

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

3232 OPINION

15

In the Matter of
State Employment Relations Board,
Complainant,

v.

Findlay City School District
Board of Education,
Respondent.

87-031

CASE NUMBER: 85-UR-11-2410

ORDER
(Opinion attached.)

Before Chairman Day, Vice Chairman Sheehan, and Board Member Latané;
June 25, 1987.

On November 19, 1984, the Findlay Education Association (Intervenor) filed an unfair labor practice charge against Findlay City School District - Board of Education (Respondent). Pursuant to Ohio Revised Code (O.R.C.) §4117.12, the Board conducted an investigation and found probable cause to believe that an unfair labor practice had been committed. Subsequently, a complaint was issued alleging that the Respondent had violated O.R.C. §4117.11(A)(1) and (A)(5) by engaging in direct dealing with bargaining unit members of the Intervenor and by refusing to bargain over the establishment of a personnel drug/alcohol policy. The case was heard by a Board hearing officer. The Board has reviewed the record, the hearing officer's proposed order, exceptions and response.

The Board adopts the Admissions, Stipulations of Fact, and Findings of Fact. For the reasons stated in the opinion attached, incorporated by reference, the Board adopts Conclusions of Law Nos. 1 and 2, amends Conclusions of Law Nos. 3, 4, and 5 to read:

3. Based on the Findings of Fact the Respondent's adoption of its personnel drug/alcohol policy is a mandatory subject of bargaining;
4. The Respondent's method of gathering input about the personnel drug/alcohol policy statement amounts to direct dealing with employees in circumvention of the exclusive bargaining representative and is a violation of O.R.C. §4117.11(A)(1) and (A)(5);

5. The Respondent's failure to bargain and unilateral adoption of and failure to negotiate the personnel drug/alcohol policy statement constitute a refusal to bargain in violation of O.R.C. §4117.11(A)(1) and (A)(5);
and adopts the Conclusions of Law as amended.

The Respondent is ordered to:

1. CEASE AND DESIST FROM:

(i) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117 of the Revised Code, and from refusing to bargain collectively with the representative of its employees certified pursuant to Chapter 4117 of the Revised Code, and from otherwise violating Ohio Revised Code §§ 4117.11(A)(1) and (5).

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

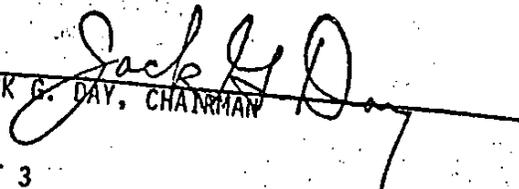
(i) Post for 60 days in all Board of Education of the Findlay City School District buildings where the employees work the Notice to Employees furnished by the Board stating the Board of Education of the Findlay City School District shall cease and desist from the actions set forth in Paragraph 1. and shall take the affirmative actions set forth in Paragraph 2.

(ii) Immediately engage in good faith collective bargaining with the certified exclusive bargaining representative of its employees regarding the adoption of the drug/alcohol policy statement.

(iii) Notify the State Employment Relations Board in writing twenty (20) calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

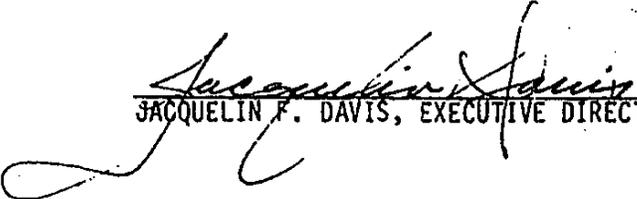
It is so ordered.

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


JACK G. DAY, CHAIRMAN

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I certify that this document was filed and a copy served upon each party
on this 17th day of December, 1987.


JACQUELIN F. DAVIS, EXECUTIVE DIRECTOR

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STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,
and
Findlay City School District
Respondent,
Employer.

CASE NUMBER: 85-UR-11-2410

OPINION

Latané, Board Member:

I

The issues in the instant case arose when the Findlay City School District Board of Education adopted a personnel drug/alcohol policy statement¹ which was not bargained collectively but drafts of which were circulated directly to all employees in the school district requesting input.²

The policy statement contained the sentence: "Under the provisions of this policy any employee seeking and/or accepting diagnosis will not receive punitive employment action, unless job performance is, becomes, or continues to be adversely affected."³

Subsequent to mailing of first draft to all employees,⁴ and to receiving Intervenor's President's notice to negotiate the policy⁵

¹F.F. 6.

²F.F. 4 and 8.

³F.F. 11.

⁴F.F. 4.

⁵F.F. 9.

