

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,
and
International Association of Firefighters, Local 332,
Intervenor,
v.
City of Lakewood,
Respondent.

CASE NUMBER: 86-JLP-1-0010

ORDER
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
March 23, 1988.

On January 9, 1986, the International Association of Firefighters, Local 332 (Charging Party) filed an unfair labor practice charge against the City of Lakewood (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 (5) by unilaterally changing from a two to a three-platoon system. The case was heard by a Board hearing officer.

The Board has reviewed the record, the hearing officer's proposed order, exceptions and responses.

For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the Admissions, Findings of Fact, amends Conclusion of Law No. 4 by omitting the words, "the 'effects' of implementing" from its first sentence; amends Conclusion of Law No. 5 by omitting the words, "the 'effects' of;" amends Recommendation No. 2(b)(2) to read: "Immediately return to operation under the two-platoon system and engage in collective bargaining with the IAFF regarding the proposed change to a different platoon system;" and adopts the Conclusions of Law and Recommendations as amended.

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The Respondent is ordered to:

a. Cease and desist from:

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

b. Take the following affirmative action:

- (1) Post for sixty days in all City of Lakewood buildings where the employees work the Notice to Employees furnished by the Board stating that the City of Lakewood shall cease and desist from the actions set forth in Paragraph (a) and shall take the affirmative action set forth in Paragraph (b).
- (2) Immediately return to operation under the two-platoon system and engage in collective bargaining with the IAFF regarding the proposed change to a different platoon system.
- (3) Notify the State Employment Relations Board in writing within 20 calendar days from the day the Order becomes final of the steps that have been taken to comply therewith.

It is so ordered.

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

William P. Sheehan

WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 11 day of JULY, 1988.

Cynthia L. Spanski

CYNTHIA L. SPANSKI, CLERK



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:

A. WE WILL CEASE AND DESIST FROM:

- (1) 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 our employees certified pursuant to Chapter 4117 of the Ohio Revised Code and from otherwise violating O.R.C. §§4117.11(A)(1) and (3)(5).

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.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

- (1) Post for sixty (60) days in all City of Lakewood buildings where the employees work the Notice to Employees furnished by the Board stating that the City of Lakewood shall cease and desist from the actions set forth in Paragraph (A) and shall take the following affirmative action set forth in Paragraph (B);
- (2) Immediately return to operation under the two-platoon system and engage in collective bargaining with the IAFF regarding the proposed change to a different platoon system;
- (4) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the order become final of the steps that have been taken to comply therewith.

CITY OF LAKEWOOD
35-ULP-1-0010

DATE _____

BY _____

TITLE _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED
This notice is to 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 violations concerning this notice or compliance with its provisions may be subject to legal action.

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,

and

International Association of Fire Fighters, Local 382,
Intervenor,

v.

City of Lakewood,
Respondent.

CASE NO. 86-ULP-1-0010

OPINION

Davis, Vice Chairman:

I.

The issue in this case is whether the City of Lakewood ("Respondent") violated Ohio Revised Code (O.R.C.) §§4117.11(A)(1) and (5) by taking unilateral action and refusing to bargain with the International Association of Fire Fighters, Local 382 ("IAFF"), regarding a change from a two-platoon system to a three-platoon system. The facts of this case are fully developed in the hearing officer's report and are adopted by the Board and incorporated herein. The key facts essential to an understanding of this dispute, briefly summarized, are that the Respondent, without bargaining, implemented a change in platoon systems. Under the previous, two-platoon system, a fire fighter worked the following hours: twenty-four hours on duty, twenty-four hours off duty, twenty-four hours on duty again, and then seventy-two hours off. (When this schedule resulted in a fire fighter working more than fifty-four hours in one week, an additional day off duty, or "Kelly day" was provided.) The three-platoon system, unilaterally implemented by the Respondent, results in a fire fighter working different hours: twenty-four hours on duty, forty-eight hours off duty, twenty-four on, forty-eight off, and so on. (Hearing Officer's Findings of Fact Numbers 1 and 2.)

