

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of  
State Employment Relations Board,  
Complainant,

v.

City of Cincinnati,  
Respondent.

CASE NUMBER: 90-ULP-01-0064

ORDER  
(Opinion attached.)

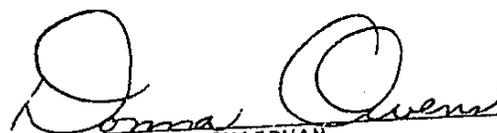
Before Chairman Owens, Vice Chairman Pottenger and Board Member Sheehan: March 21, 1991.

On January 30, 1990, Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO (Charging Party) filed an unfair labor practice charge against the City of Cincinnati (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)(5) and (A)(6) by refusing to bargain over the change in scheduled work hours.

The case was heard by 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 Board amends Conclusion of Law No. 4 to read, "The underlying unfair labor practice charge in this matter was untimely filed pursuant to O.R.C. §4117.12(B)."; deletes Conclusions of Law Nos. 5 and 6; amends Recommendation No. 2 to read, "The complaint is dismissed and the unfair labor practice charge is dismissed." and adopts the hearing officer's Statement of the Case, Findings of Fact, and the Conclusions of Law and Recommendations as amended. The complaint is dismissed and the unfair labor practice charge is dismissed as untimely filed.

It is so ordered.

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

  
DONNA OWENS, CHAIRMAN

Order  
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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 by certified mail on this 7<sup>th</sup> day of June, 1991.

Cynthia L. Spanski  
CYNTHIA L. SPANSKI, CLERK

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OPINION

Owens, Chairman.

On January 30, 1990, Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO (Charging Party or OC 8) filed an unfair labor practice charge against the City of Cincinnati (Respondent or City) alleging that the Respondent violated Ohio Revised Code (O.R.C.) §4117.11(A)(5) and (A)(6) by unilaterally changing the hours of work at the Municipal Garage from 6:00 a.m.-2:30 p.m. to 7:30 a.m.-4:00 p.m. on October 30, 1989.

For the reasons stated below the Board finds that the January 30, 1990, filing of the unfair labor practice charge was untimely pursuant to O.R.C. §4117.12(B) and Ohio Administrative Code (O.A.C.) Rule 4117-7-01(A) and dismisses the complaint and the charge.

O.R.C. §4117.12(B) provides for a ninety-day statutory period to file an unfair labor practice charge. O.A.C. Rule 4117-7-01(A) provides in pertinent part:

A charge that an unfair labor practice has been or is being committed may be filed by any person. Such charge shall be filed with the Board within 90 days after the alleged unfair labor practice was committed....

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In re City of Barberton, SERB 88-008 (7-50-88); opinion upheld, SERB v. City of Barberton, 1990 SERB 4-46 (CP, Summit, 7-31-90), SERB determined the point in time in which the ninety-day period starts running:

To begin rolling of the ninety-day period, two conditions must be present. The first is the acquired knowledge, or constructive knowledge, by the Charging Party of the alleged unfair labor practice which is the subject of the charge. The second is the occurrence of actual damage to the Charging Party resulting from the alleged unfair labor practice.

October 30, 1989, is clearly the point in time when the actual damage to the Charging Party resulting from the alleged unfair labor practice occurred, since on this date the actual implementation of the unilateral change of working hours in the city garage took place. The hearing officer, though, determined that the second condition to begin the running of the ninety-day period, the acquired or constructive knowledge, had not occurred until November 1, 1989. We disagree. Constructive knowledge had occurred on October 30, 1989, the day of the actual change of working hours. Constructive knowledge is knowledge of a fact imputed by law to a person (although he or she may not actually have it) because that person could have discovered the fact by proper diligence and the person's situation was such as to cast upon that person the duty of inquiring into it. The Lulu, 77 U.S. 192, 19 L. Ed.. 906 (1869); Baltimore v. Whittington 78 Md. 231, 27 A 984 (1893).

