

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

186
SEER OPINION 89-011

In the Matter of
State Employment Relations Board,
Complainant,

v.

Mentor Exempted Village School District Board of Education,
Respondent.

CASE NUMBER: 84-OR-12-2542

ORDER
(Opinion attached.)

Before Chairman Sweeney, Vice Chairman Davis, and Board Member Latané;
December 1, 1986.

On December 13, 1984, the Ohio Association of Public School Employees (Charging Party) filed an unfair labor practice charge against the Mentor Exempted Village School District Board of Education (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), (A)(5) and (A)(8) by issuing a Negotiations Report directly to the employees in the bargaining unit represented by the Charging Party.

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 and Stipulations, Findings of Fact, amends Conclusion of Law No. 2 to read: "The Mentor Exempted Village School District Board of Education violated O.R.C. §4117.11(A)(1), (A)(5) and (A)(8) by issuing a Negotiations Report addressing the status of contract negotiations directly to the bargaining unit employees," adopts the Conclusions of Law as amended and the Recommendations.

The Respondent is ordered to:

A. Cease and desist from:

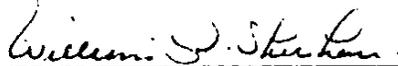
(1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117 of the Revised Code, and from refusing to bargain collectively with the representative of its employees certified pursuant to Chapter 4117 of the Revised Code by engaging in direct dealing with its employees, and from otherwise violating Ohio Revised Code §4117.11(A)(1), (A)(5) and (A)(9).

(B) Take the following affirmative action:

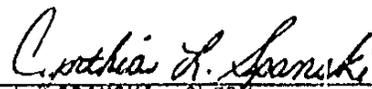
- (1) Post for sixty (60) days in all Edgewood City School District buildings where the employees work, the Notice to Employees furnished by the Board stating that the Edgewood City School District shall cease and desist from the actions set forth in Paragraph A and shall take the affirmative action set forth in Paragraph B.
- (2) Notify the State Employment Relations 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 12 day of MAU, 1989.


CYNTHIA L. SPANSKI, CLERK

2038b:LSI/jlb



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:

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 its employees certified pursuant to Chapter 4117 of the Revised Code by engaging in direct dealing with its employees, and from otherwise violating Ohio Revised Code §§4117.11(A)(1), (A)(5) and (A)(8).

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them under Chapter 4117 of the Revised Code.

B. WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Post for sixty (60) days in all Edgewood City School District buildings where the employees work the Notice to Employees furnished by the Board stating that the Edgewood City School District shall cease and desist from the actions set forth in Paragraph A and shall take the Affirmative Action set forth in Paragraph B.

MENTOR EXEMPTED VILLAGE SCHOOL
DISTRICT BOARD OF EDUCATION
84-UR-12-2548

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.

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OPINION

Sheehan, Chairman:

I

The issue in the instant case arose during contract negotiations over a successor collective bargaining agreement for non-teaching classified employees who were members of the Ohio Association of Public School Education ("OAPSE") and the Mentor Exempted Village School District Board of Education ("School Board" or "Employer").

In the Spring of 1984, negotiations opened for a successor collective bargaining agreement, which ended, after approximately twenty bargaining sessions, with OAPSE declaring impasse on December 5, 1984. Subsequently, the School Board notified OAPSE verbally of its intent to issue a memorandum on the status of contract negotiations to bargaining unit members.

'Finding of Fact (F.F.) I.

The memorandum, titled "Negotiations Report" was sent directly to bargaining unit employees on December 7, 1984.¹ It contained the following introductory language:

To our employees in the classified service:

Many of you have been asking questions about the current status of negotiations. Developments that took place on Wednesday, December 4th, warrant an explanation to you. As you know, Ohio law prohibits an employer from negotiating directly with employees when they have selected representatives to bargain for them. OAPSE is, of course, your representative and we intend to continue our efforts by negotiating only with OAPSE. Please understand why we do not answer your questions individually. We have been negotiating since this past summer in an effort to reach agreement on a contract. We have reached a tentative agreement on the following issues as well as additional tentative agreements detailed elsewhere in this memorandum.

