

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 90-021

In the Matter of
State Employment Relations Board,
Complainant,

v.

Groveport-Madison Local School District
Board of Education,

Respondent.

CASE NUMBERS: 89-ULP-01-0005
89-ULP-02-0084
89-ULP-02-0085
89-ULP-02-0086
89-ULP-04-0221

ORDER
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Brundige and Board Member Pottenger: November 15, 1990.

In January, February and April of 1989, the Groveport-Madison Local Education Association (Charging Party) filed five unfair labor practice charges against the Groveport Madison Local 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 unfair labor practices had been committed and consolidated the cases for hearing. Subsequently, a complaint was issued alleging that the Respondent had violated O.R.C. §4117.11(A)(1), (A)(3), (A)(4) and (A)(7) by failing to compensate bargaining unit members for duties performed if they participated in protected activities.

The case was heard by a Board hearing officer. The Board has reviewed the record, the hearing officer's proposed order, exceptions, cross exceptions and responses. For the reasons stated in the attached opinion, incorporated by reference, the Board amends Conclusion of Law No. 6 to read: "Respondent did violate R.C. §4117.11(A)(3) by its actions of refusing to compensate all striking teachers for the periods worked on January 18 and January 19, 1989."; adds to Recommendation 2(A)(1): "... and by refusing to compensate all striking teachers for the periods worked on January 18 and January 19, 1989."; adds a new Recommendation 2(B)(3) to read: "Properly compensate all striking teachers for the periods worked on January 18 and January 19, 1989."; rennumbers former Recommendation 2(B)(3) to become 2(B)(4) and adopts the Stipulations, Admissions, Findings of Fact, Conclusions of Law as amended and the Recommendations as amended. The Respondent is ordered to:

A. Cease and desist from:

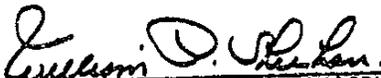
- (1) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Chapter 4117 of the Revised Code by cancelling all extracurricular activities of striking teachers and refusing to compensate teachers subpoenaed to the unauthorized strike hearing on January 19, 1989, and by refusing to compensate all striking teachers for the periods worked on January 18 and 19, 1989.
- (2) Discriminating in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117 of the Revised Code.
- (3) Locking out or otherwise preventing employees from performing their regularly assigned duties where an object thereof is to bring pressure on the employees or an employee organization to compromise or capitulate to the Employer's terms regarding a labor relations dispute.

B. Take the following affirmative action:

- (1) Post for sixty (60) days in the usual and normal posting locations where the bargaining unit employees work, the Notice to Employees furnished by the Board stating that the Groveport-Madison Local School District Board of Education shall cease and desist from the actions set forth in paragraph A and shall take the affirmative actions set forth in paragraph B.
- (2) Properly compensate the teachers who were subpoenaed on January 19, 1989 for the periods set forth in the strike notice which they would have been working absent a valid subpoena issued by the Board.
- (3) Properly compensate all striking teachers for the periods worked on January 18 and January 19, 1989.
- (4) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the issuance of the ORDER of the steps that have been taken to comply therewith.

It is so ordered.

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


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 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 18th day of December, 1990.

Cynthia L. Spanski
CYNTHIA L. SPANSKI, CLERK

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OPINION

Pottenger, Board Member:

On January 6, 1989, the Groveport-Madison Local Education Association (Association) notified the Groveport-Madison Local School District Board of Education (Employer or Board of Education) of its intent to strike. The Notice informed the Employer that the Association intended to "abstain in part from the full, faithful and proper performance of the duties of employment." This abstention involved time periods of the school day when the teachers would strike at different schools in the district. As stated in the SERB opinion on the determination of the authorization of the strike, "[a]t all other times of the normal school day, the teachers would pursue their regular assignments." In re Groveport Madison Local School Dist. Bd. of Ed., SERB 89-002, (1-27-89). Although the strike technically complied with the statutory requirements for strikes, the Board held that the "legislative control objectives" implicit in the strike provisions of the Ohio Statute were violated by the intermittent strike. Id. at 3-9.

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When the Association's employees received their paychecks for the pay period during which the employees had engaged in the intermittent strike action, they discovered that the Employer had not compensated the employees for work that was actually performed. The Association, thereafter, filed a charge alleging that the Board of Education violated O.R.C. §4117.11(A)(1) and (3) for failure to compensate the employees for the time worked.

There are two issues before the Board:

- I. Whether the Groveport-Madison classroom teaching employees were engaged in a strike as that term is defined in O.R.C. §4117.01(H) when they were performing their teaching duties during the time the partial strike was on.
- II. Did the employer commit an unfair labor practice by refusing to pay the teachers for the time they worked during the partial strike when this strike was determined by the Board to be unauthorized?

I.

The Board of Education relied on O.R.C. §4117.15(C) for its argument that the employees are entitled to no pay for work actually performed on January 18 and 19, the days the strike was in effect and prior to the determination by SERB that the strike was unauthorized. That section states that "[n]o public employee is entitled to pay or compensation from the public employer for the period engaged in any strike." Emphasizing that no employee can be paid for the period of any strike, the Employer argued that the employees could not be paid for engaging in a partial withholding of services. The Employer believes that the employees were engaged in a strike for the entire day on both January 18 and 19, notwithstanding the actual work performed, and should not be paid for those days. It would thus interpret the "strike period" referenced in O.R.C. §4117.15(C) as including

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both the period the employee is at work as well as the period after the employee has left the premises and refrained from working.

