

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 90-012

In the Matter of
Fraternal Order of Police, Capitol City Lodge No. 9,
Employee Organization,
and
Franklin County Sheriff/
Franklin County Board of County Commissioners,
Employer.

CASE NUMBERS: 89-MED-09-0880
89-MED-09-0881

DIRECTIVE GRANTING MOTION IN OPPOSITION TO
JURISDICTION OF FACT FINDER
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis and Board Member Latané:
December 7, 1989.

On October 28, 1989, the Franklin County Sheriff (Employer) filed a motion in opposition to the jurisdiction of the fact finder, the Fraternal Order of Police, Capitol City Lodge No. 9 (Employee Organization) filed a answer to the motion. A response was filed by the Employer and a motion to strike the response was filed by the Employee Organization.

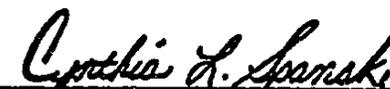
The motion to strike is denied. For the reasons stated in the attached opinion, incorporated by reference, the Board grants the motion in opposition to the jurisdiction of the fact finder.

It is so directed.

SHEEHAN, 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 18th day of July, 1990.


CYNTHIA L. SPANSKI, CLERK

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OPINION

Sheehan, Chairman:

This matter is before the Board in consideration of the "Motion In Opposition To Jurisdiction of Fact-Finder" filed by the Franklin County Sheriff Department.

I.

The issue in this case arises from events that occurred in July 1989 when the Franklin County Sheriff's Department (Employer or Sheriff) proposed a policy to drug test its employees. The Employer intended to implement this program in its workplace during the term of its two collective bargaining agreements with the Fraternal Order of Police, Capital City Lodge No. 9 (F.O.P., Employee Organization or Union).¹ Neither of these two

¹F.O.P. is the exclusive representative for two bargaining units of employees of the Franklin County Sheriff's Department. One unit consists of full-time sworn deputies below the rank of Corporal. The other unit is composed of full-time sworn deputies of the rank of Corporal and above.

collective bargaining agreements mentions drug testing. The F.O.P. states that drug testing was not discussed during contract negotiations.

The Employer's policy proposes to drug test job applicants. All employees will be routinely tested for drugs during their annual medical exam. If there is reasonable cause to believe that an employee is abusing drugs, the policy allows mandatory drug testing. Any employee who refuses to submit to a drug test will be suspended immediately and those who test positive will be subject to discipline.

In response to the Sheriff's proposed drug testing policy, the Employee Organization, on September 7, 1989, filed with SERB Notice to Negotiate. The Employee Organization requested that the Union and the Employer negotiate the proposed mid-term implementation of the drug testing policy pursuant to the statutory dispute resolution procedure in O.R.C. §4117.14.

Based upon the Union's Notices to Negotiate and since the parties had no mutually agreed-upon plan for dispute resolution, SERB followed the statutory dispute resolution procedure in O.R.C. §4117.14, appointed a mediator and later a fact finder. On October 17, 1989, at a fact finder meeting, the parties agreed to defer implementing the drug testing policy during a mutually agreed-upon extension of time for fact-finding.

On October 27, 1989, the Employer moved SERB to permanently stay fact-finding. The Employer agreed to bargain with the Employee Organization concerning the effects of the proposed drug testing policy on members of the bargaining unit. However, the Employer argued that the statutory dispute resolution procedure did not apply to these negotiations. The Employee Organization opposed the Employer's motion staying fact-finding and asserted

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that the Employer's proposed drug testing policy was a "modification of an existing collective bargaining agreement" and, thus, the dispute procedure did apply.

II.

At the outset it should be made clear that the Sheriff's drug testing program is a mandatory bargaining subject since it affects the terms and conditions of employment of the bargaining unit members. The Sheriff is required to bargain concerning the drug testing policy itself and not just the policy's effects on the terms and conditions of employment of the bargaining unit members. O.R.C. §4117.08(C), as interpreted in In re City of Lakewood, SERB 88-009 (7-11-88), aff'd. SERB v. City of Lakewood, 1988 SERB 4-141 (C.P., Cuyahoga, 12-27-88), and in Lorain City Bd. of Ed. v. State Emp. Relations Bd., 40 Ohio St. 3d 257 (1988). See also, In re Findlay City School Dist. Bd. of Ed., SERB 87-031 (12-17-87), aff'd., SERB v. Findlay City School Dist., 1988 SERB 4-54 (C.P., Hancock, 5-11-88).

III.

The issue, one of first impression, is whether the statutory dispute resolution procedure in O.R.C. §4117.14 applies in the resolution of a mid-term bargaining dispute.²

The Ohio law establishes procedures to settle disputes between public employers and unions over the terms of an initial contract, a successor

²A change is not allowed in any term or condition of employment contained in a collective bargaining agreement during the contract's term unless the parties mutually agree to the alteration. O.R.C. 4117.14(B)(3).

The procedure ensures that neither party will be able to unilaterally implement its own proposal. It guarantees that if safety forces can not reach agreement with their public employer after negotiations, mediation, and fact-finding, then the parties must go to binding conciliation. O.R.C. §4117.14(D)(2). If the employees are non-safety forces, then the employees may strike after either side rejects the fact-finder's recommendations. Thus, the resolution procedure provides for finality and ensures that neither party bears disproportionate costs for failing to agree on a proposal.

