

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SEEB OPINION 89-014

189

In the Matter of
State Employment Relations Board,

Complainant,

v.

Pickaway County Department of Human Services,

Respondent.

CASE NUMBER: 86-ULP-10-0371

ORDER
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
March 16, 1989.

On October 6, 1986, Wendy Lust (Charging Party) filed an unfair labor practice charge against the Pickaway County Department of Human Services (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)(3) by denying Ms. Lust union representation in a meeting to discuss abolishment of her position, by abolishing the part-time Income Maintenance Worker 3 position, and by laying off the employee occupying that position. The complaint then was amended to allege a violation of O.R.C. §4117.11(A)(5).

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 hearing officer's Stipulations, amends Conclusion of Law No. 3 to read: "Based on the particular facts herein, the Respondent did not violate O.R.C. §4117.11(A)(1) by its actions denying representation but did violate O.R.C. §4117.11(A)(1) by abolishing a part-time Income Maintenance Worker 3 position and laying off the employee occupying that position," and 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 the rights guaranteed in Chapter 4117 of the Revised Code with regard to abolishment of the position of part-time Income Maintenance Worker 3.

B. Take the following Affirmative Action:

1. Post for sixty (60) days in all Pickaway County Human Services buildings where the Respondent's employees work, the Notice to Employees furnished by SERB stating that the Pickaway County Human Services Department 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 part-time Income Maintenance Worker 3 position and recall Wendy Lust to this position and make her whole for all benefits which would have accrued to her had she been continuously employed since September 28, 1986 to the effective date of reinstatement.
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.

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 16th day of June, 1989.


CYNTHIA L. SPANSKI, CLERK

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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. WE WILL CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Chapter 4117 of the Revised Code with regard to abolishment of the position of part-time Income Maintenance Worker 3.

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. WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Post for sixty (60) days in all Pickaway County Human Services buildings where the Respondent's employees work, the Notice to Employees furnished by SERB stating that the Pickaway County Human Services Department 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 part-time Income Maintenance Worker 3 position and recall Wendy Lust to this position and make her whole for all benefits which would have accrued to her had she been continuously employed since September 28, 1986 to the effective date of reinstatement.

Pickaway County Department of Human Services
86-11P-10-0371

DATE _____ BY _____ TITLE _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

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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STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARDIn the Matter of
State Employment Relations Board,
Complainant,

and

Communications Workers of America,

Intervenor,

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Pickaway County Department of Human Services,

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OPINION

Davis, Vice Chairman:

I. Facts and Issues

Several issues were addressed by the hearing officer in her report. The recommendations on all but one of these issues are adopted. For the reasons that follow, the Board reverses the hearing officer on the question of whether the Pickaway County Department of Human Services ("Respondent" or "Employer") violated Ohio Revised Code ("O.R.C.") §4117.11(A)(1) by denying an employee the opportunity to have union representation at a meeting the employee had requested to discuss her impending job abolishment. In Trotwood-Madison City School District Board of Education, SERB 89-012 (May 19, 1989), this Board enunciated principles associated with the individual employee's right to union representation. The instant case, however, poses a question not raised in Trotwood-Madison: whether an employee is entitled to union representation under O.R.C. §4117.03(A)(3) when there is no exclusive representative for the relevant unit.

The facts in this action were developed by stipulation. The reader is directed to the hearing officer's report for a full compilation of those stipulations, which are incorporated herein by reference. For purposes of this opinion, the following is a capsulization of the key facts.

Pursuant to O.R.C. §4117.07, on August 20, 1986, Board agents conducted a representation election for the relevant unit of Respondent's employees. Choices on the ballot were: "Communications Workers of America" and "No

Representative." (Stipulation #5.) At the conclusion of the tally, there were sufficient challenged ballots to affect the results of the election. Thus, the outcome could not be discerned until the Board resolved the challenged ballots. The outcome of the election also was dependent upon the determination of election objections that had been filed by the Employer pursuant to Ohio Administrative Code ("O.A.C.") Rule 4117-5-10. (Stipulations #6, #7, and #11-13; Employer's Objections to Conduct Affecting Election Results, Case No. 86-REP-5-0160, filed August 29, 1986.)

While resolution of the election issues was pending, Respondent took steps to abolish the position of part-time Income Maintenance Worker 3, and on September 15, 1986, notified the employee who held that position that her job was being abolished. (Stipulation #15.) The employee then requested a meeting with management to discuss the action. She also asked that an agent of the Communications Workers of America ("CWA" or "Employee Organization") be present with her at the meeting, even though the outcome of the election had not been determined. (Stipulation #17.) Respondent refused to allow the representative to transpire if the union representative were to be present. (Stipulation #17 and #19.)

