

STATE OPINION 89-007
182

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

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

CASE NUMBER: 86-ULP-01-0026

ORDER
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
June 16, 1988.

On January 15, 1986, the International Association of Fire Fighters, Local #40's ("IAFF") filed an unfair labor practice charge against the City of St. Bernard ("Respondent" or "City") alleging that the Respondent violated Ohio Revised Code ("O.R.C.") §4117.11(A)(1) and (5). The matter was investigated pursuant to O.R.C. §4117.12, and the Board on November 26, 1986, found that there was probable cause to believe that an unfair labor practice had been committed. On March 2, 1987, a complaint was issued, and the case was heard by a Board hearing officer.

The Board has reviewed the record, the exceptions, response and cross-exceptions. The Board adopts the admissions, findings of fact, and conclusions of law as set forth by the hearing officer. For the reasons stated in the attached opinion, incorporated herein by reference, the Board finds that the Respondent has violated O.R.C. §4117.11(A)(1) and (5) by its continuing refusal to bargain with the IAFF on the issue of residency requirements for fire fighters. The adoption of Ordinance No. 17 was a continuation and product of this refusal to bargain, and, as such is invalid as applied to the fire fighters. The Respondent is ordered to:

- A. Cease and desist from:
Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117 of the Revised Code, from refusing to bargain collectively with the exclusive representative of the fire fighters regarding the issue of residency, from otherwise violating O.R.C. §4117.11(A)(1) and (A)(5), and from applying Ordinance No. 17 to the fire fighters.

ORDER

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June 16, 1988

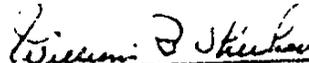
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B. Take the following affirmative action:

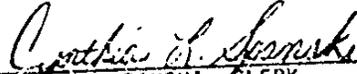
- (i) Post for sixty (60) days in all City of St. Bernard buildings where bargaining unit members work, the NOTICE TO EMPLOYEES furnished by the Board stating that the City of St. Bernard shall cease and desist from the actions set forth in Paragraph (A) and shall take the affirmative actions set forth in Paragraph (B).
- (ii) Immediately engage in good faith collective bargaining with the exclusive certified bargaining representative of the fire fighters regarding the issue of residency.
- (iii) Notify the Board in writing within 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.

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

00783:JFD/jlb

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,
v.
City of St. Bernard,
Respondent.

Case Number: 86-ULP-01-0026

OPINION

Davis, Vice Chairman:

FACTS

At all relevant times, the International Association of Fire Fighters, Local #450 ("IAFF") was the exclusive representative of a unit of fire fighters employed by the City of St. Bernard ("Respondent" or "City"). On or about October 1, 1985, the IAFF, pursuant to Ohio Revised Code ("O.R.C.") §4117.14, filed with this Board and served on Respondent a notice to negotiate in which the IAFF sought to commence negotiations for an initial collective bargaining agreement. Negotiations began, and the IAFF listed among items for negotiation the issue of residency requirements. (Transcript ["T."], p. 16).¹ The Respondent, however, refused to negotiate until the general election had been held in November. After the election, the IAFF resumed pursuit of negotiations, including a request to bargain on the issue of residency. The Respondent refused to bargain on residency, taking the position that it is not a mandatory subject of bargaining. (T., pp. 17 and 54).

In the course of fact-finding conducted pursuant to O.R.C. §4117.14(C)(3), the IAFF again raised the issue of residency and presented a proposal that would have permitted fire fighters to retain employment as long as they resided within Hamilton County or within twenty (20) miles of the City. (T., p. 18). The City maintained its position that the issue was not subject to negotiation. (T., p. 18). The fact finder declined to address whether residency was a mandatory subject of bargaining and did not make a recommendation on the matter. (T., p. 19). On January 15, 1986, the IAFF filed an unfair labor practice charge alleging that the City had violated O.R.C. §4117.11(A)(1) and (5) by refusing to bargain on the issue of residency. A collective bargaining agreement without a residency provision ultimately was executed by the parties. (T., pp. 19-21).

¹References to the transcript, exhibits, or hearing officer's findings of fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for the related factual statement.

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O.R.C. §4117.10(A) has no relevance to the determination of whether a given matter is subject to bargaining. It simply states the rule to be applied when: (1) there is in effect a proper law or ordinance pertaining to one of the listed subjects, and (2) a provision of a collective bargaining agreement conflicts with that ordinance. O.R.C. §4117.10(A) neither lists subjects for which bargaining is prohibited nor identifies those for which bargaining is required. The Ohio General Assembly specifically provided such designations elsewhere in the Act. O.R.C. §4117.08(B) enumerates those items that "are not appropriate subjects for collective bargaining," and O.R.C. §4117.08(C) lists those items on which an employer may--but is not required to--bargain. In neither of these sections is residency mentioned. Hence, the question of whether residency is a mandatory subject of bargaining must be determined simply by reference to the general statutory provisions enumerating the subjects upon which bargaining is required: O.R.C. §§4117.03(A)(4), 4117.08(A), and 4117.11(A)(5). Under these provisions, the question is resolved by determining whether residency is a matter "pertaining to wages, hours, or terms and other conditions of employment." O.R.C. §§4117.08(A) and 4117.03(A)(4).