The major difficulty with applying this procedure to mid-term disputes is that pursuant to O.R.C. §4117.18(C) no public employee is allowed to strike mid-term. Should the fact-finder's mid-term recommendations be rejected, there is no mechanism to establish what the settlement should be. Furthermore, the only effective tool non-safety forces have as the final step in a dispute resolution procedure is the strike which cannot be utilized in mid-term contract period under O.R.C. §4117.18(C).³ Thus, the procedure's element of finality and its design that no one party bears a disproportionate cost for failure to agree would be undercut by its application at mid-term.

³In Carlisle Local Board of Education, SERB 87-025 (11-10-87), SERB carved an exception to O.R.C. §4117.18(C) in regard to contract reopeners. The policy behind it was to protect reopeners which are exceedingly important contributors to the stability of labor relations. The legal construction behind it was a contractual agreement by both parties that on the issue of reopener the contract ended at the specific date. None of these two factors exist here.

Moreover, the statute imposes no restrictions on the number of issues which may be raised once a notice to negotiate is served. Either party would be free to introduce any bargainable issue, not just the one giving rise to the dispute. This hardly promotes an orderly and constructive relationship, since the negotiated provisions of any agreement would perdure only to the first dispute.

Finally, applying the statutory resolution procedure to a mid-term dispute unduly complicates the Employer's and the Employee Organization's relationship. Such an application could result in a profusion of litigations and serve only to interfere with the parties' ordered relations during the contract term.

In summary, the application of the statutory dispute resolution procedure for mid-term disputes is unworkable for at least three reasons because it:

- 1) cannot be applied uniformly for all bargaining units.
- 2) imposes no restrictions on the number of issues which can be raised once a notice to negotiate is served.
- 3) unduly complicates the bargaining relationship between the Employer and the Employee Organization.

For these reasons, the Board finds the language of O.R.C. Chapter 4117 establishes that the statutory dispute resolution procedure only applies to a "modification" requested at the end of a contract term and holds no application for mid-term disputes. Therefore, the Employer's motion in opposition to the jurisdiction of the fact finder is granted. The question still remains on how to handle mid-term disputes if the statutory procedure

of O.R.C. §4117.17 does not apply. How other jurisdictions handle mid-term disputes has not been very useful or enlightening for our purposes here. The full gamut has been run from holding that terms and conditions of employment can never be altered during the life of the collective bargaining agreement to permitting Employers to make unilateral changes following a period of attempted negotiations. The Board recognizes and is sensitive to the problems posed by mid-term disputes, particularly in the absence of an established procedure for settlement. Issues, unanticipated during negotiations, can and will arise in the course of a contract's term, which may warrant changes in policies and/or administrative practices. Some of these issues will be crucial and demand accommodation. How these accommodations are accomplished can be the difference between an early and amicable resolution, or protracted and costly litigation placing undue stress on the parties' bargaining relationship. In the absence of a settlement procedure, the Board will deal with specific incidents on a case-by-case basis. A word of caution, however, is appropriate here. Without a settlement procedure, the prospect for manipulative and abusive tactics by either party is possible. It is only fair to forewarn that such tactics will not be favorably viewed by this Board. An employee organization will not succeed in deliberately blocking necessary changes nor will an Employer be allowed to unilaterally implement changes that could have, and should have, been bargained at the most recent contract negotiations, or delayed until the next one. The rights of both parties must be carefully and judiciously balanced. Because there is no statutory remedy at hand and because of our concerns for good faith, on-going

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Sheehan, Chairman:

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contract or a contract termination. O.R.C. §4117.14. According to O.R.C. §4117.14(B)(1) and (2), if a party wishes to negotiate a new contract, a successor contract, or terminate the contract, the party must notify the other party of its intentions. If negotiating a first contract, the party must notify the other party of its intention and offer to meet with that party for a period of 90 days to negotiate a contract. O.R.C. §4117.14(B)(2). For a successor bargaining agreement, a party must notify the other party of its intention to negotiate no later than 60 days prior to the expiration date of the contract. O.R.C. §4117.14(B)(1)(a).

The parties can establish their own mutually-agreed upon resolution procedure and submit their disputes to this procedure at any time. O.R.C. §4117.14(C) and (E). Between the notification to negotiate and 45 days before the contract expires, the parties must negotiate and attempt to reach an agreement on the contract. If an impasse exists, or 45 days before the contract expires agreement has not been reached, SERB must appoint a mediator. O.R.C. 4117.14(C)(2). If the mediator is unsuccessful in settling the dispute, SERB shall appoint a fact-finding panel of members who have been selected by the parties. This panel must issue a report and recommendations on the unresolved issues within two weeks (assuming there are no mutually agreed to time extensions). O.R.C. 4117.14(C)(3)-(5). The parties then vote on the recommendations within seven days, and, if a party rejects them, SERB immediately publishes the fact-finder's report and recommendations. O.R.C. 4117.14(C)(6). Seven days after publication non-safety forces may strike, after complying with the 10-day strike notice requirement. Safety forces must submit to binding conciliation. O.R.C. 4117.14(D)(1) and (2).

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bargaining, the Board recommends for the parties the adoption of procedures especially designed to deal with mid-term disputes.

Latané, Board Member, concurs.

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