II. Discussion

A. The "Right to Representation by an Employee Organization"

In Trotwood-Madison City School District Board of Education, SERB 89-012 (May 19, 1989), this Board addressed the meaning of the "right to representation by an employee organization" as set forth in O.R.C. §4117.03(A)(3). We held that:

An employee is entitled to have an agent of the exclusive representative assist, accompany, or speak on the employee's behalf in discussions relevant to the management-employee relationship and (b) are not routine supervisory, instructional, or directory encounters.

SERB 89-012, slip opinion at page 5 (May 19, 1989). The question in the instant case requires us to examine whether this right attaches in situations where there is no exclusive representative. If the right were to apply under such circumstances, Respondent would be found to have violated the law. Certainly, a meeting to discuss an impending job abolishment falls within the elements outlined in Trotwood-Madison: it relates to

It was not until December 11, 1986, that the election issues were resolved by agreement of the parties and CWA became the exclusive representative pursuant to Board certification in accordance with O.A.C. e 4117-5-11. (Stipulation #29; Certification of Election Results, Case 86-REP-5-0160, decided December 11, 1986, issued December 19, 1986.)

employer-employee relationship and is not a routine matter. In the instant case, however, because there was no exclusive representative, we hold that the right to representation under O.R.C. §4117.03(A)(3) did not apply.²

B. Why the Right Does Not Apply

1. Consistency with Principles of the Act

On one hand, the right articulated in O.R.C. §4117.03(A)(3) is an individual right in the sense that it inures to the individual employee. On the other hand, however, this guarantee is a collective right because the union's representative role (be it of the individual employee or of the collective unit) does not properly arise until a majority of employees in an appropriate unit have selected representation as their desired manner of conducting the employer-employee relationship. Once the employees have chosen to have representation, then arise: (1) the right of the unit to be represented for collective bargaining, and (2) the right of each employee to be represented pursuant to O.R.C. §4117.03(A)(3).

Numerous rights and concepts presented by the Act have application in the absence of an exclusive representative and even in the absence of traditional union activity. For example, the right set forth in O.R.C. §4117.03(A)(2) to "engage in or whether there is other mutual aid and protection" is guaranteed regardless of whether there is an exclusive representative or whether there is other mutual aid and protection. See Cleveland City School District Board of Education, SERB 88-017, at 3-126 (October 21, 1988), and Cleveland City School District Board of Education, SERB 89-013, slip opinion at page 5 (May 19, 1989). Other rights, however, such as the right to collectively bargain and the right to "representation by an employee organization" implicitly and necessarily are conditioned upon the proper statutory designation of an employee organization as the exclusive representative of the employees.

²In addition to being beyond the scope of the right of representation set forth in O.R.C. §4117.03(A)(3), the representation sought in this instance also was beyond the realm of concerted activity protected by O.R.C. §4117.03(A)(2). The employee chose as her representative an outside union agent, not a fellow employee. The National Labor Relations Board and the federal courts have, in the past, determined that an employee in an unrepresented unit has a protected right to have a co-worker present during certain meetings with management. See, e.g., ITT Corp. v. NLRB, 719 F.2d 851, 114 LRRM 2777 (6th Circuit 1983). But see, E.I. DuPont de Nemours, 289 NLRB No. 81, 128 LRRM 1233 (1988). Such holdings are based upon the theory that the employees are engaging in concerted activity for mutual aid and protection. In the instant case, however, we need not and do not address the question of whether or when the protection of concerted action is granted in O.R.C. §4117.03(A)(2) the protection of an exclusive representative and the lack of co-worker action. The absence of an exclusive representative and the lack of co-worker action remove this matter from the scope of O.R.C. §4117.03(A)(2).

Where the employees have not elected to pursue their employment relationship through representation, application of the "right to representation" would be an affront to this foundational principle of the Act: the employees are free to choose, by a majority vote, whether they will or will not have representation. When no exclusive representative has been selected--because the employees voted to reject representation, because they never have pursued the option, or because, as here, their choice has not yet been ascertained--the insistence by one employee upon union representation would be inconsistent with the state of the employer-employee relationship. Until a union is certified as an exclusive representative, the workplace is one devoid of union representation. In such a situation, this Board cannot impose a representational relationship nor representational responsibilities upon the employees, the employer, or a union.

