

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 91-001

In the Matter of

Summit County Child Support Enforcement Agency,

and

Summit County Department of Human Services,

Employers.

and

Ohio Council 8, American Federation of State, County
and Municipal Employees, AFL-CIO, Local 2696,

Employee Organization,

CASE NUMBERS: 91-STK-04-0001
91-STK-04-0002

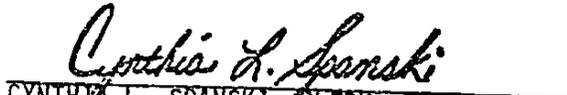
ISSUANCE OF OPINION

As stated in the Board's determination issued on April 4, 1991, the attached opinion sets forth the reasons for the determination. The opinion is incorporated by reference in the Board's determination that was issued on April 4, 1991.

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


DONNA OWENS, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 18th day of July, 1991.


CYNTHIA L. SPANSKI, CLERK

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 91-006

In the Matter of

Summit County Child Support Enforcement Agency,

and

Summit County Department of Human Services,

Employers.

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Ohio Council 8, American Federation of State, County and
Municipal Employees, AFL-CIO, Local 2696,

Employee Organization.

CASE NUMBERS: 91-STK-04-0001
91-STK-04-0002

OPINION

Owens, Chairman:

I.

This matter came before the State Employment Relations Board (SERB or Board) upon two Requests for Determination of Unauthorized Strike filed respectively by the Summit County Child Support Enforcement Agency (CSEA) and the Summit County Department of Human Services (DHS) on April 1, 1991. Named in each Request was Ohio Council 8, AFSCME and its Local 2696 (Employee Organization). Pursuant to R.C. §4117.23(A),¹ the SERB held a hearing on the consolidated cases and issued its Determination within 72 hours.

¹"In the case of a strike that is not authorized in accordance with this chapter, the public employer may notify the State Employment Relations Board of the strike and request the board to determine whether the strike is authorized under Chapter 4117. of the Revised Code. The board shall make its decision within seventy-two hours of receiving the request from the public employer."

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With respect to Case Number 91-STK-04-0001, involving the CSEA, we determined the strike to be authorized, rejecting the employer's argument that the Notice of Intent to Strike was defective because it did not specify the activity in which the employees would be engaging. We also rejected the Employee Organization's contention that the employees had not engaged in a strike. It claimed the employer had refused to extend the collective bargaining agreement, which constituted a lockout and not a strike for purposes of R.C. §4117.23(A).

In the companion case, Case Number 91-STK-04-0002, involving the DHS, we again did not accept the Employee Organization's position that it had not engaged in a strike for purposes of R.C. §4117.23(A) because the employer had refused to extend the collective bargaining agreement.² We agreed with the employer that intermittent strikes are not authorized under Chapter 4117 of the Revised Code, and therefore determined the intermittent strike in this case to be unauthorized.

This Opinion further explains the Board's April 4, 1991, Determination and is incorporated by reference therein. Based upon the parties' original filings, stipulations, proffered evidence, and exhibits, the relevant facts follow.

In each of the two cases, the strike activity occurred after the collective bargaining agreement between the parties had expired, after the parties' mutually agreed-upon settlement procedure had been exhausted, and

²As to this case only, Ohio Council 8, AFSCME, took the position that there had been a lockout, while Local 2696 maintained it had been on strike.

after a ten-day Notice of Intent to Strike had been served upon the employer and filed with the SERB.³ However, the Notice of Intent to Strike which the Employee Organization served on the DHS called for an intermittent⁴ strike, providing in pertinent part:

Bargaining unit covered employees will commence striking and picketing April 1, 1991.... Employees will be striking and picketing April 1, 1991 from time due to report to work until 1:00 p.m. each day. Bargaining unit employees will not report to work until 1:00 p.m. each day of the strike. For all scheduled work time prior to 1:00 p.m., bargaining unit covered employees will be on strike. Bargaining unit covered employees will work from 1:00 p.m. until their normal quitting time and will be on strike at all other times.

On April 1, 1991, CSEA employees did not report to work at all, and DHS employees did not report to work at their scheduled starting times but at 1:00 p.m. The CSEA and DHS work facilities were open as usual and the employees were welcome to work.

II.

On its face, the Act provides no clear answer to either of the questions posed by these consolidated cases: (1) whether R.C. §4117.23(A) omits from its coverage employees who do not report to work because their employer has refused to extend the collective bargaining agreement; and, (2) whether the intermittent strike at issue is not authorized under Chapter 4117.

³Stipulations of the parties.

⁴For the purposes of this opinion, the terms "intermittent" and "partial" strike are interchangeable. An intermittent strike is a species of the unprotected "partial" strike. See Morris, *The Developing Labor Law*, 2d Ed. at 1017: "A further example of a partial strike deemed unprotected is the intermittent work stoppage."

The Board must interpret the Act. Helpful tools in this regard are the object sought to be attained by the statute, the circumstances under which it was enacted, and the legislative history. Cf., R.C. §1.49(A)-(C).

As to strikes generally, we think the Act seeks to promote voluntary settlements and prevent strikes, granting a right to strike only as a last resort and then only in limited circumstances, with perhaps the most important limitation being that public employers faced with a strike must have the freedom to continue services as they see fit. The circumstances under which Chapter 4117 was enacted and its legislative history amply bear this out.