The Board finds that the Respondent did commit an unfair labor practice in violation of O.R.C. §§4117.11(A)(1) and (5). The analysis through which the Board reaches this conclusion requires examination of three questions:

- 1) whether the change from a two-platoon system to a three-platoon system is a mandatory subject of bargaining under the provisions of O.R.C. Chapter 4117;

The hearing officer's recommendation, however, does not comport with this standard. Relying upon an incorrect interpretation of O.R.C. §4117.08(C), the hearing officer suggested that the Respondent committed an unfair labor practice only to the extent it had refused to bargain on the "effects" of its unilateral decision to change the platoon systems. This recommendation reflects a common misconception that any matter that is covered by the "as affects" language of O.R.C. §4117.08(C) is subject only to "effects bargaining": i.e., that the initial decision is exempt from bargaining and only the ramifications of the decision must be bargained.

This approach ignores the purpose of the "as affects" language. The language is a proviso--a device that limits or contracts the scope of the preceding litany of management rights. Through this function, the proviso resolves the tension between management rights and bargaining rights. Construction of the "as affects" language as exempting bargaining on all but the implemental implications of decisions in any of the enumerated areas would be antithetical to the purpose of the proviso. The "as affects" language then would be useless as a tool to resolve conflicting terminology and to protect the integrity of the proviso. The "as affects" bargaining. In contrast, the Board fulfills the purpose of the proviso by holding that under O.R.C. §4117.08(C), any matter that "affects" wages, hours, terms and conditions of employment is a mandatory subject of bargaining. This approach gives full meaning to the proviso by preserving for exclusive management action those areas in which the employees' statutorily guaranteed bargaining rights and gives those rights the depth necessary to comport with the mandate of liberal construction set forth in O.R.C. §4117.22. Thus, in the case at hand, the foundational decision of whether to implement the platoon change is subject to bargaining as are any subsequent matters of implementation that affect wages, hours, terms and other conditions of employment.³

³The misconception of this issue may have arisen from the use of the term "effects" in the Board's opinion in City of Bedford Heights, SERB 87-016 (7/24/87), aff'd. SERB v. City of Bedford Heights, No. 54484 (8th Dist Ct. App., Cuyahoga, 11/25/87), SERB Official Reporter 1987, page 4-88. If there is confusion about the nature of the Board's holding in Bedford Heights, however, it is resolved by the order, which is the actual remedial instruction to the parties. The order required the parties to abolish the unilaterally implemented work schedule and engage in bargaining with the IAFF, thus indicating that the change in hours as well as the ramifications were topics subject to bargaining. In affirming the Board's holding in Bedford Heights, the court of appeals applied the law in a way that is consistent with the instant determination. The court stated:

Changing the work schedule of fire fighters from 24 hours on and 48 hours off to 10-hour day and 14-hour night shifts certainly affects the hours of employment and therefore requires negotiation.

SERB v. City of Bedford Heights, supra, at 4-90.

- 2) even if the matter would ordinarily be a mandatory subject of bargaining under O.R.C. Chapter 4117, whether the management rights clause of the parties' collective bargaining agreement exempts the matter from bargaining; and
- 3) if there were a right to bargain, whether the IAFF has waived that right.

II.

Ohio Revised Code §§4117.01(G), 4117.03(A), 4117.08(A), and 4117.11(A)(5) expressly state that the exclusive representative has the right--and the public employer the obligation--to collectively bargain "to determine wages, hours, terms and other conditions of employment." Applying this language to the facts, Respondent's unilateral action would constitute an unlawful refusal to bargain. The Respondent, without bargaining, implemented stark alterations in the fire fighters' on-duty and off-duty hours. Such an action is, without question, a change in "hours" and conditions of employment and is covered by the several statutory provisions establishing mandatory subjects of bargaining. The analysis, however, cannot end here because another statutory provision comes into play: O.R.C. §4117.08(C). Before the Board can conclude that O.R.C. Chapter 4117 requires bargaining on the change of platoon systems, certain terminology set forth in the management rights provision of O.R.C. §4117.08(C) must be considered and clarified.

O.R.C. §4117.08(C) sets forth a list of actions and states that "nothing in Chapter 4117 of the Revised Code impairs the right and responsibility of each public employer" to take those specified management actions. The verb "to schedule" is listed among them. Upon initial examination, it may appear that there is a contradiction between the statutory provisions establishing "hours" as a mandatory subject of bargaining and the reference in O.R.C. §4117.08(C)(5) preserving the employer's right to "schedule." This conflict, however, is resolved by the final proviso of O.R.C. §4117.08(C), which states:

The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as affect wages, hours, terms and conditions of employment. (Emphasis added.)

