

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,
v.
City of South Euclid,
Respondent.

CASE NUMBER: 89-ULP-12-0700

ORDER
(Opinion attached.)

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

On December 18, 1989, the South Euclid Fire Fighters Association, Local 1065 of the International Association of Fire Fighters (Charging Party) filed an unfair labor practice charge against the City of South Euclid (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 a change in the sick leave policy.

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 adopts the Admissions, Stipulations, Findings of Fact, Conclusions of Law and Recommendations of the hearing officer.

The complaint is dismissed and the unfair labor practice charge is dismissed.

It is so ordered.

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


DONNA OWENS, 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 7th day of June, 1991.

Cynthia L. Spanski
CYNTHIA L. SPANSKI, CLERK

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SERB OPINION 91-004

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OPINION

Owens, Chairman:

On the evening of September 11, 1989, the South Euclid City (Respondent) Council passed Ordinance No. 26-89 implementing the policy regarding sick leave. On December 18, 1989, the South Euclid Fire Fighters Association, Local 1065 of the IAFF filed an unfair labor practice charge alleging that the Respondent unilaterally changed the sick leave policy in violation of the Ohio Revised Code (O.R.C.) §4117.11(A)(1) and (A)(5).

The hearing officer found that the charge was untimely. We agree.

In re City of Barberton, SERB 88-008 (7-5-88); opinion upheld, SERB v. City of Barberton, 1990 SERB 4-46 (CP, Summit, 7-31-90), SERB held that two conditions must be present to begin the statutory ninety-day period 1) the charging party knows or has constructive knowledge of the violation and 2) actual damage to the charging party is caused by the alleged violation. Support for the second condition can be found in Cincinnati Metropolitan Housing Auth. v. SERB, 53 OS (3d) 221, 1990 SERB 4-67 (1990), (CMHA) where the Ohio Supreme Court stated that what counts is not advance notice of the alleged unlawful act, but the occurrence of the unlawful act itself.

The Complainant argued in the instant case that even though the Ordinance at issue passed on September 11, 1989, the Barberton elements had not been met until November 7, 1989. The Ordinance, at issue, implemented a sick leave policy according to which employees who have exceeded four days of absence are obligated to provide documentation verifying illness or injury prior to approval of sick leave pay. From January 1, 1989, to September 11, 1989, no fire department employee had exceeded the four days of absence without submitting the medical documentation required by the Ordinance. Therefore, according to the Complainant, when the Ordinance was enacted on September 11, 1989, it was not injurious to any bargaining unit member at that time. It was not until November 7, 1989, that bargaining unit members were notified about having to provide the necessary documentation, pursuant to the Ordinance.

Hence, argues the Complainant, actual damage pursuant to Barberton occurred no earlier than November 7, 1989, and, thus, the filing of the unfair labor practice charge on December 18, 1989, was timely.

We disagree. An ordinance is different from the garden variety of promises, threats and various kinds of decisions which constitute "advance notice" and not actual damage. Passing an ordinance is the occurrence of the act and not the advance notice of the act, to use the Ohio Supreme Court language in CMHA, supra, or the "actual damage" language to use Barberton's words. Promises, threats, announcements and various formal or informal decisions constitute, in most cases, "advance notice" which does not trigger the ninety-day statute of limitation. The reason is that no harm has been done yet and at present things are as they were. Moreover, promises and threats may easily be forgotten and decisions can be undone. Thus, there is

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really no cause of action to litigate something that has not happened and might never happen.

However, in the case of an ordinance, the situation is very different. An ordinance, like a statute, is the law. The minute an ordinance is enacted the "actual damage" is done. Unlike the other situations mentioned above, there are no expectations or possibilities that the subject of the ordinance will not be implemented. On the contrary, passing an ordinance changes the status of affairs and creates a new situation where the subject matter of the ordinance is actually in effect. This is the act itself and not an "advance notice."

The second condition in Barberton, the knowledge or constructive knowledge of the violation, is also fulfilled at the time an ordinance is passed. When an ordinance is enacted, constructive knowledge of its content is acquired. That is because ordinances passed in regular and public meetings are, like the law, presumed to be known.

To conclude, in the case at issue because an ordinance is involved, the point in time where the ninety-day statute of limitations started running is the day the Ordinance passed, which is September 11, 1989. Thus, the filing of the charge on December 18, 1989, was untimely.

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