

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

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In the Matter of
State Employment Relations Board,

SERB OPINION 88-017

Complainant,

v.

City of Alliance,

Respondent.

CASE NUMBER: 85-UR-12-4830

ORDER
(Opinions attached.)

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

On December 23, 1985, the American Federation of State, County and Municipal Employees, AFL-CIO (Charging Party) filed an unfair labor practice charge against the City of Alliance (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 (2) by refusing to enter into a members-only contract with the Charging Party while entering into such contracts with other employee organizations. The case was heard by a Board hearing officer.

The Board has reviewed the record and the hearing officer's proposed order. No exceptions were filed. Pursuant to O.R.C. §4117.12(B)(2), since no exceptions were filed, the hearing officer's proposed order becomes the order of the Board. However, the hearing officer made alternative findings of Conclusions of Law and Recommendations. Thus, for the reasons stated in the attached opinion, the Board adopts the Admissions and Stipulations, Findings of Fact, Conclusions of Law Nos. 1, 2 and 4, and the Recommendations.

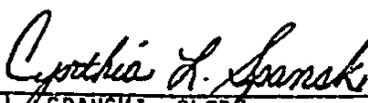
The complaint and charge are dismissed.

It is so ordered.

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


WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party
on this 21st day of October, 1988.


CYNTHIA L. SPANSKI, CLERK

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OPINION

Davis, Vice Chairman:

This case involves an unfair labor practice complaint alleging that the City of Alliance ("Respondent" or "Employer") violated Ohio Revised Code (O.R.C.) §4117.11(A)(1) and (2) when in 1985 it entered into non-exclusive agreements covering the members of three employee organizations but refused to enter into such an agreement with the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME").

After a full hearing and briefing of the issues, Hearing Officer Chester C. Christie on May 4, 1988, issued his report and recommendation pursuant to O.R.C. §4117.12(B). Neither party filed exceptions. Ordinarily, when no exceptions have been filed within twenty days after service of a hearing officer's report, the "recommended order becomes the order of the board effective as therein prescribed." O.R.C. §4117.12(B)(2). In this case, however, the Board has been presented with two possible dispositions and, therefore, must delve into the case to select which resolution is appropriate. The hearing officer, grappling with a novel point of law, properly offered these conclusions of law as alternatives:

The State Employment Relations Board lacks jurisdiction over the subject matter of the instant case;

Assuming the State Employment Relations Board finds that it has jurisdiction over the subject matter of the instant case, the City of Alliance did not violate §4117.11(A)(1) and (A)(2) by refusing to extend non-exclusive recognition via a members only contract to AFSCME.

Hearing Officer's Report and Recommendation, page 7. Thus, the Board considers the case for the purpose of determining whether it has jurisdiction of the matter. If the Board determines that it has no jurisdiction, the recommended conclusions of law on the merits will become irrelevant. If the Board asserts jurisdiction, it then will be bound by the hearing officer's recommendation that Respondent's actions did not constitute a violation of O.R.C. §4117.11(A)(1) and (2).

Accordingly, the single issue before the Board is whether the Board has jurisdiction to consider unfair labor practice allegations relating to "members only" agreements entered into by an employer after the April 1, 1984, effective date of O.R.C. Chapter 4117. For the reasons that follow, the Board concludes that it does have jurisdiction to consider the merits of such an action.

In addressing the question of jurisdiction, the hearing officer looked to two potential sources of authority: Sections 4 and 5 of Amended Substitute Senate Bill 133 of the 115th General Assembly, uncodified language ("Sections 4 and 5"), and this Board's decision in Columbus Developmental Center, SERB 85-048 (September 26, 1985). Neither Sections 4 and 5 nor the principle of Columbus Developmental Center is relevant to the case at hand. As the hearing officer correctly noted, Sections 4 and 5 preserve pre-April 1, 1984, agreements and direct the Board's responsibilities in such matters. These sections apply only to agreements into which the parties entered prior to the April 1, 1984, effective date of O.R.C. Chapter 4117 ("the Act").¹ In the instant case, the non-exclusive agreements were executed in 1985 and are beyond the scope of Sections 4 and 5.