This sentence establishes harmony between the Act's ubiquitous subjects-of-bargaining provisions and the management rights language. The

"O.R.C. §4117.03(A) specifies that "[p]ublic employees have the right to: ... Bargain collectively with their public employers to determine wages, hours, terms and other conditions of employment...." O.R.C. §4117.08 provides that "[a]ll matters pertaining to wages, hours, or terms and other conditions of employment ... are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section." Within the definition of "to bargain collectively," O.R.C. §4117.01(G) lists subjects of bargaining as "wages, hours, terms and other conditions of employment...."

"as affects" proviso is an acknowledgment and a resolution of the following dilemma: while there are some matters upon which a public employer must be able to take independent action if it is to properly run its operation, such independent management authority may be essential only as to certain aspects of those actions; in other aspects and at other levels, those very actions can be inextricably related to the determination of "wages, hours, terms and other conditions of employment," and negotiation on those issues is essential to preserve meaningful collective bargaining rights. The "as affects" provision of O.R.C. §4117.08(C) sets forth a clear standard for resolving this tension between the enumerated management rights and the subjects-of-bargaining provisions: when a matter "affects" wages, hours, terms and other conditions of employment, that matter is subject to bargaining.

Indeed, application of this standard to the instant issue illustrates the point and value of the "as affects" provision. An employer must have the ability to make scheduling decisions to ensure proper staffing and productivity, but certain actions, even if taken under the guise of "scheduling," clearly affect hours and, therefore, are in the category of those matters upon which bargaining must transpire. Under O.R.C. Chapter 4117, the Respondent's action affects "hours" worked by the fire fighters and their conditions of employment. Thus, the change in platoon systems is a mandatory subject of bargaining.

²A study of the approaches used by other jurisdictions often is useful when deciding cases involving comparable issues and provisions of O.R.C. Chapter 4117. The Wisconsin Employment Relations Commission (WERC) considered a similar change in platoon systems in International Association of Professional Fire Fighters and City of Merrill, Decision No. 15431, April 13, 1977, slip opinion (digest published in CCH Public Employee Bargaining Reporter, Para. 40,130). WERC found that the change related primarily to the hours and conditions of employment and held that the matter was a mandatory subject of bargaining. The decision in City of Merrill is especially worthy of consideration because WERC was interpreting a statutory management rights provision that is similar to Ohio's "as affects" terminology. Section 111.70(1)(d) of the Wisconsin Municipal Employment Relations Act provides that "[t]he employer shall not be required to bargain on subjects reserved to management and direction of such functions affects the wages, hours and conditions of employment of the employees." In applying this language, WERC held that "the demand to bargain over the spacing of days off and days on duty, directly and intimately affects the hours and conditions of employment of fire fighters." Id., slip opinion at 5.

As to the more general concept that the change at issue falls within the ambit of "hours," even the United States Supreme Court has considered the issue of working hours and has held that "the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain [under the National Labor Relations Act Section 8(d)]." Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 53 LRRM 2376, 2381 (1965).

On occasion, an initial or foundational decision to which the "as affects" provision applies may not be available for bargaining, such as in Wilmington City School District Board of Education, SERB 87-005 (4/9/87), and Findlay City School District Board of Education, SERB 88-006 (5/13/88). In each of those cases, the public employers were bound by state statute to make certain decisions, but related issues as to implementation were found to be subjects of bargaining. In Wilmington, the employer's determination that it would provide liability insurance was not available for bargaining, but issues relating to the nature and quality of the insurance were. In Findlay, the addition of a make-up day of classroom instruction was not subject to bargaining, but the subsequent issue of when to plan the day was. In each case, the initial decision was dictated by statute, but the ramifications of the unavoidable decision affected terms and conditions of employment and thus were subjects upon which bargaining was mandatory. These subsequent issues were no less important or significant because their mandatory nature arose from the "as affects" language of O.R.C. §4117.08(C) than they would be had they become mandatory under the specific terminology of O.R.C. §§4117.01(G), 4117.03(A), and 4117.08(A). With regard to subjects of bargaining, O.R.C. Chapter 4117 provides for three broad categories: mandatory, permissive, and prohibited. The "as affects" language does not give rise to a fourth category. Rather, if a matter is subject to bargaining because it affects wages, hours, terms and other conditions of employment, then it is as fully bargainable as if it were within the categories expressly enumerated.

