

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SEB OPINION 89-006

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In the Matter of

State Employment Relations Board,

Complainant,

v.

Cuyahoga County Commissioners,

Respondent.

CASE NUMBER: 87-ULP-06-C254

ORDER
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
October 6, 1988.

On June 17, 1987, the Cleveland Building and Construction Trades Council (Charging Party) filed an unfair labor practice charge against the Board of Cuyahoga County Commissioners (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 unilaterally implementing its decision to layoff employees and by refusing to bargain in good faith on this decision. 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 Stipulations and Admissions in the Answer, amends Finding of Fact No. 6 to delete what follows the words, "letter of understanding," and adopts the Findings of Fact as amended, Conclusions of Law and Recommendations.

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 otherwise violating O.R.C. §§ 4117.11(A)(1) and

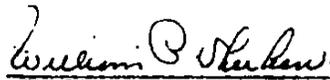
- (2) Refusing to bargain collectively with the exclusive representative of its employees and otherwise violating Revised Code 4117.11(A)(5).

B. Take the following affirmative action:

- (1) Post for sixty (60) days in conspicuous locations throughout the County where bargaining unit employees work, the Notice to Employees furnished by the Board stating that the Board of Cuyahoga County Commissioners 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 reinstate the bargaining unit employees laid off on June 27, 1987 with back pay computed pursuant to the Stipulation entered into with the Union.
- (3) Immediately engage in good faith collective bargaining with the exclusive bargaining representative of its employees regarding the decision and alternatives to layoff.
- (4) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the day this order becomes final of the steps that have been taken to comply therewith.

It is so directed.

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


WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 15th day of March, 1989.


CYNTHIA L. SPANSKI, CLERK

1986b:LS1/jlb

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SEE OPINION 89-006

In the Matter of
State Employment Relations Board,
Complainant,

v.

Board of Cuyahoga County Commissioners,
Respondent.

CASE NUMBER: 87-ULP-06-0254

OPINION

Sheehan, Chairman:

I.

In this case the Board adopts the hearing officer's Stipulations and Admissions in the Answer, amends Findings of Fact No. 6 to delete what follows the words, "letter of understanding," and adopts the Findings of Facts as amended, Conclusions of Law and Recommendations. There are, however, a couple of facets that require further amplification. These are: 1) the duty of the Respondent to bargain over the layoffs which gave rise to the unfair labor practice charge, and 2) the applicability of O.R.C. Chapter 124 in determining the validity of the subject layoffs.

O.R.C. §4117.08 provides:

- (A) All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section.

* * *

(C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

- (1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;
- (2) Direct, supervise, evaluate, or hire employees;
- (3) Maintain and improve the efficiency and effectiveness of governmental operations;
- (4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
- (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;
- (6) Determine the adequacy of the work force;
- (7) Determine the overall mission of the employer as a unit of government;
- (8) Effectively manage the work force;
- (9) Take actions to carry out the mission of the public employer as a governmental unit.

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, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement. A public employee or exclusive representative may raise a legitimate complaint or file a grievance based on the collective bargaining agreement. (Emphasis added.)

The obligation of an employer to bargain "as affect wages, hours, terms and conditions of employment" was well settled In re City of Lakewood, SERB 88-009 (7-11-88), where the Board held:

The "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.

Support for this position can be found in Lorraine City Bd. of Edn. v. State Emp. Relations Bd. (1988), 40 Ohio St. 3d 257, 1989 SERB 4-2, at 4-4 (1988), where the Supreme Court stated:

Thus a reasonable interpretation of O.R.C. 4117.08(C) is that where the exercise of a management right causes a change in or "affects" working conditions or terms of a contract, then the decision to exercise that right is a mandatory subject of bargaining.

This standard, as adopted in Lakewood, supra, and applied to the instant case with regard to layoff decisions, has found application in the private sector as well. In Lapeer Foundry and Machine, Inc., 289 NLRB No. 126, 129 LRRM 1603 (7/20/88), the National Labor Relations Board held:

We conclude that an employer's decision to layoff employees for economic reasons is a mandatory subject of bargaining and that the Respondent violated this Act by failing to bargain over its layoff decision and the effect of that decision.

Consequently, if a matter affects wages, hours, terms and other conditions of employment, it is fully bargainable. There is no doubt that in the case at issue the decision to layoff certain employees directly altered the employees' terms of employment and imposed a dramatic change in

their working conditions. Since the decision to layoff clearly "affected" terms and conditions of employment, the decision to layoff had to be bargained in good faith.

The Respondent's argument that it had the unrestricted right to layoff pursuant to the management rights clause is not persuasive. The Respondent itself had earlier interpreted the language of this clause and acknowledged its obligation to bargain over layoff decisions when it negotiated and signed a letter of understanding with the Intervenor. The letter, which was appended to the contract, provided for no layoffs during the term of the agreement. But regardless of this history of prior bargaining over layoffs, the Respondent had a duty to bargain on its layoff decision. A management rights clause, to the extent that it arguably authorizes unilateral action to change matters that are mandatory subjects of bargaining, is, in effect, a waiver by the union of its statutory right to bargain over these matters. The established standard for determining a waiver of statutory rights is that the waiver must be clear and unmistakable. In re Pickaway/Ross Joint Vocational School Dist Bd of Ed, SERB 87-027 (11-19-87). See also Metropolitan Edison Co. v. WLRB, 460 U.S. 693, 702 (1983). Hence, unlike other terms and conditions of employment which continue to be in effect after the expiration of the contract by virtue of O.R.C. §4117.08 and 4117.11(A)(5), a management rights clause, which is a waiver of these statutory rights, will not survive the contract unless it clearly and unmistakably indicates that such was the intention. Such waiver is normally limited to the time during which the contract is in effect. Holiday Inn of Victorville, 284 NLRB No. 101, 126 LRRM 1203 (1987); also David Walcott Kendall Memorial School, 288 NLRB No. 136 (1988). Therefore, even if the management rights clause in the case at hand can be interpreted to include a

waiver by the union of its statutory right to bargain over economic layoffs, there is nothing to suggest that such waiver was intended to outlive the contract. The layoffs were implemented after the expiration of the contract and, consequently, with the termination of the waiver, the Respondent had a duty to bargain in good faith on the decision to layoff.