Senate Bill 133, the legislation which enacted Chapter 4117, was introduced into the Ohio Senate on March 18, 1983. It proposed a so-called "limited right to strike"⁵ for certain categories of public employees, placing Ohio in the ranks of a distinct minority. The vast majority of

⁵The Bill's proponents stressed that their objective was to prevent strikes and that the right to strike would be limited and the disruption of services minimized. For instance, the sponsor of the Bill, Senator Eugene Branstool, said it was balanced to protect the interests of the employers and employees and to protect the public from disruptions in public services. Gongwer News Service, Ohio Report, Vol. 56 No. 53 (3-18-83), "Public Employees' Bargaining Bill Introduced In The Senate" at 1. During floor debate on the measure in the House of Representatives, Democratic legislators argued that the Bill provided an orderly process that protects the rights of both employers and employees. "Only as a last resort," they insisted, "will the right to strike be invoked and then only under limited circumstances." Gongwer News Service, Ohio Report, Vol. 56 No. 124 (6-30-83), "Collective Bargaining Bill Faces One Last Hurdle After Winning House Approval" at 1. When Governor Celeste signed the legislation, he claimed the disruption of vital services "will be minimized," and, noting Ohio had experienced over 600 public-employee strikes during the past decade, said he expected "a better record" under the new law. Gongwer News Service, Ohio Report, Vol. 56 No. 128 (7-6-83), "Celeste Signs Collective Bargaining; Expects Strikes to be Minimized" at 2.

states with public-sector bargaining laws did not, and still do not, permit any public worker to strike. Of the 33 states that had enacted such legislation when the General Assembly considered S.B. 133, only eleven states permitted any strikes of any kind by public employees.⁶ In each of those eleven states, the right to strike was, and is, controlled in the public interest by various conditions and restrictions.⁷

In the economic warfare of private-sector collective bargaining, the strike is an economic weapon designed to break an impasse in negotiations by coercing concessions from the employer. It hurts an employer in the pocketbook. In the public sector, however, the calculus of strikes is not the same. Such economic coercion has little to do with forcing a public employer to settle, since the employer's revenues ordinarily continue during the strike. Greater pressure to settle comes from public opinion. Rather than being an economic weapon, the public-sector strike is one way in which a union may try to influence public opinion. But the strike can inflict great injury upon the innocent public by disrupting governmental services.

⁶See Larson, Bumpass, Ashmus & Ward, Public Sector Collective Bargaining: The Ohio System (1984) at 1 n.10, 91 n.6. The authors note that in one state the right to strike apparently was granted by judicial interpretation.

⁷Two common limitations are to deny the right to strike to certain groups of public employees and to make it contingent upon the completion of a stipulated impasse- or dispute-resolution procedure. For example, several states forbid strikes by police and firefighters. See Alaska Stat. §23.40.200; Oregon Rev. Stat. §1001; Wisconsin Stat. §111.77(a). Hawaii and Pennsylvania are examples of states that make the right to strike contingent upon completion of an impasse- or dispute-resolution procedure. Hawaii Rev. Stat. §89-12(b); Penn. Cons. Stat. §1002.

Against this backdrop, S.B. 133 generated tremendous controversy on the issue of a right to strike for public workers.⁸ The Bill underwent a number of amendments in the Ohio legislature that limited the right to strike in order to gain political acceptance for the measure.⁹ As introduced, the Bill denied the right to strike to some categories of public employees and also made it contingent upon the completion of a stipulated dispute-resolution procedure (or designated alternative thereto). The legislation additionally made it an unfair labor practice for certain groups of public employees who were permitted to strike, or their employee organizations, to strike without advance written notice. See S.B. 133, As Introduced, proposed §4117.14, §4117.15(A), and §4117.11(B)(8).

⁸The measure received widespread criticism, including opposition from interest groups which opposed giving public employees the right to strike under any circumstances. See e.g., Gongwer News Service, Ohio Report, Vol. 56 No. 60 (3-29-83) "Local Officials Assail Public Employee Bargaining Proposal"; Vol. 56 No. 66 (4-7-83) "Subcommittee Begins Redrafting Collective Bargaining Bill" (mentioning that the Senate Subcommittee still faced a "knotty issue" of whether any public employee should have the right to strike, id. at 2); Vol. 56 No. 93 (5-16-83) "Big City Mayors Join Forces on Public Employee Bargaining Bill" (mayors of Ohio's five largest cities sought to convince state legislators that changes were needed in S.B. 133; also mentions that, separately, 13 statewide organizations had formed a "Coalition of Public Employers, Administrators and Taxpayers" to fight the Bill, id. at 1-2); Vol. 56 No. 97 (5-20-83) "Public Employee Bargaining Bill Called Poor Public Policy" (the aforementioned Coalition unanimously opposed legalizing any public-employee strikes, id. at 1); Vol. 56 No. 107 (6-6-83) "Citizens Group Wants Changes in Public Employee Bargaining Bill" (Citizens League of Greater Cleveland opposed the Bill's granting the right to strike, id. at 2).

⁹The proposal narrowly passed the Senate by a party-line vote of 17-16, and passed the House by a near party-line vote (two Democrats voted with Republicans against it). See Gongwer News Service, Ohio Report, Vol. 56 No. 76 (4-21-83) "Bargaining Bill for Public Employees Approved by Senate"; Vol. 56 No. 124 (6-30-83) "Collective Bargaining Bill Faces One Last Hurdle After Winning House Approval."