The report goes on with an explanation of the status of negotiations, listing issues on which tentative agreement had been reached, and the status of twenty (20) issues which remained unresolved. The report indicates the proposals and counterproposals made by each party without editorial comment and capsulizes the bargaining positions taken by the parties up to the declaration of impasse.²

Following the distribution of the Negotiations Report, OAPSE called a meeting of its membership on December 9, 1984. This meeting was attended by approximately 100 of the 350 members of the bargaining unit. During the meeting, OAPSE's representation strategy was attacked by unit members as a

¹F. F. 1

²F.F. 2.

result of information gained from the Negotiations Report.⁴ The chief negotiator for OAPSE testified that some members were upset that the bargaining team had not signed off on some of the issues presented in the report. He further stated that it took a long time during the meeting to convince the unit members that the union was working on their behalf, not against them.⁵

On December 13, 1984, OAPSE filed an unfair labor practice charge against the School Board alleging that the Board's issuance of the Negotiations Report constituted a violation of O.R.C. §4117.11(A)(1), (A)(5) and (A)(8). A complaint was subsequently issued and a hearing conducted on November 23, 1987.

II

The issue in this case is whether the School Board's distribution of a Negotiations Report to bargaining unit members constitutes an attempt by the Board to deal directly with bargaining unit members.

III

The State Employment Relations Board agrees with the Hearing Officer's Conclusions of Law Nos. 1 and 2, but disagrees with No. 3, which found no violation of the law had occurred. For reasons adduced below, the Board finds that issuance of the Negotiations Report constitutes a violation of O.R.C. §4117.11(A)(1), (A)(5) and (A)(8).

⁴F.F. 3

⁵Transcript pp. 20-21.

IV.

In the collective bargaining process and the employer/exclusive representative relationship, the parties must be free to develop and execute their bargaining strategies and techniques that will, in their judgment, best serve to advance and/or protect their respective interests. The development of these strategies and techniques must be free from the other party's influence.

Affecting a negative reaction at the bargaining session to an offer that privately may be acceptable is a common bargaining technique. By such posturing the party hopes to advance its objectives and perhaps attain some extra benefit in the process. This posturing, however, if reported out of context to its strategic design, and especially to a union membership, has the potential of impairing the exclusive representative's effectiveness and relationship with the employees it represents.

A union's bargaining strategies and techniques can be effectively blunted if an employer, using its unique position, elects to undercut the union's exclusive representative status by going directly to the union's membership.

Although the Hearing Officer referenced Findlay City School District Board of Education, SERB 88-006 (May 31, 1988), he missed the thrust and the scope of that decision when he distinguished it from the instant case. In Findlay, supra, the Board said:

By dealing directly with the employees and circumventing their representative, the Respondent not only breached the rules and terms of the relationship, but also undercut the status of the exclusive representative, potentially impairing (the union's) relationship and effectiveness with the employees it represents. This action is inconsistent with the Respondent's duty to

bargain and interferes with the employees' basic rights to representation and collective bargaining. Therefore, it is a violation of O.R.C. §4117.11(A)(1) and (5). (Emphasis added.)

While the issue giving rise to the dispute in Findlay, supra, dealt with the Employer's direct solicitation of employee opinions, the essential element was the circumvention of the exclusive representative in the bargaining process. Findlay, supra, is clearly applicable to the case at hand. The Employer, in the instant case, chose to communicate directly with the employees, circumventing the exclusive representative, and, regardless of intent, caused dissension⁶ among the union members at a critical time in contract negotiations. In such an instance, it is not necessary to prove that the Employer deliberately tried to undermine the union's exclusive representative status. It is sufficient to know that its actions caused disruption in the union's ranks.

Comparison with the NLRB is indeed instructive and we note that the policies of free speech enunciated by the Federal Courts, and cited in case law by the hearing officer, and an employer's free-speech right to communicate his views to his employees is firmly established by the courts.⁷ This right of employers to communicate directly with employees, however, is not without limitation.

⁶F.F. No. 4.

