

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARDIn the Matter of  
State Employment Relations Board,  
Complainant,

v.

City of Lancaster,

Respondent.

CASE NUMBER: 86-ULP-12-0499

DIRECTIVE GRANTING MOTION TO DISMISS  
UNFAIR LABOR PRACTICE CASE  
(Opinion attached.)

Before Chairman Day, Vice Chairman Sheenan, and Board Member Latané;  
December 10, 1987.

On December 24, 1986, Local 291, International Association of Fire  
Fighters (Charging Party) filed an unfair labor practice charge against the  
City of Lancaster (Respondent) alleging that the Respondent had committed an  
unfair labor practice in violation of Ohio Revised Code (O.R.C.)  
§4117.11(A)(1) and (A)(5) when it gave notice that, effective January 1,  
1987, it was going to unilaterally implement new wages, hours, terms, and  
conditions of employment for the Lancaster Fire Fighters.

Pursuant to 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 and the case was directed to hearing.

On October 28, 1987, the Respondent filed a motion to dismiss the  
Charging Party's unfair labor practice charge. The Charging Party filed a  
memorandum contra to the motion to dismiss and joined the complainant in its  
request for the full Board's ruling on the motion to dismiss.

The Board has reviewed the record, and for the reasons stated in the  
attached opinion, incorporated by reference, grants the motion to dismiss.

The complaint and the charge are dismissed.

It is so directed.

SHEEHAN, Chairman, and LATANE, Board Member, concur.

DIRECTIVE GRANTING MOTION TO DISMISS  
CASE NO. 86-ULP-12-0499  
DECEMBER 10, 1987  
PAGE 2 OF 2

*William P. Sheehan*  
WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party  
on this 28<sup>th</sup> day of January, 1988.

*Cynthia L. Spanski*  
CYNTHIA L. SPANSKI, CLERK

1504b:1si/jlb

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of  
State Employment Relations Board,  
Complainant,  
and  
City of Lancaster,  
Respondent.

CASE NUMBER: 86-ULP-12-0499

OPINION

Sheehan, Vice Chairman:

I

The Respondent in this action has filed a motion to dismiss the unfair labor practice complaint pursuant to Option 1 of Miamisburg.<sup>1</sup> The case comes before the Board on a request by the parties (City of Lancaster and International Association of Fire Fighters, Local 291) for the Board to rule directly on the motion to dismiss thus by-passing the usual formal hearing. The hearing officer recommended granting the parties' request and the Board agreed.

Miamisburg Option #1 provides:

"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. 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."

The parties began negotiations in October 1986, observing the prescribed statutory procedures set forth in Ohio Revised Code (O.R.C.) §4117.14. By its terms, the collective bargaining agreement then in existence would expire December 31, 1986. Mediation and fact finding were both utilized. On December 15, 1986, the fact finder issued his recommendation. There was some confusion on the part of the employee organization with respect to the fact finder's recommendations, but the matter was subsequently resolved in favor of the Respondent. It is not clear from the parties' exhibits and memorandums but, from the events that followed, it must be assumed the fact finder's recommendation was rejected by the employee organization.

Seven days after the issuance of the fact finder's recommendation, the City, on December 22, 1986, informed the employee organization of its intent to implement on January 1, 1987, the fact finder's recommendation and the tentative agreements reached by the parties during negotiations. Two days later, on December 24, 1987, the union responded by filing an unfair labor practice charge against the Respondent. The thrust of the charge was that the City may not unilaterally change the status quo even after expiration of the collective bargaining agreement but must either continue to abide by the terms of the old agreement or negotiate with the exclusive representative for any changes to be made during the interim period between the expiration of the old contract and the conciliator's award establishing a new contract.

The new terms and conditions were implemented by the City on January 1, 1987, as planned, and as a result bargaining unit members' work week and hourly rates of pay were reduced; overtime provisions were changed; and personal days previously enjoyed were denied. Irrespective of this action

by the City, negotiations, which were at impasse, were proceeding to conciliation.

At some point during the interim period after the contract had expired and prior to the conciliator's award, the employee organization filed 125 grievances. These 125 grievances basically involved two issues. The first concerns a contractual interpretation of extended vacation days. The second is whether the City had the legal right to implement new wages, hours, terms, and conditions of employment effective January 1, 1987. These grievances were submitted to arbitration which evidences that the parties were observing at least the portions of the expired contract that were not affected by the City's implementation of the new terms and conditions.