Subsequently, the Senate Labor and Commerce Committee amended the Bill to further limit the right to strike by denying it to dispatchers employed by a police, fire, or sheriff's department or the State Highway Patrol, employees of the State School for the Deaf or the State School for the Blind, and special policemen appointed in accordance with R.C. §5123.13. The Committee also denied the right to strike to any public employees during the term or extended term of a collective bargaining agreement. Sub. S.B. 133, As Reported by Senate Labor and Commerce Committee, proposed §4117.14(D) and §4117.15(A), Senate Bills, 115th G.A., Ohio, Regular Session, 102-164, 1983-84. That Committee also added a "two-for-one" wage deduction whereby a striker could be denied two days' pay for each day of unauthorized strike. Id. at proposed §4117.23(B)(3).

Other significant amendments to the Bill's strike provisions then occurred in the House Commerce and Labor Committee which further limited the right to strike by denying it to civilian dispatchers, employees of any public retirement system, special policemen or policewomen appointed in accordance with R.C. §5119.14, psychiatric attendants employed at mental health forensic facilities, and youth leaders employed at juvenile correction facilities. Am. Sub. S.B. 133, As Reported by House Commerce and Labor Committee, proposed §4117.14(D) and §4117.15(A), Senate Bills, 115th G.A., Ohio, Regular Session, 102-164, 1983-84. The House Committee also made it an unfair labor practice for any public employees - not just certain categories of them - or their employee organizations to strike without advance written notice. Id. at proposed §4117.11(B)(8).

Separately from the unfair labor practice provision, any strike was made unauthorized under Chapter 4117 unless the requisite notice has been given.

Id. at proposed §4117.14(D)(2). The Committee also shortened the time in which the SERB must determine whether or not a strike is unauthorized - from five days to 72 hours. Id. at proposed §4117.23. Additionally, it strengthened R.C. §4117.23(B)(3) by adding the paragraph that permits certain strike penalties to be assessed retroactively to the first day of the strike. Id. at proposed §4117.23(B)(3).

Viewed in this setting, R.C. Chapter 4117 obviously was intended to encourage voluntary settlements and prevent strikes, granting a right to strike for use only as a last resort and then only under limited circumstances. In order to minimize disruption of services, public employers were to have the leeway during a strike to continue services as they saw fit (a policy exemplified by the strike notice requirements). The General Assembly strove as well to provide an effective means, through R.C. §4117.23, to ensure that strike action would go no further than authorized under the Act.

In an effort to gain support for the controversial legislation, which would place Ohio among a small minority of states allowing public-employee strikes, legislators kept amending the Bill to make the right to strike more and more limited. Only limited categories of employees would have the right and under limited circumstances, subject to the SERB's power to speedily determine whether particular strikes were not authorized by the legislation, and subject to certain sanctions which employers could impose on individuals who engaged in such unauthorized strikes.

R.C. §4117.23 thus is crucial to attaining the Act's objective of a limited right to strike. Division (A) of the statute serves strictly to allow the SERB, upon an employer's request, to determine expeditiously whether a strike is not authorized under Chapter 4117. Division (B) then

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enables the employer, following a Board determination that the strike is not authorized, to discipline or discharge the strikers (and, in certain circumstances, impose a wage deduction). R.C. §4117.23 has the sole and unique purpose of expediting and streamlining the process whereby an employer may take such actions against employees who engage in strikes that are not authorized under the Act.¹⁰

A brief word about the operation of R.C. §4117.23(A). When an employer invokes the section, the SERB first must ascertain whether any strike activity is occurring. To aid the Board, the legislature provided the definition of "strike" at R.C. §4117.01(H).¹¹

¹⁰Prohibiting strikes by statute does not necessarily prevent their occurrence. Ohio learned as much after years of experience under the Ferguson Act, former R.C. §4117.01, et seq. The Ferguson Act, now repealed and replaced by the collective bargaining Act, prohibited strikes by public employees but had little deterrent effect on strikes, as Ohio's work stoppage statistics for the period demonstrate. See Bureau of Labor Statistics, U.S. Dept. of Labor, Work Stoppages In Government (published annually through 1980). Consistent with its goal of reducing the number of work stoppages, and learning from its past mistakes in the Ferguson Act, the General Assembly designed R.C. §4117.23 to be a more effective deterrent to strikes not authorized under Chapter 4117. In addition to mandating a 72-hour period in which the SERB must act, the statute specifies a wage deduction to be assessed against strikers. See R.C. §4117.23(B)(3). The wage deduction appears to have been modeled on a similar provision in the New York Taylor Act. See NY Serv. Law §§200-214 (McKinney 1983). Under the Taylor Act, New York had experienced few work stoppages as compared to Ohio's experience under the Ferguson Act. See Work Stoppages In Government, supra.

¹¹"'Strike' means concerted action in failing to report to duty; willful absence from one's position; stoppage of work; slowdown, or abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in wages, hours, terms and other conditions of employment. Stoppage of work by employees in good faith because of dangerous or unhealthful working conditions at the place of employment which are abnormal to the place of employment shall not be deemed a strike."

Once the SERB decides that such strike activity is occurring, it must determine whether the strike is not authorized under the Act. This is a separate question.

III.

We turn now to the Employee Organization's contention that the CSEA and DHS¹² employees did not engage in strike activity for purposes of R.C. §4117.23(A). It does not dispute that the work facilities remained open or that work was available, but insists that employees did not report to work because their employers had refused to extend the respective collective bargaining agreements. This constitutes a lockout, it says, and employees cannot be engaged in strike activity for purposes of R.C. §4117.23(A) if they have been locked out.