⁷United Technologies Corporation, 274 NLRB 87, 118 LRRM 1446 (1985); Proctor and Gamble Manufacturing Co., 160 NLRB 334, 62 LRRM 1617 (1966); Adolph Coors Co., 235 NLRB 271, 98 LRRM 1539 (1978).

A caveat should be made here with regard to applying private sector law on the constitutional rights issue to the public arena. Public employers do not have constitutional rights that private employers have. "... it [political subdivision] is not entitled to rely upon the protections of the Fourteenth Amendment." Avon Lake City School District v. Limbach (1988), 35 Ohio St. 3d 122.

In NLRB v. Gissel Packing Company, 395 U.S. 575, 71 LRRM 2481 (1969),
the Court said:*

Any assessment of the precise scope of employer expressions, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in §7 and protected by §8(A)(1) and the proviso to §8(C). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a non-permanent, limited relationship between the employer, his economically dependent employee and his union agent, not the elections of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk.

Against this framework and the context of the labor relations setting in the instant case,⁹ the Respondent's contentions that it is lawful for an employer to communicate the status of negotiations and the terms of its final offer to its own employees must be rejected.

*Although Gissel, *supra*, dealt with a representation election matter and not with an issue of direct dealing, the principle of balancing the employer's free speech right with the employees' statutory rights in labor/management relations as enunciated by the Court has general applicability.

⁹The concurring opinion erroneously misinterpreted the scope of the majority opinion by stating in its last paragraph, "... we conclude, unlike the majority, that an employer's accurate, noncoercive communication to its employees of its bargaining proposals in certain circumstances may not be a violation, standing alone." (Emphasis added.) As a matter of fact, the only difference the concurring opinion makes in this paragraph, to distinguish it from the majority opinion, is the mentioning of a fact finder's report, the existence of which is not supported by the record.

OPINION
Case 84-UR-12-2548
Page 7 of 7

Regardless of the union's strategy or the employer's intent, the employer's actions, in the instant case, clearly damaged the relationship of the exclusive representative with the members it represents and placed it in a defensive bargaining position. Thus, by its actions violated O.R.C. §4117.11(A)(1), (A)(5) and (A)(8).

Davis, Vice Chairman, concurs.

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Case Number: 84-ULP-12-2548

CONCURRING OPINION

Latané, Board Member:

The issue in this case is whether the School Board's distribution of a Negotiations Report to bargaining unit members after impasse was declared constitutes an attempt by the Board to deal directly with bargaining unit members. I agree with the majority which finds that a violation has occurred, but for a different reason.

The School Board (employer or respondent) distributed a factual summary of unresolved issues after notifying OAPSE (union or complainant) verbally of its intent to issue the report several days after OAPSE declared impasse¹. OAPSE objected and told the Board that if such a report were distributed the union intended to file an unfair labor practice charge.²

The School Board argued that communication of the status of negotiations and the terms of its final offer was lawful and well supported by NLRB decisions and caselaw.³ The report included a statement that the School Board knew that it was legally prohibited from negotiating directly with employees when they had selected representatives to bargain for them and

¹Finding of Fact (F.F.) 1.

²Admissions and Stipulations 7 and 8.

³Transcript (T.) p. 60.

⁴United Technologies Corporation, 274 NLRB 87, 118 LRRM 1446 (1985);
Proctor and Gamble Manufacturing Co., 160 NLRB 334, 62 LRRM 1617 (1966);
Adolph Coors Co., 235 NLRB 271, 98 LRRM 1539 (1978), 235.

that it intended to continue its bargaining efforts by negotiating only with OAPSE⁵.

The majority states that the hearing officer erroneously distinguished Findlay City School District Bd of Ed., SERB 88-006 (5-31-88) and argues that the essential element there was the circumvention of the exclusive representative in the bargaining process. This is true. However we are not confronted with precisely the same set of issues dealt with in that case. The communication in this case was factual and did not solicit responses from employees, as was the case in Findlay nor was it found to be coercive.

In addition, although comparisons to the NLRA are instructive in some cases before SERB, the majority's reliance on NLRB v. Gissel Packing Co., 71 LRRM 2481, is misplaced, since that decision deals with employer threats during election campaigns, and not with noncoercive information disseminated to employees.