The Conciliator conducted his meeting with parties on February 12-13, and issued his award on March 18, 1987. The same month, the union filed a grievance challenging the Employer's right to implement new terms and conditions of employment. The grievance was factually similar to the unfair labor practice filed with SERB on December 24, 1986. The following month, on April 24, 1987, SERB notified the Respondent of a finding of probable cause to believe an unfair labor practice had been committed and directed the issuance of a complaint.

In the meantime, the grievance proceeded to arbitration and arguments were heard on June 25, 1987. On September 16, 1987, Arbitrator Jerry B. Sellman ruled that the city acted legally when it unilaterally changed the terms of the expired 1986 agreement on January 1, 1987.

II

The Respondent supports its motion for dismissal by arguing that the arbitrator's award should stand because it meets the applicable deferral standards: 1) the proceeding was fair and regular, 2) both parties agreed to be bound by the arbitrator's decision, 3) the issue arbitrated was factually parallel to the unfair labor practice issue, 4) the arbitrator's award is consistent with the Miamisburg Doctrine and Fostoria<sup>2</sup> (SERB No. 86-037). The Respondent further argued that to grant the employee organization's unfair labor practice would produce unlawful results by 1) retroactively applying the law and rule-making through adjudication,<sup>3</sup> 2) SERB modifying the arbitrator's award which can be modified only by a court pursuant to O.R.C. §2711.11, 3) granting the employee organization's remedy unlawfully modifies the conciliator's binding award which can be modified only by a court under O.R.C. §4711.14(H).

The employee organization in opposition to the motion argued that deferral to arbitration under the Miamisburg Doctrine is inappropriate because 1) SERB had earlier denied the Employer's motion to stay the unfair labor practice proceedings on the grounds that the issues implicate sufficient statutory import, and 2) even if Miamisburg Option 1 were applicable, no deferral should take place since, by allowing a public employer to invoke its bargaining objection, the Arbitrator reached a conclusion contrary to the letter and spirit of Ohio law. The employee organization further claimed that the Respondent's retroactivity argument

---

<sup>2</sup>The majority held in Fostoria, "... That the ultimate point of impasse occurs at the end of the publication period following rejection of the fact-finding recommendation."

<sup>3</sup>Ohio Administrative Code (O.A.C.) Rule 4117-9-02(E).

has no merit. Fostoria, as a SERB decision, can be overruled, and the new holding can be given retroactive effect. It also argued that rulings by an arbitrator or conciliator do not bar SERB from considering the unfair labor practice charges on the grounds that arbitrators and conciliators cannot overrule the law, especially by exercising jurisdictions they do not have.

III

For the reason adduced below, the Board grants the Respondent's motion to dismiss the unfair labor practice complaint, but not pursuant to Option 1 of the Miamisburg Doctrine.

When adopting the Miamisburg Doctrine, the Board wrote that it was unnecessary to commit itself to an inflexible policy. The purpose of the doctrine was to facilitate the expedition of issues arising from grievances and unfair labor practice charges over interpretation and adjustment of existing agreements.

Apart from the unfair labor practice aspect, the issue here involves the settlement of a successor agreement. Accordingly, the Miamisburg Doctrine does not appropriately lend itself for application in this case and deferral to Option 1 is rejected.

There is no dispute over the facts. The case has gone through the conciliation process, it has been litigated in arbitration, and a contract is currently in effect. On the issue awarded the union by the conciliator, all members of the bargaining unit have been made whole.

Essentially, the employee organization is asking the Board to overrule the Fostoria opinion. This is unnecessary. Fostoria was overruled and the policy enunciated by it repealed by the amendment of Ohio Administrative Code Rule 4117-9-02(E), effective May 18, 1987.

7

When the Respondent unilaterally implemented the new terms and conditions on January 1, 1987, Fostoria was in force. The action taken by the Respondent on that date could be considered consistent with the spirit of Fostoria, and clearly unabusive to its stated policy. In view of the forums this case has journeyed through and on the basis of fairness, the Board is disinclined to reverse Fostoria retroactively. Therefore, it is deemed the Respondent acted within its rights at the time it implemented the new changes and conditions.

Similar actions to that which the Respondent pursued occurring after the effective date of the O.A.C. 4117-9-02(E) will find a different response.

Day, Chairman, and Latané, Board Member, concur.

0348B:s/b:1/13/88:f

8