

86-048 #119

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of  
State Employment Relations Board,  
Complainant,

and

Lucas County Board of Mental Retardation and  
Developmental Disabilities Education Association,  
Intervenor,

Ohio Council 8, American Federation of State, County  
and Municipal Employees, AFL-CIO,  
Intervenor,

and

Lucas County Board of Mental Retardation and  
Developmental Disabilities,  
Respondent.

Respondent.

CASE NUMBER: 85-UR-02-2996

OPINION

Day, Chairman:

The parties to this case are: 1) State Employment Relations Board (SERB or Board), 2) Lucas County Board of Mental Retardation and Developmental Disabilities Education Association (OEA), 3) Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO, (AFSCME), and 4) Lucas County Board of Mental Retardation and Developmental Disabilities (Respondent or MR/DD Board).

STATE  
STATE EMPLOYMENT I

AFSCME, a deemed certified employee representative,<sup>1</sup> filed a petition for a representation election on April 23, 1984. The unit consisted of "all professional employees of Respondent, excluding all confidential, management, and supervisory employees and guards."<sup>2</sup> On May 13, 1984, OEA also filed for a unit of "all teachers and certificated non-supervisory professional school staff."<sup>3</sup> SERB consolidated the cases. A hearing was held on January 21, 1985. Ultimately, an election was directed for July 3, 1985, in the unit proposed by AFSCME.<sup>4</sup>

Pay increases were discussed and approved by the Respondent in a closed executive session in September 1984. Written notice was not provided the unit employees to explain that the wage increases resulted from the implementation of the September 1984 determination.<sup>5</sup> Nevertheless while the representation proceedings pended, the Respondent granted wage and benefit

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<sup>1</sup>AFSCME and Respondent were parties to a collective bargaining agreement at least as early as March 9, 1981, Hearing Officer's Proposed Order, Admission No. 6. This gave AFSCME "deemed certified" status, see Temporary Law, Section 4(A). Hereafter the Hearing Officer's Proposed Order will be designated "HORD".

<sup>2</sup>HORD Admission No. 10; Findings of Fact (FF) No. 1.

<sup>3</sup>Id. Admission No. 11; FF No. 1.

<sup>4</sup>Id. Admission No. 12. The initial election results were inconclusive and required a run-off. The run-off generated challenges and objections. A hearing on the challenges and objections culminated in a set aside of the run-off results and a directive for another run-off. See SERB v. Lucas County Board of MR/DD (1986) 84-RC-04-0770 and 84-RC-04-1044.

<sup>5</sup>FF Nos. 4 and 6. The HORD does not indicate whether verbal or any other variety of notice was attempted.

increases to the bargaining unit employees retroactive to January, 1984, 6  
coupled with a step increase in September, 1984. 7

II  
A narrow question is presented by these facts:  
Did the Respondent violate R.C. 4117.11(A)(1) and (2) by unilaterally  
granting wage and benefit increases to bargaining unit employees prior  
to a representation election?  
For reasons adduced below the question is answered, "Yes."

III  
The evidence in this case does not indicate malevolent conduct on the  
part of the Respondent. But even well intentioned action may have illicit  
consequences. And it is a fundamental in the conduct of a fair election  
between competitors for bargaining rights, or between one competitor and no  
representation, that nothing be done by any party to prejudice, or  
potentially prejudice, a free choice. Because this is apt to be a recurring  
problem and because of its importance to the election environment, a brief  
explication of principle is in order.

As a general rule no wage increase or other benefit should be granted by  
an employer during a representation election campaign. This is so because  
the benefit is so readily perceived as an attempt to advantage one side or  
the other. However, the general rule is subject to exceptions depending on  
circumstances. One example is a situation in which an employer becomes

6Negotiations between the Respondent and AFSCME (a "deemed certified"  
exclusive representative under Section 4(A) of the temporary law) for a  
successor contract began before the expiration date (December 31, 1983) of  
an existing contract. Negotiations continued until April 10, 1984, without  
reaching agreement. HORD, Admission No. 9; FF No. 5. Shortly after this,  
the representation contest began. See Admissions 6-12; FF No. 1.

7HORD, Admissions No. 14; FF Nos. 2, 3, and 5; cf. FF No. 6.

obligated for a benefit before representation becomes an issue. Another is an increase in wages or benefits following an established practice or custom or required by law. Even these exceptions and the announcements of them should be forewarned until after a pending election if the timing of the custom or obligation permits.

In any case the bestowal, if it must be made, should be accompanied by an explanation of its necessity. Of course, an announced justification must be full, clear and neutral.

In the present case the timing of the increase in benefits, the absence of a vested obligation, and the failure to advance a neutralizing explanation, if one existed, contribute to the conclusion of impropriety.<sup>8</sup> The Board will act on that premise.

IV

Since the improptious bestowal of benefits does not appear to be illegally motivated and another run-off has been scheduled,<sup>9</sup> the remedial action in this case is sufficient if confined to a cease and desist order and an affirmative explanation of the installation of benefits coupled with a clear and firm declaration of neutrality.<sup>10</sup>

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

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<sup>8</sup>The Admissions and FF in the HORD are incorporated in this opinion by reference with special emphasis on those cited to support particular propositions in the text of this opinion.

<sup>9</sup>See fn. 4, supra.

<sup>10</sup>See the order accompanying this opinion.