

86-037

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,

v.

City of Fostoria,
Respondent.

CASE NUMBER: 84-UR-07-1650

ORDER
(Opinion Attached)

Before Chairman Day, Vice Chairman Sheehan, and Board Member Fix; July 3, 1986.

The Fraternal Order of Police, Ohio Labor Council Inc., Lodge No. 22 (FOP) filed an unfair labor practice charge against the City of Fostoria (Respondent). Pursuant to Ohio Revised Code Section 4117.12, the Board investigated the charge and found probable cause to believe that an unfair labor practice had been committed. Subsequently, the Board issued a complaint alleging that Respondent had violated Ohio Revised Code Section 4117.11 (A)(1) and (A)(5) by refusing to pay June 1984, September 1984, and December 1984 cost-of-living adjustments pursuant to a collective bargaining agreement with the FOP. The matter was heard by a Board hearing officer.

The Board has reviewed the record, the hearing officer's report, exceptions and responses. For reasons stated in the attached opinion, incorporated by reference, the Board approves the hearing officer's findings of fact, recommendations and conclusions of law as modified by this order. The City of Fostoria is ordered to:

(A) 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 4117.11 (A)(1) and (A)(5).

(B) Take the following affirmative action:

(1) Post for 60 days in all City of Fostoria Police Department Offices the notice to employees furnished by the Board stating that the City shall cease and desist from the actions set forth in paragraph (A) and take the affirmative action set forth in paragraph (B)(2) and.

(2) Immediately pay the bargaining unit employees the cost-of-living adjustments that would have been due to them on June 1, 1984 and September 1, 1984 pursuant to the 1982-84 labor agreement.

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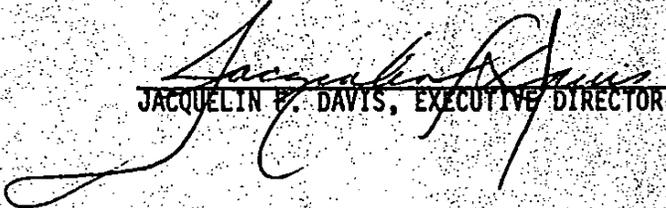
It is so directed.

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



JACK G. DAY, CHAIRMAN

I certify that this document was filed and a copy served upon each party
on this 15th day of September, 1986.



JACQUELIN B. DAVIS, EXECUTIVE DIRECTOR

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OPINION

Day, Chairman:

In this case, the collective bargaining contract expired while negotiations and impasse process looking toward a new agreement were in progress. The expired contract had provision, implemented by ordinance, for quarterly cost of living adjustments. When the City of Fostoria (employer or city) refused to pay the June 1, 1984, adjustment on the ground that the contract had expired, the Fraternal Order of Police, Ohio Labor Council (FOP/OLC or union) filed an unfair labor practice charge against the city alleging violations of Section 4117.11(A)(1) and (5). The charge encompassed the failure to pay the cost of living adjustment in September and December of 1984 as well as June.

At bottom the disposition in this case involves two questions. First, do the terms of an existing contract extend beyond the expiration date of the contract or beyond 60 days from the notice to negotiate whichever is

later¹ and, second, if the contract terms do extend, when does the extension terminate? For reasons adduced below, the majority holds the extension continues to ultimate impasse.² In addition the majority finds that point to occur later in this case than does the hearing officer. Hence, the hearing officer's recommendation is modified and, as modified, adopted.³

I

Public employees with the right to strike do not have a totally untrammelled right. It is held subject to limitation.⁴ Among other limitations is the prohibition of a strike "during the pendency of the settlement procedures set forth in Section 4117.14 of the Revised Code."⁵

¹ Section 4117.14(B)(3) of the Revised Code provides:

The parties shall continue in full force and effect all the terms and conditions of any existing collective bargaining agreement, without resort to strike or lockout, for a period of sixty days after the party gives notice or until the expiration date of the collective bargaining agreement, whichever occurs later, . . .

² "Impasse" is used frequently in the statutory impasse procedure to indicate the time for advance to the next step of the procedure. In this opinion "ultimate impasse" is used to connote that definitive point at which strike action (in the case of strike permitted employees) or arbitration (in the case of safety forces) is the next step.

³ See the order which this opinion accompanies and explains.

⁴ P.e. specific notice of date and time. See South Euclid-Lyndhurst City School District Board of Education (1984) Case 84-US-09-1930, 1 OPER 1205, VII-158.

⁵ R.C. 4117.18(C).

The latter structure indicates that ultimate point of impasse⁶ occurs at the end of the publication period following the rejection of the fact-finding recommendation.⁷ This must be so because the next permissible step is job action.⁸ And a strike would be illicit unless the impasse procedure had ended.⁹

II

Strike prohibited public employees are involved in this case. For them "conciliation" (i.e., arbitration) is the substitute for strike action.¹⁰ By analogy the end of the publication period after the rejection of fact-finding is also the ultimate impasse point for those public employees who must arbitrate in lieu of withholding work.¹¹

Thus, in a very real sense impasse has to be ultimate before either the right to strike or to arbitrate matures. And arbitration is simply the compelled substitute for a strike. Thus, each recourse provides a method for breaking the deadlock on those issues remaining after exhaustion of all

⁶Footnote 2 marks the difference in the use of the word, "impasse", see R.C. 4117.14(C)(2) and (3). The effect of impasse under these sections is to trigger the next step in the impasse procedure. The end of the publication period described in the text triggers the option of strike when strike permissible employees are involved. At this point conciliation (arbitration) is available to strike prohibited employees.