A requirement that employees maintain a certain residence to obtain or retain employment impinges significantly on the initial and continuing employer-employee relationship and ultimately may result in its severance. By making initial and continued employment contingent upon such residential status, the requirement is a "condition of employment" in the purest sense of the term and thus is a topic that falls within the compulsory bargaining obligations of O.R.C. §§4117.03, 4117.08, and 4117.11.

Ohio is not alone in this conclusion. Other states with comparable statutory delineations of mandatory bargaining subjects have required negotiation on residency requirements. For example, in City of New Haven v. Connecticut State Board of Labor Relations, 410 A.2d 140, 36 Conn. Supp. 18 (Superior Court of Conn., 1979), the court stated:

...if an employee fails to become a city resident within six months of employment, he will, except in unusual cases, have his employment terminated. Therefore, it clearly follows that the residency clause is a condition of employment.... Any other conclusion would torture the intent of the legislation. The interpretation of the residency ordinance as a condition of employment is consistent with the labor board's prior holdings and is therefore entitled to great weight. (Citations omitted.)

It is further clear that the residency ordinance as it applies to future employees is a subject for mandatory bargaining with the collective bargaining agent of the present employees. "The duty to bargain is a continuing one, and a union may legitimately bargain over wages and conditions of employment which will affect employees who are to be hired in the future." N.L.R.B. v. Laney and Duke Storage Warehouse Co., 369 F.2d 859, 866 (5th Cir.).

Id. at 144 (footnotes omitted). The Michigan courts and labor relations board have made similar determinations. In City of Pontiac and Local 539, Utility Workers of America, Case No. C80 D-109, slip opinion issued December 2, 1980, at p. 2, the Michigan Employment Relations Commission stated:

It is well established that residency as a condition of employment is a mandatory subject of bargaining...[and] if a City has a residency requirement it is mandatory that the municipality bargain with the representative of its employees as to its continuance.

See also Detroit Police Officers Association v. City of Detroit and Michigan Employment Relations Commission, 85 LRRM 2536, 391 Mich. 44 (Mich. Supreme Ct. 1974); Pennsylvania Labor Relations Board v. Ambridge School District, Case No. C-9996-W (slip opinion issued January 23, 1978), reported in CCH Public Employee Bargaining Reporter, ¶40,598 (Pa. Labor Relations Board 1978); and Boston School Committee and Boston Teachers Union, Local 66, AFT, et al., MUP-2503, 3 MLC 1603 (slip opinion issued April 15, 1977).³

Having determined that the issue of residency is a mandatory subject of bargaining, the application of O.R.C. §4117.11(A)(1) and (5) to the City's pre-ordinance conduct is clear: the Respondent's steadfast pre-ordinance refusal to bargain regarding the issue of residency constitutes an unfair labor practice in violation of O.R.C. §4117.11.⁴

The issue that remains is whether the adoption of Ordinance No. 17 was a continuation of the City's unfair labor practice or whether the enactment of the ordinance relieved the City of its duty to bargain. Ordinance No. 17 was adopted at a time when Respondent clearly had a duty to bargain, had been asked to bargain, and had persistently refused to fulfill its legal obligation. Thus, the promulgation of the ordinance was an extension of the Respondent's unlawful refusal and constitutes a violation of O.R.C. §4117.11(1) and (5).

³Respondent argues that it is inappropriate to consider the approaches used by other states on this issue because the statutes of the other jurisdictions cited do not contain language similar to O.R.C. §4117.10(A). Respondent's Exceptions, filed May 11, 1988, pp. 5 and 6. In advancing this argument, Respondent continues the error of attempting to apply O.R.C. §4117.10(A) in a situation to which it has no relevance. O.R.C. §4117.10(A) does not pertain to subjects of bargaining. It has relevance only if, after bargaining, a collective bargaining agreement conflicts with a law governing one of the enumerated subjects. Such was not the case when Respondent refused to bargain in late 1986 and early 1987.

⁴Respondent argues that a duty to bargain on residency could create unworkable possibilities if a proper ordinance were in place and if impasse on the subject were reached. The circumstances of this case do not present this issue, and, thus, the question need not be resolved. It is conceivable that, given the particular facts of a future case involving bargaining in the presence of a proper ordinance, a different approach to obligations at impasse might arise, with credit being given to the import of the ordinance and any good faith bargaining that may have transpired.