¹The relevant portions of Sections 4 and 5 are:

Section 5: Any written contract, agreement, or memorandum of understanding in effect on April 1, 1983, or entered into between January 1, 1983 and March 31, 1984 between a public employer and an employee organization shall be deemed valid for its term, except as provided in division (D) of Section 4 of this act.

Section 4(D): Nonexclusive recognition previously granted through an agreement or memorandum of understanding shall not preclude the Board from: (1) determining an appropriate unit, (2) if necessary, removing classifications from a bargaining unit under an existing nonexclusive contract, agreement or memorandum of understanding, and (3) holding a recognition-certification election to determine an exclusive representative for all such employees deemed part of the appropriate unit.

These provisions are uncodified portions of Amended Substitute Senate Bill 133, enacted by the 115th General Assembly, effective October 6, 1983. As uncodified language, the provisions have no Ohio Revised Code citation and are commonly referred to as "temporary law" because their applicability is of a limited but undefinable duration. The relevance of these provisions ceases when the transitional circumstances to which they were addressed dissolve with the passage of time.

The principle advanced by the Board in Columbus Developmental Center is inapplicable for similar reasons. That case involved a non-exclusive agreement between an employer and an employee organization. The agreement provided a specific grievance procedure to be used by the employee organization's members and allowed for grievance representation by that union. For employees who were not members of that union, the employer had established a different grievance procedure that did not provide for representation. The charge, filed by a rival organization, raised the issue of whether the employer had committed an unfair labor practice by refusing to allow the rival employee organization to represent its members in grievance proceedings. The Board held that it lacked jurisdiction over the action and dismissed the charge. Columbus Developmental Center, SERB 85-048, page 164.

The non-exclusive agreement in Columbus Developmental Center had been executed prior to April 1, 1984, and therefore had been preserved and validated by Sections 4 and 5. The employer's adherence to the non-exclusive agreement and failure to allow representation by the rival was alleged to be unlawful assistance and interference favoring one nonexclusive employee organization over another. The employer's action, however, was not subject to challenge because the employer had been complying with the terms of a non-exclusive agreement that had been legitimized by Sections 4 and 5 of the statute and, therefore, had to be fulfilled. There was no issue that could be presented for Board review. Thus, the question raised in Columbus Developmental Center was found to be beyond the realm of unfair labor practice jurisdiction.

By contrast, the instant case involves non-exclusive agreements and recognition that are not shielded from scrutiny by virtue of Sections 4 and 5. The Respondent's actions have no special status under the law and O.R.C. §4117.11 is fully applicable. Indeed, the focus of this action is on the application of the Act's unfair labor practice provisions--not the representation provisions. The question is not whether the Board has the authority to require, condone, or regulate non-exclusive recognition. Rather, the question is whether the Board may consider alleged unfair labor practices that are linked to non-exclusive recognition. The Act's potential application to the merits of allegations such as those advanced by the Complainant is apparent from the very protections and prohibitions stated in the statute.

The gist of the Act is focused upon exclusive representation and collective bargaining, but it would be inaccurate to suggest that O.R.C. Chapter 4117 relates only to exclusive recognition. On the contrary, the Act creates and protects rights that need not be directed to selection, retention, or operation of exclusive representatives. For example, employees are protected in their pursuit of concerted activities for the purpose of "other mutual aid and protection." O.R.C. §4117.03(A)(3). It is a fundamental principle of labor law that such activity need not involve even the concept of exclusive representation. See, e.g., NLRB v. Washington Aluminum, 370 U.S. 9, 50 LRRM 2235 (1962). Also protected is an employee's freedom to choose in which, if any, employee organization he or she will participate. This right is not limited to those organizations that are

exclusive representatives or are seeking certification as such. O.R.C. §4117.03(A)(1) grants employees the right (with the limitations associated with exclusive representation and certain contractual agreements) to:

Form, join, assist, or participate in, or refrain from forming, joining, assisting, or participating in...any employee organization of their own choosing;...