In the case at issue, rumors that the City was considering changing the working hours at the garage "soon" began to circulate around the garage prior to mid-October 1989. Staab, an employee in the city garage, contacted Rachford, the president of Local 190 (Local), and told him about the

rumors. The president of Local 190 advised Staab that it was best not to take action unless and until the City actually implemented the change.<sup>1</sup>

Staab and another employee - Heck - were notified by Assistant Superintendent Hesse on October 24, 1989, in a telephone conversation that their hours would be changed beginning on Monday, October 30, 1989. A memorandum dated October 12 was circulated among the employees of the city garage regarding the impending change of hours and was received by Staab and Heck sometime after the October 24, 1989, telephone call.<sup>2</sup>

On Wednesday, November 1, 1989, Rachford, the President of Local 190, telephoned Staab asking whether the hours had, in fact, changed at the garage. A grievance was filed on that day.<sup>3</sup> The representative of OC 8, who is the one who decides whether to file an unfair labor practice charge, received a copy of the grievance on November 17, 1989, and this was the first actual notice OC 8 had of the unilateral change of hours by the City in the garage.<sup>4</sup>

The facts of the case show that, as far as actual knowledge is concerned, the employees knew on October 24 that the due date of the change in working hours was going to be October 30, 1989, and they knew for sure on October 30 when the change took place. The Local president had actual knowledge on November 1 when he called Staab to find out. The OC 8

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<sup>1</sup>Finding of Fact (FF) No. 3.

<sup>2</sup>FF No. 4.

<sup>3</sup>FF No. 6.

<sup>4</sup>FF Nos. 7 and 8.

representative had actual knowledge on November 17, 1989, when he received the grievance.

The question though is not when actual knowledge occurred, but when constructive knowl dge occurred. The employees in the garage knew what was coming a week in advance. Rachford, the President of Local 190, was alerted to the upcoming changes in hours. He is a full-time employee of the City and works in another area of the Municipal Garage located a short distance away. Thus, with very little effort and a little diligence, Rachford could easily find out what happens on a moments notice. Rachford's advice to Staab that it is best not to take action until the City makes the change was sound advice, but the employees should have also been advised to report to Rachford immediately once a change takes place. The same instructions should have been given to the Local staff with regard to notification procedures to the office of OC 8 which is responsible for filing unfair labor practice charges.

Union officials have the duty to exercise proper diligence to find out about violations since there are always statutes of limitations, deadlines, contractual time lines and the like which have to be met. With an adequate communication system it should have been quite easy for both the Local union officials as well as the OC 8 staff, in the circumstances of this case, to find out about the change in hours on the same day it took place. Thus, since they had the duty to inquire and with proper diligence could have discovered the change of hours on the same day it occurred, the union officials should have known about the change on October 30, 1989, and thus had constructive knowledge on that day. Thus, the two Barberton conditions

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- the occurrences of the "act" itself as well as the constructive knowledge
- were met on October 30, 1989.

In Cincinnati Metropolitan Housing Authority v. SERB, 53 Ohio St. 3d, 221 (1990); SERB 4-65 (1990), the Ohio Supreme Court held that for an unfair labor practice charge to be timely it must be filed within ninety days of the action.

A statute of limitations begins to run when an unlawful act occurs, not upon advance notice of the act. (Id. at 4-70.)

Applying the Supreme Court analysis to our case for purposes of computation, the event or act triggering the running of the 90-day statute of limitations in unfair labor practice cases is the occurrence of the act and not the filing of the charge. Thus, once the date when the two Barberton conditions are met is established, it will constitute the "day of the act, event, or occurrence" in O.A.C. Rule 4117-1-03(A) and the counting will go forward. In our case the date is October 30, 1989. Using October 31, 1989, as day one in the rule and counting forward, day ninety is January 28, 1990, which is Sunday. Thus, according to O.A.C. Rule 4117-1-03(A) Monday, January 29, 1990, is the last day in the 90-day period of the statute of limitations.

The unfair labor practice charge was filed on January 30, 1990, and thus was untimely and, consequently, the complaint and charge is dismissed.