The Association, on the other hand, interprets the "strike period" as including only those periods when the employees were refusing to perform their duties, and would exclude the time spent actually performing work duties. The Hearing Officer found that it is axiomatic that one cannot be striking at the same time one is engaged in the full, faithful and proper performance of the duties of employment and thus, that §4117.15(C) when applied to intermittent strikes does not bar compensation for the period the employees worked. The Board agrees.

In O.R.C. §4117.01(H) the Ohio Legislature included in the definition of a strike partial strikes or intermittent strikes as they are sometimes referred to. Since all strikes, and especially partial strikes, are by their nature disruptive and designed to cause inconvenience, this Board adopted, with regard to all strikes, the policy of balancing the right to strike with the inherent legislative control objectives. In re Beaver Local School Dist. Bd. of Ed., SERB 90-002 (1-26-90); Groveport-Madison Local School Dist. Bd. of Ed., SERB 89-002 (1-27-89); Ft. Frye Local School Dist., SERB 87-021 (11-5-87).

In a situation of an authorized partial strike the implementation of the above-mentioned balancing policy is part and parcel of treating the working part of the partial strike as a normal work time, and not as part of the striking period. The Board opinion in Beaver Local, supra, illustrates this position clearly. In re Beaver Local, one of the issues was whether an alleged misconduct of certain teachers, which occurred in the classroom or

on the premises during the period of the partial strike, was relevant to the determination of an unauthorized strike. The Board answered in the negative and reasoned that when teachers, during the working part of a partial strike, are on the premises and performing their usual and customary duties, all reasonable rules and regulations governing their conduct which were in place prior to the strike are still in force. The strike has changed nothing in this aspect. The Board continued by saying: "If certain teachers' conduct is violative of their rules while performing their normal work related activity, then the enforcement of those rules and regulations are at the discretion of the Employer and not a function of this Board." Id. at 3-4.

Thus, balancing the right to strike with the inherent legislative control objectives dictates that in a partial strike situation, the working periods are normal work time and governed by the rules and regulations of normal work activities and its enforcement is at the discretion of the employer. To do otherwise will create complete chaos and an utter lack of control. This determination, that the work periods of a partial strike constitute normal work activities in which the employees are expected to perform their duties of employment fully and faithfully and to be subject to all the normal rules and regulations, mandates that the employees are entitled to receive their full and regular compensation for these working periods. For one's regular work one gets one's regular pay.

II.

The Hearing Officer, however, concluded that SERB could provide no relief for the employees because their conduct was "unprotected activity"

and could not be the basis of an unfair labor practice. The Board does not agree with this conclusion. The Board finds that the Employer's refusal to compensate the striking employees for the time they worked was an act of discrimination for exercising rights guaranteed in O.R.C. 4117 and is a violation of O.R.C. §4117.11(A)(1) and (A)(3).

In reaching the conclusion that unauthorized but "legal" strike activity is unprotected, the Hearing Officer relied on case law interpreting the National Labor Relations Act (NLRA) that held that improper strike activity, even if legal, was unprotected under that Act.

There are, however, fundamental differences between the NLRA and the Ohio statute governing the strike at issue here which lead to a different result.

Particularly pertinent to the case at issue is O.R.C. §4117.23, governing the procedure for determining whether a strike is unauthorized and the penalties and remedies available for such strikes. This section is unique to our law and has no parallel in the NLRA. A careful analysis of O.R.C. §4117.23 shows that the Legislature intended to treat the short period, no more than 72 hours of an unauthorized strike between its inception and the Board's determination, as "protected" activity to be regulated by and under the jurisdiction of SERB. Section 4117.23(B) provides penalties that can be imposed by the Employer on its striking employees. However, the statute specifically states that the sanctions and penalties are applicable to those employees who continue to strike after SERB declared the strike unauthorized and after they received a one-day notice from the Employer to that effect. These sanctions and penalties include removal and suspension, as well as wage deduction.

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This is a clear case where "expressio unius est exclusio alterius": the existence of these express, specific regulated procedures strongly implies the exclusion of others.

In other words, penalties and sanctions can be imposed on employees who continue to strike after SERB declared the strike unauthorized, but not on employees who return to work following the Board's ruling (subject to a limited exception to be discussed later). The finding by SERB that a strike is unauthorized can be compared to an injunction enjoining the employees from continuing to engage in a strike. The sanctions and penalties are for the violation of the injunction, which means that they are prospective in nature.

Support for this approach can be found in the last paragraph of §4117.23 which sets out the one limited exception to the rule of prospective penalties and, thus, emphasizes the rule in all other situations:

Notwithstanding the provision in this section that authorizes certain penalties to commence one day after a public employee is notified that the board has determined the employee is engaged in an unauthorized strike, the board may authorize the public employer, if the public employer requests it, to impose the penalties contained in this section retroactive to the date the unauthorized strike commences.

Thus, the only way for an employer to impose retroactive penalties on its employees for the period they were involved in a strike prior to the Board's unauthorized strike determination is to request SERB to authorize such retroactive penalties.

To the extent that without first requesting SERB authorization no penalties can be imposed on striking employees for the period before SERB declared the strike unauthorized, the strike for that very short and limited

period is "protected." In the case at issue, the refusal of the Employer to compensate the striking employees for the time they worked during the partial strike was nothing but a penalty for their strike activity during the period before SERB declared the strike unauthorized. Since the Employer neither requested nor got authorization for such retroactive penalties, the imposition of these penalties in regard to protected activity is an unfair labor practice.

For all of the above, we find that the Groveport Madison Local School District Board of Education violated O.R.C. §4117.11(A)(1) and (A)(3) by failing to compensate the bargaining unit members for time they were performing their teaching duties on January 18 and 19, 1989.

Sheehan, Chairman, and Brundige, Vice Chairperson, concur.

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