Such a right, of course, is essential to allow for democratic change and challenge when there is an exclusive representative. These protected rights, however, also come into play in a workforce in which there is no interest in representation or when there is only fledgling interest that is insufficient to give rise to an active campaign for exclusive representation. To read the Act as having application only when employee actions are in immediate pursuit of exclusive representation would be contrary to the terms of the statute and to the foundational and critical rights it establishes.

If an employer grants non-exclusive recognition, care must be taken to avoid infringement of these basic rights. Depending upon the circumstances, an employer that creates or confers non-exclusive status could be engaging in unlawful assistance, interference, or discrimination that impedes the employees' exercise of protected rights and choices. While this potentiality was not borne out in the instant case, the possibility illustrates the statutory basis for and need for Board jurisdiction over such matters. Allegations that an employer has interfered with pursuit of these rights or has interfered with, assisted, or dominated an employee organization of any type -- one that is exclusive, one that is seeking exclusive status, or one that is non-exclusive -- are within the Board's jurisdiction.

The matters alleged in the instant complaint thus are properly and fully within the Board's jurisdiction to consider. Having concluded that consideration of the merits is appropriate, the Board gives full effect to O.R.C. §4117.12(B)(2) and adopts the hearing officer's recommendation. Because equivalent standards were applied to all involved employee organizations, the Respondent did not violate O.R.C. §§4117.11(A)(1) and (2). The complaint is dismissed.

Sheehan, Chairman, concurs. Latané, Board Member, dissents.

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DISSENTING OPINION

Latané, Board Member, dissenting: . . . However,
I concur with the majority that the case should be dismissed.

I respectfully dissent from the majority's rationale in reaching this
conclusion. The majority adopted the Hearing Officer's Conclusion of Law No.
4 which found that the Respondent did not violate Ohio Revised Code (O.R.C.)
§4117.11(A)(1) and (A)(2), in the event that the State Employment Relations
Board (SERB) did assume jurisdiction over the subject matter of this case.

The Hearing Officer's Conclusion of Law No. 3, which finds that SERB
lacks jurisdiction over the subject matter in the instant case, is the
preferable conclusion to draw in this case.

Ohio Revised Code Chapter 4117 establishes rights for exclusive
representatives of public employees to bargain collectively. Except for any
written contract, agreement or memorandum of understanding in effect prior
to 4/1/84, O.R.C. Chapter 4117 grants no bargaining right to non-exclusive
representatives nor any legal status upon non-exclusive agreements.

O.R.C. Chapter 4117 gives SERB jurisdiction over employee organizations which are exclusive representatives or are attempting to become such. In this case, AFSCME is neither. The employees had, in fact, previously rejected AFSCME as the exclusive bargaining agent.

In another case involving an employer's grant of non-exclusive recognition to an employee organization, State Employment Relations Board v. Columbus Developmental Center, SERB 85-048 (9-26-85), the State Employment Relations Board declined jurisdiction:

The thrust of O.R.C. 4117 establishes rights for public employees to select, or refrain from selecting, an exclusive representative for the purpose of collective bargaining with their employer. This does not prescribe for those who are exempt from its coverage or their rights to refrain from doing so, except to protect their employment are handled by other means.

Although the specific circumstances of the instant case differ, the rationale remains the same. O.R.C. Chapter 4117 does not establish rights for public employees to select nor an obligation for employers to recognize non-exclusive representatives for the purpose of collective bargaining. The parties might do so, but not through procedures administered by or under the auspices of SERB.

Therefore, any demand posed by AFSCME was done under the same conditions as those of the members-only associations -- outside of the legal framework of O.R.C. Chapter 4117.

The State Employment Relations Board has no jurisdiction to order an employer to recognize a non-exclusive representative.