Although the ordinance may have been produced with the hope of invoking O.R.C. §4117.10(A), the enactment does not excuse the City's previous or continuing refusal to bargain. The violation of O.R.C. §4117.11(A) was extended, tainting the ordinance as well as the conduct. The City cannot escape its collective bargaining obligations and liabilities by formalizing its refusal to bargain to itself and the IAFF of the opportunity to engage in productive discussion. The act of adopting the ordinance was part and parcel of the Respondent's unlawful refusal to bargain. As the product of the City's illegal conduct, Ordinance No. 17 is invalid and cannot relieve the City of its duty to bargain.

Moreover, even if the ordinance were not tainted, or if there had been a proper pre-existing ordinance, the Respondent still would not have escaped its bargaining obligation. The mere existence of an ordinance on residency does not remove the subject from the realm of present or future negotiation. O.R.C. §4117.10(A) provides only that if a negotiated provision of a collective bargaining agreement on one of the enumerated topics conflicts with the existing law, the law prevails. While the existence of an ordinance on a topic might preclude agreement by labor and management to a specific conflicting provision, there are other possible outcomes. Productive bargaining on such a topic might reveal approaches that are consistent with the existing law or might produce alternatives or improvements that could spark mutual pursuit of legislative change of the applicable ordinance. O.R.C. §4117.10(A) does not inhibit such useful and beneficial activity. Indeed, O.R.C. §§4117.03(A), 4117.08(A), and 4117.11(A)(5) require it.⁵

⁵Respondent suggests that there is a complete separation between the City and its legislative body, the city council, and argues that the items enumerated in O.R.C. §4117.10(A) are left to the sole discretion of the city council. Again, had the Ohio General Assembly wished to enunciate such a stark separation, it would have so stated. Moreover, Respondent's argument begs the question. In the instant case, the City's enactment of Ordinance No. 17 was not the product of independent legislative desire or inspiration. Rather, it is clear from the record that Ordinance No. 17 resulted from the issue having been brought to light in the course of negotiations (T., pp. 47 and 48). In fact, the president of city council was a member of the negotiating team that committed the refusal to bargain, and the council consistently had been involved in the administration of various city departments. (T., pp. 41, 45, and 52-54). Because of the governmental structures associated with appropriations and other matters, a legislative body can become inextricably tied to aspects of the negotiation process. A city council thus may not be used as a vehicle for effectuation of unlawful actions and circumvention of obligations under O.R.C. Chapter 4117. The City, with all of its component parts, bears the obligation of performing its duties within the confines of O.R.C. Chapter 4117.

CONCLUSION

Respondent's conduct in this action gave rise to violations of O.R.C. §4117.11(A)(1) and (5). The Respondent had and has a duty to bargain on the issue of residency requirements for fire fighters. The pre-ordinance refusal to bargain on the issue of residency was an unfair labor practice, and the implementation of an ordinance without bargaining was a product and continuation of that breach. Ordinance No. 17 as it applies to fire fighters is invalid.⁶ The Respondent is ordered to cease and desist from application of this ordinance to employees in the bargaining unit represented by the IAFF and to commence bargaining with the IAFF on the issue. These remedies are set forth with greater specificity in the order that accompanies this opinion.

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

⁶Although one could question whether the ordinance in its entirety is invalid, this issue is not available for Board determination. Ordinance No. 17 applies to all employees of the City. Some of those employees other than the fire fighters may be in bargaining units with exclusive representatives and thus may have had the right to bargain on the issue. Nevertheless, the Respondent's actions as they relate to these other employees are not at issue in the instant case. Since no other unit has challenged the City's actions, our remedy relates only to those employees in the unit represented by the IAFF.



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:

Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117 of the Revised Code, from refusing to bargain collectively with the exclusive representative of the fire fighters regarding the issue of residency, from otherwise violating Ohio Revised Code §4117.11(A)(1) and (A)(5), and from applying Ordinance No. 17 to the fire fighters.

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 60 days in all City of St. Bernard buildings where bargaining unit members work, the NOTICE TO EMPLOYEES furnished by the Board stating that the City of St. Bernard shall cease and desist from the actions set forth in Paragraph (A) and shall take the affirmative actions set forth in Paragraph (B).
- (2) Immediately engage in good faith collective bargaining with the exclusive certified bargaining representative of the fire fighters regarding the issue of residency.
- (3) Notify the Board in writing within twenty (20) calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

CITY OF ST. BERNARD
86-UPL-01-0026

DATE

BY

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

ERB 2012

This notice must 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 questions concerning this notice or compliance with its provisions may be directed to the Board.