

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 90-020

In the Matter of
Fraternal Order of Police, Ohio Labor Council, Inc.,
Rival Employee Organization,
and
Ohio Council 8, American Federation of State, County
and Municipal Employees, AFL-CIO,
Incumbent Employee Organization,
and
City of Columbus,
Employer.

CASE NUMBERS: 89-REP-12-0270
89-REP-12-0271

DIRECTIVE REMANDING CASE TO HEARING
(Opinion attached.)

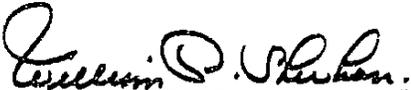
Before Chairman Sheehan, Vice Chairman Brundige, and Board Member Pottenger: November 1, 1990.

On December 29, 1989, the Fraternal Order of Police, Ohio Labor Council, Inc. (Rival Employee Organization) filed Petitions for Representation Election seeking exclusive representation of certain employees of the City of Columbus (Employer). Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO (Incumbent Employee Organization) filed a Motion to Intervene. The Board granted this motion on May 17, 1990 and directed the instant cases to hearing to determine the representation issues involved.

The Board has reviewed the record, the hearing officer's recommended determination, exceptions and response. For the reasons stated in the attached opinion, incorporated by reference, the Board remands the above-cited cases to hearing for a determination on the merits.

It is so directed.

SHEEHAN, Chairman, BRUNDIGE, Vice Chairman, and POTTENGER, Board Member, concur.


WILLIAM P. SHEEHAN, CHAIRMAN

34

DIRECTIVE

Case Nos. 89-REP-12-0270 & 89-REP-12-0271

November 1, 1990

Page 2 of 2

I certify that this document was filed and a copy served upon each party
on this 13th day of December, 1990.

Cynthia L. Spanski

CYNTHIA L. SPANSKI, CLERK

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OPINION

Brundige, Vice Chairperson:

The Board's opinion, in this instance, arises from the filing of a Petition for Representation Election in each of the aforementioned cases by a rival employee organization, the Fraternal Order of Police (FOP). The purpose of the filings was to carve a group of approximately 150 employees out of Ohio Council 8's (OC8), the incumbent employee organization, deemed-certified unit of approximately 3,000 employees. The two cases were consolidated after a preliminary investigation and directed to hearing to determine whether an actual question of representation existed.

In preparation for this hearing, on June 8, 1990, a standard form - Notice of Hearing and Prehearing Order - was issued to the parties. This order, directed by the Board and signed by the Clerk, is a general form which is not necessarily tailored to each individual case. To overcome that, this standard form states in the relevant part:

The Hearing Officer may order the parties to take additional or alternative prehearing measures to narrow the issues in the case. If a party fails to timely file its prehearing statement or if the parties fail to comply with an order of the Hearing Officer, the Hearing Officer may limit the witnesses or issues to be tried at hearing or otherwise enter such order as is appropriate under the circumstances or which due process may require.

Thus, the hearing officer in this case issued a prehearing order on the same day, June 8, 1990, with her own requirements in lieu of the prehearing statements in the general standard form. The hearing officer's prehearing order stated in the relevant part:

The parties shall file their Prehearing Statements with this Hearing Officer by July 9, 1990. The parties shall also file a signed copy of the Stipulations of Fact by July 9, 1990, along with the Exhibit Directory and all Exhibits.

Failure to comply with any requirements of this Order can result in cancellation of the hearing, dismissal of the petition, default or other appropriate sanctions.

Neither party totally complied. However, the hearing officer found that the FOP failed to substantially comply with both the general form order as well as the hearing officer's specific order. She found the City to be in "substantial" compliance. As a result, the hearing officer issued on July 12, 1990, a Hearing Officer's Prehearing Order imposing sanctions upon the FOP for its failure to comply. This July 12 order stated in relevant part:

Given these circumstances, I hereby invoke my authority and discretion to impose appropriate sanctions upon the FOP. The Hearing Officer's Prehearing Order required that potential witnesses be identified and that potential exhibits be exchanged. The FOP did neither--accordingly, I hereby limit its presentation to,

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at most, the testimonial evidence of rebuttal witnesses, and I will not allow the introduction of any documentary evidence, absent a showing that it did not exist as of July 11, 1990.

On the same day of the issuance of these sanctions, July 12, 1990, the FOP filed its prehearing statement. On July 17, 1990, the hearing officer issued another prehearing order striking the FOP's prehearing statement as untimely and inappropriate.

At the hearing, OCB and the City declined to put on any case and thus, the FOP, which pursuant to the hearing officer was allowed only rebuttal testimony, was not allowed any witnesses but was allowed to proffer. The hearing officer ruled that the FOP had not met its burden of proof as established in In re University of Cincinnati, SERB 85-054 (10-5-85) and recommended that the case be dismissed.

The FOP filed objections to both the Hearing Officer's Prehearing Orders arguing that both were too harsh, that none of the parties had "clean hands" and that the sanctions imposed stemmed from anger rather than any real justification. OCB and the City, on the other hand, argued that the Prehearing Orders were reasonable and justified.

The Board has reviewed the case and is remanding it to the hearing officer for determination on the merits. The reason for this opinion is to explain the Board's rationale for this action.

There is no question, in this case, that Petitioner failed to substantially comply with the hearing officer's prehearing order and came unprepared to the prehearing conference. This seemingly indifference to the prehearing order and the Board's procedures invited the sanction.

Ordinarily the sanction would stand because hearing officers are vested with significant discretionary authority, and the Board reaffirms its faith in the hearing officer's judgment and its support of this discretionary delegation. Only rarely, when facts warrant, will a remand be ordered.

In reviewing the record in the instant case, the Board recognized that less than clear signals were given on matters of preparation and sanctions. The lack of clarity was sufficient enough to raise doubts as to whether the full implication of the order was understood by the offending party. For instance, the use of the verb "can" followed by four options leaves room for honest doubt. Moreover, the options are listed without any clue whether there is a progression of penalty or whether the level and/or option is determined by whim. The imposition of sanctions resulting in default is essentially an act of last resort. Before such measure is taken, a clear and unambiguous notice must precede it. This was not done in the case at issue.

Further, the use of discretion leading to sanctions or default:

- * must be done to facilitate the process and for no other reason;
- * must be evenhandedly applied; and
- * must have a legitimate purpose and be grounded in reasonableness.

In the instant case, it is not clear that these principles were observed before the sanctions were imposed.

For these reasons the case is remanded for a hearing on its merits.

It is worth noting at this point that it is the Board's responsibility to assure that an abuse of discretion will not stand and that sanctions will not be imposed against a party arbitrarily or capriciously, or without a

clear warning beforehand. The parties should also note that this opinion should not be construed as granting license to disregard clear and unambiguous orders of a hearing officer. Nothing less than full compliance is expected.

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

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40