2. Policy Considerations

In addition to being inconsistent with the rights and restrictions of O.R.C. Chapter 4117, a right to representation by employee organizations that have no official status in relation to the workforce would establish a precedent that would invite a variety of confusing and potentially disruptive situations. Carried to the extreme, as Respondent argues in its exceptions, an employer could be required to interact with a different union for each individual employee. Respondent's Exceptions, page 7, filed February 7, 1989. The statutory goals of orderly dispute resolution and equitable collective conditions would be lost in a quagmire of private, individualized concerns.³

Moreover, one must question the efficacy of representation by non-exclusive unions. In Trotwood-Madison, supra, we cited the benefits to be derived from union representation of the individual employee. Among them were: enhanced employer-employee communication; a better informed, more effective exclusive representative; and an increased sense of workplace fairness among employees. Achievement of these productive results, however, can occur only when two factors are present: (1) the union has a commitment and obligation to the entire unit, and (2) the union and the employer conduct business as equals. Neither factor is present when an employee organization is not the exclusive representative.

3. Terminology of O.R.C. §4117.03(A)(3)

As Complainant notes, the actual wording of O.R.C. §4117.03(A)(3) establishes the right to representation "by an employee organization" rather

³Further, an employer easily could be forced into this Catch-22: by not permitting individual representation by whatever non-exclusive union an employee might choose, the employer would violate O.R.C. §4117.11(A)(1); yet, by attempting to comply with O.R.C. 4117.03(A)(3) and permitting representation by a non-exclusive union, the employer may risk violating O.R.C. §4117.11(A)(1) and (2). See City of Alliance, SERB 88-017 (October 21, 1988).

than "by an exclusive representative." However, given the foregoing statutory and policy considerations, we cannot consider the General Assembly's choice of terminology to be dispositive in this instance. The terms "employee organization" and "exclusive representative" appear throughout O.R.C. Chapter 4117. Wherever the term "exclusive representative" is used, it is clear that the Legislature intended the text to apply only to unions that have been certified or recognized as the exclusive bargaining representative for the employees in the relevant unit. See, e.g., O.R.C. §§4117.08(A), 4117.11(A)(5), and 4117.14(A) and (B).

The reverse, however, is not true. Often the term "employee organization" is used in a context for which the reference could apply only to an exclusive representative. For example, in O.R.C. §4117.04(A), both terms appear in the same sentence pertaining to the contract bar--a statutory restriction that can have effect only where there is a collective bargaining agreement with an exclusive representative. O.R.C. §4117.09(C) uses the words "employee organization" with regard to fair share fees paid pursuant to contractual provisions that arise only between exclusive representatives and employers. All provisions of O.R.C. §4117.14 deal with collective bargaining negotiations and thus could pertain only to exclusive representatives. Yet, while this section begins with precise terminology, the precision begins to slip in the middle of the section; O.R.C. §4117.14(C)(5), (6), and (D)(2) refer to "employee organization" when, of course, these paragraphs would not apply were an employee organization not the exclusive representative. This interchangeable use of the two terms appears throughout O.R.C. Chapter 4117 and illustrates that, in certain contexts, the term "employee organization" may--in fact, must--be construed as meaning "exclusive representative."

C. Conclusion

1. The Issue of Representation

For the foregoing reasons, we hold that the employee in question was not entitled to union representation. Because there was no representational right pursuant to O.R.C. §4117.07(A)(3), the employer did not violate O.R.C. §4117.11(A)(1) when it denied the employee the opportunity to have a CHA representative present at the requested meeting.

2. The Remaining Allegations

As noted at the outset of this opinion, the hearing officer addressed several other issues, including allegations of discriminatory action, refusal to bargain, and alteration of the status quo pending resolution of the representation issue. On each of these remaining issues, the Board adopts the hearing officer's recommendations, and finds that the Respondent did not discriminate in violation of O.R.C. §4117.11(A)(3); did not refuse to bargain in violation of O.R.C. §4117.11(A)(5); but did violate O.R.C. §4117.11(A)(1) by abolishing the position of part-time Income Maintenance

OPINION
Case 86-ULP-10-0371
Page 6 of 6

Worker 3 and laying off the incumbent employee when the question of representation was pending.*

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

*In its Exceptions, Respondent contends that the hearing officer erred in recommending that "a public employer has a duty to bargain with a non-certified representative." Respondent's Exceptions, filed February 7, 1989, page 15. While the Board believes that the hearing officer's recommendation on this issue is clear and that we need not develop the issue further, we take this opportunity to respond to the Respondent's characterization of the recommendation. The Board does not hold, nor do we construe the hearing officer's recommendation as suggesting, that the Respondent had a duty to bargain with a union that had not been certified as the exclusive representative. Rather, we hold that the Respondent violated the law when, without rationale or explanation, it disrupted the status quo at a time when the outcome of the representation election was in question. This is reflected by the conclusion that the Respondent violated O.R.C. §4117.11(A)(1) but not O.R.C. §4117.11(A)(5).

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