The Board finds that the failure of CSEA and DHS employees to report to work was, under the circumstances and in both cases, strike activity for purposes of a R.C. §4117.23(A) determination of whether such activity is not authorized under Chapter 4117. The Employee Organization should pursue its lockout theory not under R.C. §4117.23(A), but under the unfair-labor-practice statute, R.C. §4117.11(A)(7), which expressly addresses illegal lockouts by employers.¹³

¹²See n.2, supra.

¹³The Employee Organization has filed unfair labor practice charges against the CSEA and the DHS which include alleged violations of R.C. §4117.11(A)(7). Case Numbers 91-ULP-03-0153 and 91-ULP-03-0171.

After each collective bargaining agreement had expired, each mutually agreed-upon settlement procedure had been exhausted, and a ten-day Notice of Intent to Strike had been served on each employer, CSEA and DHS employees on April 1, 1991, engaged in concerted action in failing to report to duty as described in each of their respective Notices of Intent to Strike. The CSEA and DHS work facilities remained open and the employees were welcome to work. Without any doubt, they engaged in strike activity within the meaning of R.C. §4117.01(H) and §4117.23(A).¹⁴

The Employee Organization maintains that there was no strike for purposes of R.C. §4117.23(A) because the employees were locked out. However, nothing in §4117.23(A) says that when employees have been locked out, they have not engaged in strike activity for purposes of that section. Additionally, the definition of "strike" at R.C. §4117.01(H) does not exclude lockouts. The legislature did exclude a "[s]toppage of work ... in good faith because of dangerous or unhealthful working conditions ... abnormal to the place of employment...." The absence of a similar exclusion for lockouts strongly suggests the legislature did not intend one.

By contrast, the Act specifically designates lockouts as an unfair labor practice at R.C. §4117.11(A)(7). It fashions distinct procedures and remedies for unfair labor practices. See R.C. §4117.12 and §4117.13. We

¹⁴R.C. §4117.01(H) in pertinent part defines a "strike" as "concerted action in failing to report to duty." The CSEA employees did not report at all on April 1st, and the DHS employees did not report until 1:00 p.m.

think the General Assembly contemplated that allegations of illegal lockouts would be processed under the SERB's unfair-labor-practice jurisdiction, not under R.C. §4117.23(A).

In order to accommodate the Employee Organization's lockout theory, the Board would have to read into R.C. §4117.23(A) an exception for lockouts. Doing that in the circumstances of the present cases would offend the legislature's design for R.C. §4117.23.

The work facilities remained open, work was available, but the employees did not report to work because their respective employers allegedly refused to extend the collective bargaining agreements. If the SERB allowed a lockout exception to R.C. §4117.23(A) here, the exception would swallow the statute. Any employee whose employer had refused to extend the contract could strike with impunity. What would keep such employees from striking without giving the ten-day notice? Not R.C. §4117.23; they would come within the lockout exception. What would stop police officers, fire fighters, prison guards, and other strike-prohibited employees from striking if their employers refused to extend the contract? Not R.C. §4117.23. What would prevent employees from striking during the term of a collective bargaining agreement or during the pendency of R.C. §4117.14 settlement procedures? Again, not R.C. §4117.23. A lockout exception here not only would destroy the utility of the R.C. §4117.23 mechanism as a deterrent to unauthorized strikes, but also would encourage self-help remedies by employees who should be fighting alleged illegal lockouts through the Act's unfair-labor-practice protections.

The Employee Organization is not without rights and remedies under the Act if it believes an illegal lockout has occurred. It should pursue the matter as an unfair labor practice.¹⁵

IV.

We come to the question of whether the intermittent strike activity of the DHS employees¹⁶ is not authorized under R.C. Chapter 4117. As mentioned in Part II of this Opinion, the question of whether strike activity is occurring for purposes of R.C. §4117.23(A) is a separate inquiry from whether such activity is not authorized under the Act.

The SERB traditionally has used the Act's policy objectives concerning strikes to guide it in determining whether particular strikes are not authorized under the Act. We pinpointed several of these objectives in an early decision, In re South Euclid-Lyndhurst City School Dist. Bd. of Ed.,

¹⁵When the SERB concludes that an employer has committed an unfair labor practice by locking out employees whom the Board earlier had determined to be unauthorized strikers under R.C. §4117.23(A), the lockout finding clearly would be relevant to the Board's consideration of any penalties which the employer imposed on the strikers pursuant to R.C. §4117.23(B). Division (B)(3) of the statute gives the Board jurisdiction to authorize a deduction from strikers' wages "if the board also determines that the public employer did not provoke the strike," and Division (B) also states:

Any penalty that is imposed upon the employee, except for the penalty imposed under division (B)(3) of this section, may be appealed to the board. The board may modify, suspend, or reverse the penalty imposed by the public employer, if the board does not find that the penalties are appropriate to the situation....

¹⁶The Employee Organization did not deny that the strike notice for the DHS employees called for an intermittent strike or that DHS employees were engaged in such a strike on April 1, 1991.

SERB 84-006 (10-9-84). There, we held unauthorized a strike for which the notice indicated an intent to strike in ten days in a general declaration without explicit reference to date and time. Requiring the notice to specify the date and time, we said, made the notice more comprehensible as a communication and comported more logically with the rational objectives of the Act, which "clearly are collective bargaining, peaceful labor relations in the public sector and strikes only as a last resort, and then in circumstances limited in a manner designed to take account of the public employers' public responsibilities." Id. at 9.