⁷ R.C. 4117.14(C)(6).

⁸ R.C. 4117.14(D)(2) authorizes a strike for strike permissive employees under specific conditions.

⁹ See R.C. 4117.18(C) quoted in the text.

¹⁰ R.C. 4117.14(D)(1).

¹¹ SERB essays no decision on the ultimate impasse point in mutually agreed alternative procedures.

other measures in the R.C. 4117.14 procedure.

In this case, exhaustion came on October 8, 1984, seven days after the rejection of fact-finding. This fact compels a finding of a later date for the application of contract terms¹² than recommended by the hearing officer.¹³

Fix, Board Member, concurs. Sheehan, Vice Chairman, dissents.

¹² SERB does not attempt at this juncture to determine what an employer's obligations are with respect to the maintenance of terms and conditions pending the outcome of arbitration or strike action where the latter is permitted.

¹³ See the order in the case.

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Respondent.

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OPINION

Sheehan, Vice Chairman, dissenting:

I

In the instant case, proper disposition of the initial issue¹ hinged upon what point impasse is determined during the negotiations process.

Referring to Ohio Administrative Rule 4117-9-05(B), and because the parties were in agreement, the hearing officer ruled impasse was reached when the fact finder was appointed.

The majority held in amending the hearing officer's recommendation, "that the ultimate point of impasse must be the end of the publication period after the rejections of the fact finding recommendation." "This must be so," they argued, "because the next permissible step is job action. And a strike would be illicit unless the impasse procedure had ended."

¹Did the employer commit an unfair labor practice by unilaterally refusing to pay cost-of-living adjustments due on June 1, September 1, and December 1?

II

I respectfully dissent from the majority's view on three points:

- 1) The point impasse occurs for non-striking employees,
- 2) their characterization of interest arbitration,
- 3) failure to award payment of the December COLA.

III

Impasse occurs when negotiations break down and the statutory dispute resolution procedure is exhausted. For public employees with the right to strike, impasse is reached, as the majority opinion holds, seven days after publication of the fact-finding recommendation.² At this point, the employer may make certain unilateral changes in the contract and the union is free to initiate job action. Not so, however, for public employees who are prohibited from striking and their public employer. They must submit to the final offer settlement procedure³ which is an integral part of the statutory dispute resolution procedure. R.C. 4117.18(C) prohibits public employees from striking "during the pendency of the settlement procedures set forth in 4117.14 of the Revised Code." Hence, the statutory dispute resolution procedure for these employees and their employer is never exhausted.

Allowing one party to exercise unilateral action while prohibiting the other, creates a serious imbalance in power between the two. Under the

²There are earlier impasse points but they normally trigger the next procedural step. R.C. 4117.14(C)(2) and (3).

³R.C. 4117.14(D)(1):

"Public employees...shall submit the matter to a final offer settlement procedure pursuant to a board order issued forthwith to the parties to settle by a conciliator selected by the parties (non-striking public employees)."

majority's ruling, the employer has been given license to change the terms of the contract while the employee organization is left with no effective response save to patiently await the conciliator's decision in hope to be made whole again. The probable result of such imbalance is a further deterioration of relations between the parties, a condition which SERB, albeit unintentionally, should not sanction.

IV

The majority erred in its characterization of binding interest arbitration as the "compelled substitute for a strike action." This is incomplete. The purpose of binding interest arbitration is to accomplish peaceful resolution to contract disputes while avoiding the use of raw economic power by the parties. By necessity, and to fulfill its purpose, binding interest arbitration must serve as the quid pro quo for both job action by employees and unilateral contract changes by the employer.

V

Under R.C. 4117.14(D)(1) deadlocks between non-striking employees and their employer must be resolved through conciliation. In the instant case the issues were still in the hands of the conciliator on December 1, 1984, which means the settlement procedure was still pending.⁴ Therefore the December 1, as well as June 1 and September 1, COLAs should be paid.

⁴R.C. 4117.18(C):

"No public employee shall strike during the term or extended term of a collective bargaining agreement or during the pendency of the settlement procedures set forth in section 4117.14 of the Revised Code."



NOTICE TO EMPLOYEES FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE
STATE EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the Order of the Board and abide by the following:

WE WILL CEASE AND DESIST FROM interfering with and restraining employees in the exercise of their rights guaranteed in Chapter 4117, or refusing to bargain collectively with the employees representative, and otherwise violating Ohio Revised Code Section 4117.11(A)(1) and 4117.11(A)(5).

WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Post for sixty days in all City of Fostoria Police Department Offices this Notice to Employees furnished by the Board
2. Immediately pay the bargaining unit employees the cost-of-living adjustments that would have been due them on June 1, 1984 and September 1, 1984 pursuant to the 1982-84 labor agreement .

WE WILL NOT in any like or related matter, interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them under Chapter 4117 of the Revised Code.

CITY OF FOSTORIA

DATE

BY

TITLE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board.

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