III.

Having determined that the change implemented by the Respondent falls within the mandatory subjects of bargaining as set forth in O.R.C. Chapter 4117, the Board turns to the Respondent's argument that the management rights provision of the parties' collective bargaining agreement exempts the change in platoon systems from the bargaining obligations of O.R.C. Chapter 4117. The Respondent cites Article 13 of the collective bargaining agreement, which reserves to Respondent's "exclusive management rights" these matters:

to reorganize, discontinue, or enlarge any operation or division within the Fire Department; to transfer, including the assignment and allocation of work, within or to other operations-divisions within the Fire Department; ... to determine the size and duties of the work force, the amount of shifts required, and all work schedules; to establish reasonable residency requirements; to establish, modify, consolidate or abolish jobs; and to determine staffing patterns, including assignments of employees, numbers employed, duties to be performed, qualifications required, and areas worked....

The same analysis that was applied to the relevant statutory provisions applies with regard to this language. The alteration of the platoon system clearly relates to hours and conditions of employment, and Article 13 contains no language giving Respondent the authority to unilaterally change

hours and conditions of employment. Precise terminology is a threshold requirement before a provision of a collective bargaining agreement may be construed as overriding a clear and basic statutory right. Such an express delegation by the IAFF to the Respondent of a critical topic of bargaining is not found in Article 13 or any other provision of the collective bargaining agreement.

IV.

The final issue is whether the IAFF waived its right to bargain (a) by allegedly failing to demand bargaining when the Respondent first stated its intention to make the change or (b) by subsequently working with the Respondent to achieve an orderly transition to the three-platoon system. This issue must be examined under the very strict standards applicable to waiver. The waiver of a statutory right can be effected only through clear and unmistakable action by the waiving party. No such action was taken in this instance. The Respondent cites the Board's opinion in Pickaway-Ross JVSD Board of Education, SERB 87-027 (11/19/87), but reliance upon that decision is misplaced. Pickaway-Ross JVSD involved an employee organization that sat on its rights after repeated opportunities to assert its desire to bargain. The employee organization's inaction and other circumstances of the case resulted in a confusion of the employer's bargaining obligation. In the case at bar, the facts reveal several occasions on which IAFF representatives were told of the Respondent's intention to change to the three-platoon system. In each instance, the IAFF responded by protesting the change and requesting the opportunity to bargain. (Hearing Officer's Findings of Fact Numbers 5, 6, and 8.)

The Respondent takes issue with the factual conclusions of the hearing officer on many of these points. A review of the full transcript indicates that the parties did present differing accounts of the discussions cited by the hearing officer. The transcript also indicates variations in the testimony that justify the hearing officer's credibility determinations. The Board has been presented with no arguments or record references that would draw into question these credibility determinations. However, even if the Respondent's version of the facts were credited, all witnesses were consistent in their recollection that the IAFF representatives expressed concern and reservations about the proposed change. (Transcript pp. 35, 36, 39, 11, 112, 152-158, 173, 206.) Moreover, a key fact is corroborated by even the Respondent's witness: during collective bargaining sessions that commenced in the fall of 1985, the IAFF made clear its position on the change and its belief that the change was a mandatory subject of bargaining. (Transcript pp. 158, 167, 173, 109-111.) The record solidly establishes that by the time the Respondent implemented the change, it had clear knowledge that the IAFF wished to bargain on the issue. There was no waiver by the IAFF nor did the IAFF sit on its rights.

The Respondent's second basis for contending that the IAFF waived its right is based upon the IAFF's conduct after the Respondent changed to the three-platoon system. Even though the IAFF had protested the Respondent's unilateral action and had filed the instant unfair labor practice charge, the IAFF endeavored to assist in making a smooth transition and to protect the remaining rights of its membership as the change was implemented.

Construction of a waiver or some type of acquiescence based upon the IAFF's actions would have serious deleterious impact on future attempts by parties to continue cooperative, productive relations while litigating disputes. The very goal of peaceful resolution and productive management would be destroyed.

V.

As a remedy for the action taken by the Respondent, the Board orders the Respondent to return to operation under the two-platoon system and to engage in collective bargaining with the IAFF regarding the proposed change to a different platoon system as well as ramifications that may relate to or may affect wages, hours, terms or other conditions of employment. Posting as designated in the accompanying order also will be required.

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

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