In a later case, In re Central Ohio Transit Auth., SERB 86-047 (11-25-86), we determined the strike to be unauthorized where no written notice had been served on the employer and the parties apparently had made an agreement bearing on the waiver of strike notice. We remarked that the primary purpose of the strike notice requirement is "to alert the employer in order that it may take whatever measures are available to it to safeguard the public concern. Thus, an iron approach to the enforcement of notice requisites is justified, indeed compelled, in the public interest." We also ruled that the statutory strike notice implicates the public interest and cannot be waived. Id. at 345-6.

Similarly, in the decision of In re Fort Frye Local School Dist., SERB 87-021 (11-5-87), finding a strike to be unauthorized because the notice incorporated all of R.C. §4117.01(H), we commented:

However, one obvious legislative condition in extending the right to strike to those public employees who have it was to limit the right by specific notice restrictions. The clear legislative objective was to apprise public employers of projected job actions to enable them to institute whatever damage controls were available to them.

Id. at 3-81 and 3-82.

Then, in a case involving an intermittent strike, we again applied a policy objective of the Act to determine that the strike was not authorized. In re Groveport Madison Local School Dist. Bd. of Ed., SERB 89-002 (1-27-89). The statutory strike notice was not at issue; the nature of the strike activity was. We determined that the irregular strike activity present in the case was, in concept, contrary to the very principle of damage control inherent in the Act. Id. at 3-9. The employer was not required to prove that any disruption in its services had occurred.¹⁷ Rather, we bottomed our determination on the fact the strike activity was contrary to a policy objective of the Act.

The SERB's ruling in In re Beaver Local School Dist. Bd. of Ed., SERB 90-001 (1-26-90), marked a radical departure from the Board's own tradition of using the Act's policy objectives concerning strikes to guide it in determining whether particular strikes are not authorized under the Act. For the first time, the Board applied a "policy of balancing the statutory definition of a strike with inherent legislative control objectives," and determined that the intermittent strike there in question satisfied the statutory requirements of Chapter 4117 and constituted a legal strike. Id. at 3-3.

The Beaver rationale incorrectly implied that the SERB had, in prior decisions, held that certain language in the strike definition at R.C. §4117.07(H) - i.e., "slowdown, or abstinence in whole or in part from the

¹⁷There was no evidence that the strike was causing the school district to fail to provide education and instruction in accordance with the state minimum standards as required by law. Id. at 3-9.

full, faithful, and proper performance of the duties of employment" - encompassed intermittent strikes. (In fact, the SERB had never reached this issue, deciding these cases on other grounds.¹⁸) The premise in Beaver was that R.C. §4117.14(D)(2)¹⁹ literally authorizes all of the activities listed in the statutory strike definition and that, while an intermittent strike "may be somewhat unusual and departs from the generally held concept of a strike, it, nevertheless, comports with those activities set forth in [R.C.] §4117.01(H)." Beaver at 3-3.

The Board distinguished Groveport-Madison: in that case, the intermittent strike was too "elaborate," "complex," and "intricate," whereas the intermittent strike in Beaver was "simple and clear." Beaver at 3-3. As to the Act's policy objectives, the Board dispatched with them in just two short sentences: "Neither is the action seen to be any more disruptive than a strike where total services are withheld," and, "Moreover, the Board can find no impediment through the action or the notice of action that would impair the employer from taking what damage control measures it deems necessary." Id.

¹⁸In particular, the SERB's Groveport-Madison determination did not reach the question of whether the strike definition at R.C. §4117.01(H) would include an intermittent strike. See SERB 89-002 at 3-9 n. 4. The Beaver Opinion implies that it did. See SERB 90-001 at 3-3.

¹⁹"If the parties are unable to reach agreement within seven days after the publication of findings and recommendations from the fact-finding panel or the collective bargaining agreement, if one exists, has expired, then the ... public employees other than those listed in division (D)(1) of this section have the right to strike under Chapter 4117. of the Revised Code provided that the employee organization representing the employees has given a ten-day prior written notice of an intent to strike to the public employer and to the board"

By maximizing the weight of the statutory strike definition and minimizing the weight of the Act's policy objectives regarding strikes, the Board's newly-inaugurated "balancing" process in Beaver effectively lead to the result that intermittent strike activity was protected under the Act (as long as it is "simple and clear" and not "elaborate," "complex," or "intricate"). The Board had taken an approach exactly the reverse of the one previously used, whereby the strike definition was not a factor and the Act's policy objectives held sway in determining whether particular strikes were not authorized under the Act.

We no longer consider the Beaver balancing process to be viable for making determinations pursuant to R.C. §4117.23(A) of whether a strike is not authorized under Chapter 4117. The correct focus, we believe, must be on the Act's policy objectives as to strikes, not on the statutory strike definition. The strike definition was enacted just to assist the SERB and the courts in identifying strike activity which the legislature wished to prohibit. Considering the legislative history of the Act and the circumstances under which it was enacted, lawmakers could not possibly have envisioned the strike definition being used to legalize "slowdowns" or partial or intermittent strikes. Moreover, whatever the intended purposes of R.C. §4117.01(H), legalizing intermittent strikes simply does not square with the legislature's and the Act's overall policy objectives concerning strikes.

