either in a grievance procedure topped by arbitration or by processing as an unfair labor practice (a) are the remedies mutually exclusive, (b) does one displace the other, or (c) can these two remedial processes be compatible?

Part (a) is answered, "No."

Part (b) is answered, "No."

Part (c) is answered, "Yes."

## II

- 1) Is the refusal to negotiate a grievance settlement, a proper subject for impasse processing under Ohio Revised Code Section 4117.14?

The question is answered, "No."

The first question is answered "no" for fairly obvious reasons. Ohio Revised Code Section 4117.14 is designed to:

"...govern the settlement of disputes....concerning the termination or modification of an existing collective bargaining agreement or negotiation of a successor agreement or the negotiation of an initial collective bargaining agreement."

In a very narrow sense the disposition of grievances might be deemed a "modification of an existing collective bargaining agreement." A more exact definition of grievance dispositions would rank them with contractual "interpretations" or "adjustments." These designations conform to the conventional understanding and usage by labor relations specialists. It follows that grievance dispositions normally involve issues of relatively small import. This distinguishes them from both the fundamental and sweeping actions suggested by contractual terminations, modifications, successions or initial negotiations. To support these objectives, Section 4117.14 provides the procedural means. An ultimate settlement is accomplished by bargaining or, as a last resort, by issue conciliation<sup>2</sup> for safety force basic contractual disputes. Limited strike action is permitted to resolve the terms of collective agreements for non-safety force public employees. Such settlement techniques are not characteristic of grievance procedures. Processing under Section 4117.14 is much too elaborate, time consuming and potentially expensive for grievance requirements. Thus, the logic of the statutory schema supports the proposition that the impasse procedure was not designed to resolve grievances.<sup>3</sup>

The issue in this case, apart from its unfair labor practice aspect, is a classic grievance example. It should never have been subjected to Section

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<sup>2</sup>"Conciliation" is the statutory language. From the context it is clear that "arbitration" is meant.

<sup>3</sup>The statute implicitly recognizes the distinction between basic issues and grievances by treating them separately, see R.C. 4117.09(B)(1) and R.C. 4117.10(A). And compare the last sentence of R.C. 4117.08(C): "A public employer or exclusive representative may raise a legitimate complaint or file a grievance based on the collective bargaining agreement."

4117.14 process. And had the Board been fully informed, it would not have been. To correct the error, Case 85-MF-06-3806 is dismissed.

III

- 2) If the facts of a controversy make it susceptible to resolution either in a grievance procedure topped by arbitration or by processing as an unfair labor practice (a) are the remedies mutually exclusive, (b) does one displace the other, or (c) can these two remedial processes be compatible?

Part (a) is answered, "No."

Part (b) is answered, "No."

Part (c) is answered, "Yes."

In this case a unilateral change in the school instruction day has triggered both a grievance subject to arbitration under a collective bargaining contract and two unfair labor practice (ULP) charges of refusal to bargain. Thus, the issue presents grievance/ULP aspects.

There are several tenable rationales warranting an affirmative response to part (c). The reasons for answering "no" to parts (a) and (b) of the second question will become clear from the rationale supporting the "yes" answer to part (c).

The Board has these options:

- 1) retain jurisdiction of a pending ULP/grievances until the grievance procedure is exhausted or the parties terminate it. Should the grievance not be settled or the ULP not be withdrawn, the Board can provide a limited review of the arbitration decision under its retention of jurisdiction to determine whether the ULP issues were considered and decided in conformity with Due Process of law in the

arbitration proceeding.<sup>4</sup> If the review discloses that the arbitration process has not provided procedural or substantive Due Process, the Board will process the ULP. Otherwise the ULP will be dismissed;

- 2) decide that an employee proceeding under a grievance procedure provided by a collectively bargained contract has waived statutory rights to ULP process unless the ULP involves the collective bargaining representative in a conflict of interest or failure in its duty to fairly represent;<sup>5</sup>
- 3) process a conflict of interest ULP/grievance under the statutory procedure because of the obvious inadequacy of the contract procedure when the claim is against the union in whole or in part;
- 4) go immediately to the statutory ULP process without deferring to the grievance procedure when a critical policy issue is raised by the ULP/grievance;
- 5) dismiss the ULP and permit the grievance to be resolved in the contractual procedure when the procedure is capped by arbitration and has no policy or conflict of interest implication;<sup>6</sup>
- 6) treat the ULP/grievance as strictly a contract issue and leave the parties to their contract and whatever judicial remedies are available under it.

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<sup>4</sup>Procedural Due Process requires notice and fair hearing. Substantive Due Process implicates a fair and accurate application of statutory and substantive constitutional rights.

<sup>5</sup>A typical conflict of interest claim is presented when an employee organization is charged with a failure to fairly represent the grievor.

<sup>6</sup>One important consequence of options 5 and 6 is to save the Board from a monitoring responsibility for a multitude of relatively small contract adjustments better decided with finality in the parties' own processes.

In the future, SERB may exercise any one of these options or some combination of them. The option chosen will be determined case by case to fit the circumstances.

In the instant case the issues affect no policy of consequence to the administration of R.C. 4117. Moreover, there is no conflict of interest between individual grievors and their collective bargaining agent. The charges are dismissed and the parties referred to the grievance procedure under the contract.

#### IV

To support the procedure adopted in this case, it is unnecessary to commit the Board to an inflexible policy. One may construct a defensible theory of waiver of statutory rights where a collectively bargained grievance procedure exists. However, there may be instances in which disposition under the contract is not appropriate in the face of unfair labor practice claims. In such circumstances a contractual grievance procedure might prove inadequate to protect both statutory policy development and employee rights. Given that possibility, SERB may retain jurisdiction and either process the ULP/grievance directly under the statute or review any resulting arbitration award.

On the other hand, there are many run-of-mine grievances whose facts raise both grievance and unfair labor practice claims. Many of these can be resolved under the contractual procedures without doing violence to statutory rights or undercutting SERB's enforcement obligation. There is no contradiction involved in a policy which allows maximum flexibility to the Board in the guarding of its statutory duties while at the same time placing full responsibility on the informed parties for resolving contractual adjustments without Board intervention.

V

- 1) Case 85-MF-06-3806 is dismissed.
- 2) Cases 85-UR-08-4018 and 85-UR-08-4021 are dismissed.
- 3) The dispute giving rise to the foregoing cases is referred to resolution in the grievance procedure.

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

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