Also, the presence of §4117.21 in the Ohio collective bargaining statute cannot be ignored. This section provides that collective bargaining meetings between public employers and employee organizations are private, and not subject to public meeting requirements as mandated in O.R.C. §121.22. It is reasonable that communications about negotiations are included within this provision.

The statement in R.C. §4117.21 that "Collective bargaining meetings between public employers and employee organizations are private..." was intended to promote frank, productive collective bargaining notwithstanding the requirement of open meetings for public bodies. See R.C. §121.22. One can assume that codification of that provision was for the dual purposes of promoting productive bargaining between the parties and to protect employers from potential consequences of violating the open meetings law.

The facts of this case do not lend themselves to a broad statement of the rights of public employers to make noncoercive statements to bargaining unit members; neither does the case lend itself to stating a blanket prohibition against employers' public speech in the context of public bargaining.

It is clear in Chapter 4117 that privacy is ended in collective bargaining with publication of a factfinder's report by SERB, which is required in R.C. §4117.14. That it ends prior to such publication is evident in SERB's determination in City of Lima v. F.O.P., Lodge 21, (2 OPER 2647) that no violation occurred when the union publicized the recommendations of the factfinding panel, which were then printed in the local newspaper two days prior to city council's vote on the recommendations (and prior to the expiration of the seven day period from the date the recommendations were mailed).

There must be a balance between the General Assembly's intent to protect the privacy of collective bargaining negotiations as codified in R.C.

§4117.21 with an employer's limited right to free expression. Some allowance must be made for factual, noncoercive statements outside of negotiations after issuance of the factfinder's report if the parties are negotiating under the statute. If there is an alternative dispute resolution procedure in operation, with no provision for factfinding, another means must be devised to determine when such statements are appropriate.

However, the circumstances in this case provide no evidence that ultimate impasse had been reached and support the conclusion that the Employer's statement directly to bargaining unit members concerning contract proposals constitutes an unfair labor practice. The Employer's communication with bargaining unit members about contract proposals in circumvention of the exclusive representative and in violation of the statutory provision for privacy in collective bargaining talks undermined the union's bargaining strategy.⁶ See R.C. §4117.11(A)(5) and R.C. §4117.21. This is precisely the harm that the prohibition on direct dealing is intended to address.

Significance is attached by the complainant to the Legislature's failure to include an "employer free speech" proviso in Chapter 4117 similar to 29 USC Sec. 158(c) of the National Labor Relations Act. This provision of the federal law is merely a restatement or codification of decisional law extending First Amendment rights to employers. La Peer County General Hospital & Service Employees International Union, AFL-CIO, Hospital Employees Division of Local 79, 2 NPER 23-11049 (Mich. ERC 1980); NLRB v. Virginia Electric & Power Co., 314 US 469, 9 LRRM 405 (1941). The lack of such a provision in Chapter 4117 should not be construed as an absolute abridgement of employer rights. As to the majority's assertion that public employers do not enjoy the constitutional rights of private employers, suffice it to say, that the case it relied on dealt with the right of political subdivisions to "...assert constitutional protections regarding due course of law or due process of law against the state, its creator."

In summary, I conclude, unlike the majority, that an employer's accurate, noncoercive communication to its employees of its bargaining proposals in certain circumstances may not be a violation, standing alone. However, in the instant case, assessing the totality of the employer's conduct, it appears that the employer's actions prior to the issuance of the factfinder's report constituted, through distribution of the negotiations report, an attempt "to deal with the union through the employees, rather than the employees through the union..."⁷ That is, in this case the

⁶F.F. 3

⁷Avon Lake City School Dist. v. Limbach, 35 Ohio St. 3d 118 (1988).

⁸General Elec. Co., 150 NLRB 192, 194, 57 LRRM 1491 (1964), enf., 418 F2d 736, 72 LRRM 2530 (CA 2, 1969), cert. denied, 397 US 965, 73 LRRM 2600 (1970).

OPINION
Case 84-ULP-12-2548
Page 4 of 4

timing of the report and its effect constitute a violation of the provisions
of Chapter 4117.

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