Many roads lead to the conclusion that R.C. §4117.01(H) was designed solely to assist the SERB in identifying strike activity which the legislature wanted to prohibit. For one, the definition contains a special proviso stating that "[s]toppage of work by employees in good faith because

of dangerous or unhealthful working conditions at the place of employment which are abnormal to the place of employment shall not be deemed a strike." (Emphasis added.) The legislature would not have included this proviso unless R.C. §4117.01(H) was meant to define the word "strike" for purposes of the Act's prohibitions against strikes.

Relatedly, in keeping with the Act's limited right-to-strike objectives, numerous Revised Code sections prohibit strikes in a variety of circumstances: besides R.C. §4117.23, see R.C. §4117.11(3)(5) and (8), §4117.14(B)(3), §4117.15(A), and §4117.18(C). To achieve uniformity, the different enforcement authorities for these sections - the SERB and the courts - needed guidance as to what sort of activity might constitute a prohibited "strike" within the meaning of the sections. So, the legislature supplied a strike definition. On the other hand, was a statutory strike definition needed before public employees could engage in a strike pursuant to R.C. §4117.14(D)(2)? We suspect not. The Act already grants them a right to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection. See R.C. §4117.03(A)(2).

Lastly, we observe that the language of R.C. §4117.01(H) appears to be similar to the definition of "strike" in the former Ferguson Act.²⁰ The

²⁰The Ferguson Act provided, at former R.C. §4117.01(A), that "strike" means "the failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purposes of inducing, influencing, or coercing a change in the conditions, compensation, rights, privileges, or obligations of employment...." However, the General Assembly designed R.C. §4117.01(H) and §4117.23 to be a more effective strike deterrent than was the Ferguson Act. See n.10, supra.

Ferguson Act prohibited, and provided penalties for, strikes as defined in that statute; the strike definition was used solely for that purpose. The collective bargaining legislation which replaced the Ferguson Act also prohibits and provides penalties for strikes. Especially in view of the many provisions of the Act prohibiting strikes, legislators reasonably would have understood that the strike definition was to function in the same way as it had under the Ferguson Act.

Notwithstanding R.C. §4117.01(H), however, we do not believe the General Assembly intended to authorize intermittent strikes, since doing so undercuts the very objectives which it worked to achieve: promoting voluntary settlements and preventing strikes, a right to strike only as a last resort and then only under limited circumstances, and giving public employers the freedom to continue services as they see fit during a strike. Further, authorizing intermittent strikes disserves the Act's policy objective of preventing parties from unilaterally dictating the terms and conditions of employment.

In the first place, the National Labor Relations Board (NLRB) has long held intermittent strikes to be outside the protection of the National Labor Relations Act (NLRA), which governs private-sector employees. The Ohio General Assembly plainly endeavored to give public employees a right to strike which was more limited than that possessed by their private-sector counterparts. (Indeed, that is fundamental to the notion of a limited right to strike; it is limited as compared to the private sector.) If the intermittent strike is not protected activity for private-sector employees, then the General Assembly certainly would not have made it protected activity for Ohio's public employees.

Second, the reasons that intermittent strikes are not protected under the NLRA apply with equal, if not greater, force to R.C. Chapter 4117. In John S. Swift Co., 124 NLRB 394, enf'd. in part, 277 F. 2d 641 (7th Cir. 1960), the NLRB reasoned that when employees engage in repeated work stoppages limited to a portion of the working day, they are plainly unwilling to assume the status of strikers - a status contemplating a risk of replacement and a loss of pay. See Polytech, Inc., 195 NLRB 695, 696 (1972). The principle is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform all of the work they were hired to do. Id.

The same principle extends to Ohio's public-sector Act. Before they strike, public employees must be prepared to assume the worst risks of striking and a loss of all pay and employer-paid benefits. They cannot try to maintain the advantages of remaining in a paid employee status while refusing to perform all of the work they were hired to do. Holding otherwise would fly in the face of the Act's policy objectives. If public employees could strike intermittently and thereby lessen the risks of striking by remaining in paid employee status, they would be more inclined to strike than otherwise and would experience less economic pressure to settle, leading to an overall prolongation of disputes.²¹ The Act's strike objectives do not countenance either result. Neither does the Act's

²¹There is less economic pressure to settle on intermittent strikers who know they are guaranteed work with their employers (during hours they themselves set) than there is on full strikers who give up paid employee status and must derive income from other sources during the labor dispute. The lesser the economic pressure on strikers, the greater the likelihood that the dispute will continue each day without settlement.

policy of encouraging the parties to resolve their differences through negotiations and voluntary settlement.

Intermittent strikes do not receive protection under the NLRA because they permit employees and unions unilaterally to determine their schedules and hours of work. Hence, in Valley City Furniture Co., 110 NLRB 1589 (1954), enf'd., 230 F. 2d 947 (6th Cir. 1956), the NLRB characterized a regular daily strike of one-hour duration as an unprotected strike. The NLRB said:

The vice in such a strike derives from two sources. First, the Union sought to bring about a condition that would be neither strike nor work. And, second, in doing so, the Union in effect was attempting to dictate the terms and conditions of employment. Were we to countenance such a strike, we would be allowing a union to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment. Such a result would be foreign to the policy objectives of the Act. Id. at 1594-5.

We agree with this reasoning and do not believe employee organizations should be permitted to dictate the terms and conditions of employment with an intermittent strike. A public employer is not required to alter and adjust its operating schedules and hours to the changing whim which may suit the strikers' or employee organizations' purpose. See Honolulu Rapid Transit Co., Ltd., 110 NLRB 1806, 1809 (1954).