Respondent's Superintendent met with Intervenor's President to discuss the proposed policy.⁶

Written notice of intent to negotiate was sent by Intervenor's President⁷ on or about October 17, 1984. On or about October 24, 1984, Respondent sent a memorandum to Intervenor's President inviting suggestions concerning the policy.⁸ On or about November 7, 1984, Respondent's Superintendent sent all employees a revised proposed policy statement, seeking input.⁹

The Intervenor filed an Unfair Labor Practice charge with SERB against the Respondent on November 19, 1984.¹⁰ The Respondent adopted the policy at its November 26, 1984, meeting.¹¹

On March 19, 1986, SERB determined that there was probable cause to believe that the Respondent had committed an unfair labor practice and directed that a complaint be issued. On November 14, 1986, a complaint and Notice of Hearing was sent to the parties by SERB. A motion to continue the hearing was granted, and the hearing was scheduled for January 5, 1987.

On December 17, 1986, the Intervenor filed a motion for default judgment or in the alternative judgment on the pleadings. This motion was filed due to Respondent's failure to file an Answer to the Complaint within the ten

⁶F.F. 9.

⁷F.F. 9.

⁸F.F. 5.

⁹F.F. 5.

¹⁰Stip. Fact 9.

¹¹F.F. 6.

day time period from November 14, 1986, to November 24, 1986. An answer was filed December 18, 1986. 12

II

The issues in this case were:

- 1) Whether the Intervenor's Motion for Default Judgment should be granted due to Respondent's failure to timely file an Answer to Complaint.
- 2) Whether a personnel substance abuse policy which contained a provision for punitive action was a mandatory subject of bargaining and adoption thereof without bargaining violated O.R.C. 4117.11(A)(1) and (A)(5).

The Hearing Officer found in the negative on both issues and recommended denial of the Motion for Default Judgment and dismissal of the complaint and underlying charge.

III

The Board concurs with the Hearing Officer's recommendation on Issue 1 to deny the Intervenor's Motion for Default Judgment and the Motion is hereby overruled but disagrees with him on Issue 2 and finds that an unfair labor practice has been committed.

IV

The Board's reasoning in denying the Motion for Default Judgment is that the allegations deemed admitted by the lack of timely filing of an answer by the Respondent are the factual allegations in the complaint.

Although O.A.C. Rule 4117-7-04(B) states: "If a respondent fails to file a timely answer to the complaint, such failure shall be deemed to constitute an admission of the allegations contained in the complaint." and, therefore, the allegations must be deemed admitted, the legal determination remains as to whether the factual allegations in the complaint, even if there, are enough to prove a violation of O.R.C. §4117.11. Therefore, the Board denies the Motion for Default Judgment.

V

With respect to the Hearing Officer's proposed dismissal of the complaint on the merits, the Board rejects the conclusions of law and the proposed order to the effect that the Employer's adoption of the "policy statement" on substance abuse is not a mandatory subject of bargaining. The inclusion of the sentence in the policy inviting the imposition of discipline on employees whose performance is adversely affected by a chemical dependency makes the adoption of such a "statement" a mandatory subject of bargaining. The threat of disciplinary action, especially where the employee is already seeking treatment or diagnosis of the chemical dependency, brings the policy statement clearly within the scope of bargaining. The subject of discipline for chemical dependency adversely affecting job performance is clearly pertinent to the working environment of employees and the requirement to bargain over same does not abridge the Employer's freedom to manage its operations in any significant manner. The negotiable nature of this subject is analogous to the Employer's duty to bargain over safety provisions adopted by the Employer, which, also, involve "... an essential part of the employees' terms and conditions of

employment." Gulf Power Co., 156 NLRB 622, 625, 61 LRRM 1073 (1966),
enforced, NLRB v. Gulf Power Co., 384 F. 2d 822, 66 LRRM 2501 (5th Cir.
1967).

The Board finds the Respondent did deal directly with employees even
after Intervenor's notice of intent to negotiate, and that inclusion of the
threat of disciplinary action in the policy required collective bargaining.
Therefore, the Conclusions of Law Nos. 3, 4, and 5 are amended as follows:

3. Based on the Findings of Fact the Respondent's adoption of its
personnel drug/alcohol policy is a mandatory subject of bargaining.
4. The Respondent's method of gathering input about the personnel
drug/alcohol policy statement amounts to direct dealing with
employees in circumvention of the exclusive bargaining
representative and is a violation of O.R.C. §4117.11(A)(1) and
(A)(5).
5. The Respondent's failure to bargain, unilateral adoption of and
failure to negotiate the personnel drug/alcohol policy statement
constitutes a refusal to bargain in violation of O.R.C.
§4117.11(A)(1) and (A)(5).

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