

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SEEB OPINION 89-022

In the Matter of
State Employment Relations Board,
Complainant,
v.
Tuscarawas County Engineer,
Respondent.

CASE NUMBER: 86-ULP-08-0290

ORDER
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
November 17, 1988.

On August 12, 1986, Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO and Local Union No. 3118 (Charging Party) filed an unfair labor practice charge against the Tuscarawas County Engineer (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 refusing to bargain over reinstatement of laid-off employees.

The case was directed to hearing before a Board hearing officer. The Board has reviewed the record, the hearing officer's proposed order, exceptions and response. For the reasons stated in the attached opinion, incorporated by reference, the complaint and the unfair labor practice charge are dismissed.

It is so ordered.

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

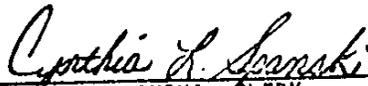
William P. Sheehan

WILLIAM P. SHEEHAN, CHAIRMAN

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You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D), by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Common Pleas Court in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party on this 30th day of August, 1989.



CYNTHIA L. SPANSKI, CLERK

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CASE NUMBER: 86-ULP-08-0290

OPINION

Sheehan, Chairman:

I.

In the instant case, the Tuscarawas County Engineer (Respondent or Employer), on or about November 22, 1985, abolished twenty-two positions in a bargaining unit represented by Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO, (Union).¹ The twenty-two employees holding these positions were laid off.²

The Union appealed the abolishment of the jobs to the State Personnel Board of Review (PBR) and on June 24, 1986, PBR disallowed the abolishment of all twenty-two positions.³ The Union, in letters to the Respondent dated July 7, 16, and 17, 1986, demanded reinstatement of the twenty-two laid-off employees.⁴

¹Stipulation of Fact No. 7.

²Stipulation of Fact No. 8.

³Stipulation of Fact No. 9.

⁴Stipulation of Fact No. 9.

On August 1, 1986, the Union formally requested the Respondent to bargain and presented a proposal regarding back pay, benefits and reinstatement for the laid-off employees.⁵

In response to this request, the Respondent declined to bargain and has continued to decline several times thereafter over reinstatement, back pay, and benefits for the employees laid off on November 22, 1986.⁶

On August 12, 1986, the Union filed an unfair labor practice charge against the Respondent alleging violations of O.R.C. §4117.11(A)(1) and (A)(5).

II.

The matter was referred to hearing and pursuant to the parties' stipulations, the case was submitted for determination upon the written pleadings of the parties. The parties waived their right to an evidentiary hearing. The hearing officer found the Respondent had committed an unfair labor practice by violating O.R.C. §4117.11(A)(1) and (A)(5) when it refused, and continues to refuse, to bargain with the Union on reinstatement of its laid-off employees.

III

The Board does not concur with the hearing officer's recommendations for the reasons adduced below

⁵Stipulation of Fact No. 10.

⁶Stipulation of Fact No. 11.

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The matter at hand does not rise to a bargaining issue. The Union selected the State Personnel Board of Review as a forum to challenge the legality of the job abolishments and the layoffs of the twenty-two employees. The Union sought a remedy and PBR provided one in disallowing the layoffs. At this point, pending any appeal, it is the obligation and duty of the Employer to respond. What is at hand, in the instant case, is simply the enforcement of the remedy imposed by the State Personnel Board of Review. The SERB is not the forum for enforcing orders of the State Personnel Board of Review.

Latané, Board Member, concurs. Davis, Vice Chairman, dissents.

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STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 89-022

In the Matter of
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Tuscarawas County Engineer,
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CASE NUMBER: 86-UWP-08-0290

DISSENTING OPINION

Davis, Vice Chairman:

I respectfully dissent from the conclusion of the majority in this action. I do, however, agree with the majority's view that this Board is not the proper forum for enforcement of Personnel Board of Review ("PBR") orders.

Compliance with PBR determinations is properly sought through a writ of mandamus in which the laid-off employees "seek to compel their employer to abide by orders of the State Personnel Board of Review disaffirming their layoffs." Bispeck v. Board of Commissioners of Trumbull County, 37 Ohio St. 3d 26, 27 523 N.E.2d 502 (1988). Because an employer's only available defense to such an action is either that it has complied with the order or that PBR abused its discretion in making its decision, the opportunity for an employer to challenge such PBR orders is quite limited. In any event, absent a reversal on mandamus, the PBR order creates a clear legal obligation on the part of the employer to reinstate the laid-off employees.

The Respondent in this action concedes that:

... once the decision to reinstate laid-off employees has been made, the subjects of back pay and back benefits would be mandatory subjects of bargaining.

Respondent's Exceptions, filed October 20, 1988, page 6 (italics deleted). With this concession, the Respondent attempts to advance the argument that the decision of whether to reinstate these employees has not yet been made, is not a subject for which bargaining is mandatory, and thus cannot form the basis of an unfair labor practice. The flaw in Respondent's argument is that the decision of whether to reinstate the employees already has been made by PBR. In disaffirming the layoffs, PBR created in the Respondent

This is not to suggest agreement with Respondent's argument that reinstatement is not a mandatory subject of bargaining. It simply is not an issue in the instant case.

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the affirmative legal duty to return the employees to their pre-abolishment, pre-layoff status. While the Respondent seems to imply that it intends to disregard its legal duty, this is not our concern. Based upon evidence in the record, the duty to reinstate exists and AFSCME, on several occasions, has sought to bargain regarding issues that spring from this duty: back pay and benefits. (Findings of Fact #9 and #10). Respondent has conceded that these are matters with regard to which they must bargain.

The situation is somewhat similar to that presented in Findlay City School Dist. Bd. of Ed., SERB 88-006 (5-13-88), in which the Board held that the question of whether to schedule a make-up day of classroom instruction was resolved by statutory obligation and, thus, was not available for bargaining. The related issue, however, of when to hold the make-up day was found to be subject to bargaining. In the instant action, the question of whether to reinstate has been resolved, not by statute, but by the proper administrative entity. With that issue having been resolved, the duty as conceded by Respondent arises.

Thus, it is not failure to comply with the PBR ruling that gives rise to the unfair labor practice herein. It is, rather, the Respondent's unlawful refusal to bargain over issues which it concedes are mandatory subjects of bargaining.

For these reasons, I would: adopt the hearing officer's recommended conclusions of law, find the Respondent to have violated O.R.C. §4117.11(A)(1) and (5), order the Respondent to bargain, and order the appropriate posting.

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