Finally, intermittent strikes are not authorized under Ohio's Act because they would place within an employee organization's discretion the employer's ability to remedy service disruptions by hiring replacements.²² If intermittent strikes were protected under the Act and

²²The Board does not hereby decide or even suggest that it has decided whether employers have the right to permanently replace strikers under the Act.

the employee organization called one, the employer could not hire a replacement for each striker, but only a second paid employee to finish the rest of the work which the striker was supposed to do.

The employer might have good reason to want to remedy the disruption in services by hiring replacements,²³ but could not do it - even if the intermittent strike were as disruptive as a full strike.²⁴ On the other hand, if the employee organization had called a full strike, no one would deny that the employer could hire replacements.

Therefore, bringing intermittent strikes within the Act's protection would enable employee organizations to cause the same disruption in services as occurs with a full strike while denying employers an effective tool for countering the disruption: hiring replacements. That contravenes the Act's policy of minimizing the disruption of services and allowing employers (not employee organizations) to decide how best to remedy service disruptions occasioned by a strike. More importantly, the prohibition of intermittent or "partial" strikes protects the public interest as well.

²³For various reasons, the employer might not want or be able to hire a second paid employee for each striker. For instance, in circumstances where administrative resources already are stretched thin, the employer might not want the administrative burden of having to employ two employees to perform the work that each striker used to perform. Or, the employer might prefer to hire replacements because doing so maintains higher quality or better continuity of services. Or, the employer might find it easier to hire replacements than second paid employees because anything less than regular work hours (as would occur with an intermittent strike) is not attractive to individuals who know they may have to cross a picket line in order to report to work.

²⁴The SERB has recognized that intermittent strikes can disrupt services as much as full strikes. In Beaver, supra, it said, "Neither is the action seen to be any more disruptive than a strike where total services are withheld." SERB 90-001 at 3-3 (emphasis added).

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Accordingly, we determine that intermittent strikes per se are not authorized under R.C. Chapter 4117. Case-by-case determination of whether intermittent strikes are not authorized - based on whether the strike action is "simple and clear" or instead, "elaborate," "complex," or "intricate" - is not a viable or predictable method. And, the Beaver "balancing" process gave short shrift to the dispositive question: are intermittent strikes at war with basic policies of the Act? It is these policies - supported by the Act's legislative history, the circumstances in which it was enacted, and the SERE's own decisions - that matter most. Intermittent strikes by nature work against quintessential policies of the Act: promoting voluntary settlements and preventing strikes, granting a right to strike only as a last resort and then only under limited circumstances, allowing public employers the freedom to continue services as they see fit during a strike, and prohibiting parties from dictating the terms and conditions of employment.

Pottenger, Vice Chairman, concurs. Sheehan, Board Member, dissents.

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STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SEEB OPINION 91-006

In the Matter of
Summit County Child Support Enforcement Agency,
and
Summit County Department of Human Services,
Employers.

and
Ohio Council 8, American Federation of State, County
and Municipal Employees, AFL-CIO, Local 2696,
Employee Organization,

CASE NUMBERS: 91-STK-04-0001
91-STK-04-0002

DISSENTING OPINION

Sheehan, Board Member:

I concur with the majority that the job action pursued by Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO, Local 2696, (Union) at the Summit County Child Support Enforcement Agency (Employer), Case 91-STK-04-0002, is a strike and is authorized. However, for the reasons adduced below, I respectfully dissent from the majority's view that the intermittent strike instituted at the Summit County Department of Human Services (Employer), Case 91-STK-04-0001, by the Union constitutes a per se violation of O.R.C. 4117.

O.R.C. §4117.01(H) defines strike as:

"Strike" means concerted action in failing to report to duty; willful absence from one's position; stoppage of work; slowdown, or abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in wages, hours, terms and other conditions of employment. Stoppage of work by employees in good faith because of dangerous or unhealthy working conditions at the place of employment which are abnormal to the place of employment shall not be deemed a strike.

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The evident intent of the strike definition in O.R.C. §4117.01(H) is to enumerate those job actions that are to be considered work stoppages for the purposes of the Act. Had the framers of the statute intended only the so-called "traditional" strike to be so considered, they would not have so carefully enumerated the variations. From this flow two effects: employees are prevented from engaging in intermittent job actions under circumstances in which a strike would be illegal; and employees are permitted to engage in intermittent job actions under circumstances in which a strike is legal.

The policy of balancing the statutory definition of a strike with inherent legislative control objectives was reaffirmed In re Beaver Local School Dist. Bd. of Ed., SERB 90-001 (1-26-90). The majority sees this as a radical departure from the Board's own tradition of using the Act's policy objectives concerning strikes to guide it in determining whether particular strikes are not authorized under the Act.

The majority is wrong.

In Fort Frye Local School Dist., SERB 87-021 (11-5-87), SERB found a strike to be unauthorized because the notice was simply not specific enough with respect to the intended strike action as described in O.R.C. §4117.01(H). Fort Frye does not ignore the definition of strike in O.R.C. §4117.01(H). On the contrary, Fort Frye specifically acknowledges the garden variety of strike action the legislature enumerated. The single demand made in Fort Frye was that the required ten (10) days notice of strike be specific not only in setting forth the time and place the strike would occur but also setting forth the strike action intended - whether it was in whole or abstinence in part.

In other words, Fort Frye does balance the legitimate strike action as described in the strike definition in O.R.C. §4117.01(H) with the policy objectives of specific notice by requesting a notice specifying the type of strike action.