II.

The second issue is the applicability of Chapter 124, pursuant to which the Personnel Board of Review determined the validity of layoffs in the instant case in Randy A. Battaglia, et al. v. Cuyahoga County Board of Commissioners, SPBR Case No. 87-LAY-06-0493, et seq. (1988).

O.R.C. §4117.10(A) provides in part:

Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees.

Clearly Chapter 124 enjoys a pertinency to layoffs and clearly the layoffs in the case at hand took place after the expiration of the collective bargaining agreement. However, even though no agreement existed when the layoffs took place, the employer, pursuant to Chapter 4117, had a statutory duty to bargain collectively with the exclusive representative of its employees on matters pertaining to wages, hours, terms and conditions of employment, which include, in this case, layoffs. (See analysis in Section I. of this opinion.) The statutory duty to bargain does not depend on the existence of an agreement, but rather on the existence of an exclusive representative for the employees of the public employer. See also §4117.08 and 4117.11(A)(5). Freezing the status quo ante after a collective bargaining agreement has expired promotes industrial peace by fastening a noncoercive atmosphere that is conducive to serious negotiations on a new

contract. Thus, an employer's failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining. Labors Health & Welfare Trust v. Advanced Lightweight Concrete, 779 F. 2d 497 (9th Cir. 1985), NLRB v. Haberman Construction Co., 618 F. 2d 288, 105 LRRM 2059 (5th Cir. 1980), NLRB v. Katz, 369 U.S. 736 (1962).

If Chapter 124 becomes applicable with regard to layoffs after a contract expires but when a duty to bargain still exists pursuant to Chapter 4117, a conflict is almost unavoidable because layoffs under Chapter 124 are perceived as an exclusive employer's prerogative which requires no bargaining. Thus, for example, when an employer refuses to bargain on its layoff decision and lays off its employees according to the procedure in Chapter 124, this layoff action might be found valid and be upheld under Chapter 124 while found an unfair labor practice and reversed pursuant to Chapter 4117.

If such conflict creates a situation of "conflicting laws" pursuant to O.R.C. §4117.10(A) then Chapter 4117 prevails by operation of this

10.R.C. §4117.10(A) provides:
Except for sections 306.08, 306.12, and 4981.22 of the Revised Code and arrangements entered into thereunder, and section 4981.21 of the Revised Code as necessary to comply with section 13(c) of the "Urban Mass Transportation Act of 1964," 87 Stat. 295, 49 U.S.C. 1609(c), as amended, and arrangements entered into thereunder, Chapter 4117 of the Revised Code prevails over any or all other conflicting laws, resolutions, or shall be construed to future, except as otherwise specified in Chapter 4117 of the Revised Code or as otherwise specified in the general assembly. Nothing in this section prohibits or shall be construed to invalidate the provisions of an agreement establishing supplemental workers' compensation or unemployment benefits or exceeding minimum requirements contained in the Revised Code pertaining to public education or the minimum standards promulgated by the state board of education pursuant to division (D) of section 3301.07 of the Revised Code. (Emphasis added.)

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section. But even if such conflict does not create a "conflicting laws" situation, it clearly creates an undesirable situation and confusion and dissonance which do not promote orderly and constructive labor relationships as mandated in O.R.C. §4117.22. Thus, the pertinent part of O.R.C. §4117.10(A) should apply only where there is no duty to bargain.

A different application would result if, for example, a decertification of the bargaining unit had occurred or if the exclusive representative had clearly indicated no further interest in the unit, causing the revocation of certification. Then the duty to bargain no longer survives. Also, a less discernible situation might arise when the parties reach a bona fide impasse in negotiations, the contract has expired, and the employee organization does not exercise its right to strike. However, this clearly was not the case here. First, the parties were actually in the middle of negotiations when the layoffs were implemented, and second, impasse cannot be reached as long as one of the parties refuses to bargain over a mandatory subject of bargaining, as did the Respondent in this case.

Davis, Vice Chairman, and Latané, Board Member, concur.

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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. 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 otherwise violating O.R.C. §§ 4117.11(A)(1) and
- (2) Refusing to bargain collectively with the exclusive representative of its employees and otherwise violating Revised Code 4117.11(A)(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 action:

- (1) Post for sixty (60) days in conspicuous locations throughout the County where bargaining unit employees work, the Notice to Employees furnished by the Board stating that the Board of Cuyahoga County Commissioners 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 reinstate the bargaining unit employees laid off on June 27, 1987 with back pay computed pursuant to the Stipulation entered into with the Union.
- (3) Immediately engage in good faith collective bargaining with the exclusive bargaining representative of its employees regarding the decision and alternatives to layoff.
- (4) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the day this order becomes final of the steps that have been taken to comply therewith.

BOARD OF CUYAHOGA COUNTY COMMISSIONERS
87-ULP-66-0254

DATE

BY

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board.

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