Similarly, Groveport-Madison Local School District Bd. of Ed., SERB 89-002 (1-27-89) was also a balancing act. The statutory language of §4117.01(H) was specifically dealt with in the Board opinion. The Board, in that opinion, observed:

Is the intermittent strike statutorily proscribed? The language of O.R.C. §4117.01(H), in pertinent part, provides for "[A]bstinence in whole or in part from the full, faithful and proper performance of the duties of employment.... This is a case of first impression but a reading of this provision, on its face, would permit such action.

The Board, however, did not reach any decision on the intermittent strike issue because of the complexities of that specific job action. The in and out, off-and-on coming and going of teachers throughout the day at different times at different buildings was uncontrollable. Equitable balance between the statutory language and the legislative control objective in such a situation resulted in the finding that the strike was unauthorized.

Again, in Groveport-Madison, the statutory definition of the strike was not ignored and balancing of the strike action with policy objectives was clearly observed.

Beaver was a clear continuation of the application of the balancing policy. The action was quite simple. The Employer was properly noticed and the intermittent strike was very well defined and limited. The employees

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worked one half day and were on strike one-half day. The strike notice was clear and the conduct of the strike straightforward, thus providing the Employer ample opportunity to establish any damage control measures at his disposal. In this case, balancing the statutory language with the legislative control objectives lead to the finding that the strike was legal.

An interesting aside occurred in Beaver. Following the lockout of the strikers by the Beaver Board of Education, a delegation of parents called at the SERB offices in Columbus. The parents asked SERB to order the schools reopened so the intermittent strike could continue until the parties resolved their differences and a settlement was reached. The reasoning behind the parents' request was their firm belief that their children were far better served with half-day classes taught by their regular classroom teachers than with no school at all or with full-day sessions in the custodial care of substitute teachers.

It must be emphasized again and again that until the instant case, SERB never ignored the statutory definition, and with good reason. Statutory definitions cannot be ignored and must be given great weight. As the Supreme Court said in Ohio Civil Rights Commission v. Parklawn Manor, (1975) 70 O.O.2d 148, 41 O.S.2d 47:

The rule is well established that the General Assembly's own construction of its language, as provided by definitions, controls in the application of a statute. This definition will be given great weight against any claim that application of the statutory definition defeats the general purpose of the statute. (citation omitted.)

The General Assembly defined "strike" in O.R.C. §4117.01(H) to include abstinence in part. This is the General Assembly's own construction of its

language and, thus, when the word "strike" appears in §4117.14, the General Assembly's own definition controls. The majority has no mandate to decide that the General Assembly did not really mean what it said.

Moreover, the majority's interpretation that the comprehensive statutory strike definition was meant to apply only to situations where strikes are prohibited (as in the case of safety forces) and not in a situation where strikes are legal has to be rejected. This interpretation leads to the conclusion that the word "strike" as it appears in §4117.15 (where strikes are prohibited) and the word "strike" as it appears in §4117.14(D)(2) (where strikes are allowed) have two different meanings. This is an unacceptable interpretation of a statute, especially where §4117.01, which includes the strike definition, begins with the words, "... as used in this chapter." (Emphasis added.) Thus, whenever the word "strike" appears anywhere in Chapter 4117, it should be used as defined in §4117.01(H).

Today the majority legislated §4117.01(H) out of the statute and by doing so clearly exceeded its authority and abused its discretion.

The majority cites long and fascinating excerpts from Gongwer News Service as legislative history for the purpose of O.R.C. §1.49(C). Gongwer, which has been in existence since 1906, has never been considered legislative history. As a matter of fact, the Ohio Supreme Court in State v. Dickinsen, 57 O.O.2d 255, 28 O.S.2d 65 (1971) said:

Further, since no legislative history of statutes is maintained in Ohio, we must look to the source of the statute and to judicial pronouncements to determine the meaning of the word in question.

Commission meetings, as reflected in official minutes, were accepted as legislative history: (Brechele v. Sandusky, (1979) 75 O.O.2d 15, 46 O. App.

2d 4, as were various forerunners, amendments, recodifications and development of certain statutes recorded in various House Bills, Senate Bills and Amended Bills. Pylant v. Pylant, (1978) 15 O.O.3d 407, 61 O. App. 2d 247.

Gongwer, like the city newspaper, is not legislative history for statutory interpretation purposes.

I agree with the majority that strikes in Ohio are limited indeed. But the limitation has to do with who can strike, notice requirement, and timing, i.e., whether the dispute resolution procedure has been exhausted. However, strikes are not so limited in the type of action allowed. The legislature specifically allowed a garden variety of activities in its strike definition.

It is not surprising that at the time strikes were prohibited in Ohio there were more strikes than now. It should clearly demonstrate that when employees are given tools to take charge of their destiny and a fair forum to adjudicate their problems, they will behave responsibly. But without such a forum, people get desperate and strike even when strikes are prohibited and penalties severe. The lesson is that strikes have to be legal and have some teeth. The legislature limited the strikes in one way and comprehensively defined them in another. This is where the balance rests. The majority today changed the balance. This is not a wise policy. Moreover, it defies any reasonable interpretation of the statute.

SERB's experience with strikes is limited indeed. But from the limited experience, one could conclude that the intermittent strike, as permitted in Beaver, is no more disruptive to the employer's mission and to the public

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interest than the so-called traditional strike. In fact, if the parents in Beaver are to be heeded, intermittent strikes may, under certain circumstances, be less disruptive than the traditional strike.

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