

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 92-014

In the Matter of
State Employment Relations Board,
Complainant,
v.
Chester Township Police Department,
and
Chester Township Board of Trustees
Respondents.

CASE NUMBERS: 90-ULP-04-0239
90-ULP-12-0735

OPINION

OWENS, Chairman:

This case comes before the Board on exceptions filed by the Complainant to the Hearing Officer's Proposed Order in this case.

Respondents had a long-standing practice of giving wage increases to all full-time police officers and all full-time dispatchers on the first and second anniversary dates of hire. (F.F. 1-8). Respondents gave wage increases to full-time police officers Mark Purchase, Deborah Davis, and Janel McBrayer, and to full-time dispatcher Ardis Danicic on their first anniversary dates of hire in 1989. (Stip. 10-11).

On January 11, 1990, Respondents gave an across-the-board wage increase to all employees. (Stip. 10). The employees in question each received a \$.25 per hour increase. Also on January 11, the Respondents announced that they planned to give wage increases of 85 cents per hour to all full-time police officers and dispatchers on their second anniversary dates of hire in

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1990. (Stip. 14). (F.F. 9-10).¹

Eight days later on January 19, 1990, the FOP/OLC won a SERB-conducted re-run election in Case Nos. 88-REP-11-0234 and 88-REP-11-0236. The FOP/OLC won the right to represent a bargaining unit of full-time police officers and a bargaining unit of full time dispatchers. The union was certified by SERB on February 2, 1990. (Stip. 16). Bargaining commenced on March 7, 1990. The FOP/OLC submitted an entire collective bargaining agreement on that date, which included the subject of wages. (Stip. 17). The Respondents unilaterally withheld the anniversary wage increases. (F.F. 11).² Purchase, Davis, and Danicic did not receive wage increases on their second anniversary date of hire, March 23, 1990. McBrayer did not receive an increase on her second anniversary, October 5, 1990.

At issue is whether Respondents' failure to implement the wage increases for Dispatcher Danicic and Police Officers Purchase, Davis and McBrayer, pursuant to the Police Wage Scale adopted by resolution of the Respondent Trustees effective January 11, 1990, and announced to the employees

¹ We do not reach the question of whether it was unlawful to announce the 25% across-the-board wage increase during the union campaign. This question was not addressed in the unfair labor practice charge or complaint.

² According to the testimony of Police Chief Smith, the Respondents announced that they would not give the previously announced wage increase. (Tr. 132, 154). According to other testimony by Complainant's witnesses, Berwald and Jones, Respondents never announced that they would not give the wage increases, nor did they notify the FOP/OLC before they suspended the wage increases. (Tr. 66-67, 75-76, 84). The hearing officer credited the testimony of the Complainant's witnesses. (F.F. 11). We defer to his resolution of credibility.

involved, constitutes a violation of Ohio Revised Code (O.R.C.) Sections 4117.11 (A)(1), (A)(3), and (A)(5).

The hearing officer, recommending dismissal of the complaint, found that Respondents were obligated, after certification, to maintain the status quo, which he defined as whatever rate of compensation the police personnel had obtained effective January 11, 1990. Accordingly, he concluded that the Respondents were not obligated to implement the wage increase, and found no violation of O.R.C. Secs. 4117.11 (A)(1), (A)(3), and (A)(5).

In reaching his conclusion, the hearing officer relied on two NLRB cases, Anaconda Ericsson, Inc., 110 LRRM 1134 (1982), and American Mirror Company, Inc. 116 LRRM 1048 (1984), which he found to be factually analogous. In Anaconda Ericsson, the employer withheld wage increases during bargaining. The NLRB found no violation because it considered the wage increases to be discretionary. The increases had varied as to date and amount, and they were not determined, promised, scheduled, or announced. In American Mirror, the employer also withheld wage increases during bargaining and again, no violation was found. Again, the NLRB found the wage increases to be discretionary. Applying those cases to these facts, the hearing officer found that because the amount of the wage increase in the instant case was within Respondents' discretion, it, too, could be withdrawn.

The Complainant, in its exceptions, cites other NLRB cases which hold that it is a violation to withhold wage increases during contract negotiations when there is an established practice of granting those wage increases. Daily News of L.A., 138 LRRM 1132 (1991); Gannett Publishing Co. d/b/a/ Central Maine Morning Sentinel, 131 LRRM 1554 (1989); Medical Center

at Princeton, 116 LRRM 1100 (1984); Sweetwater Hospital Association, 226 NLRB 321 (1976). Because there was a regular practice of granting second-year anniversary increases of 5-6% in the instant case, we find that the Complainant argued persuasively that the increases of 85¢ per hour were not discretionary. The increases are indeed an established practice of the employer.

We hold that an employer must grant reasonably anticipated wage increases to uphold the status quo during a representation election campaign prior to the certification of election results. In that regard, we reaffirm our holding in In re Lucas County Bd. of Mental Retardation and Developmental Disabilities, SERB 86-048 (12-4-86), in which we stated:

As a general rule, no wage increase should be granted during a representation election campaign. This is so because the benefit is so readily perceived as an attempt to advantage one side or the other. However the general rule is subject to exceptions depending on circumstances. One example is a situation in which an employer becomes obligated for a benefit before representation becomes an issue. Another is an increase in wages and benefits following an established practice or custom or required by law. Even these exceptions and the announcements of them should be forewarned until after a pending election if the timing of the obligation or custom permits.

Once a union has been certified as the exclusive representative, the employer's obligation to grant increases is more limited than in the pre-certification period discussed in Lucas. After certification it need not grant increases simply on the basis of established practice or custom. It need only grant preannounced increases or those to which it has become obligated by law. The employer's obligation to grant wage increases after

certification is more limited because the parties then become mutually obligated to resolve prospective employment terms through the bargaining process.

Obligating employers to pay increases that have neither been announced nor required by law during the period following certification would severely limit the parties' flexibility in crafting viable economic proposals in collective bargaining.

As limited as we find an employer's obligation to be in implementing wage increases during this post-certification period, we nonetheless find that the employer in the instant case violated O.R.C. §4117.11(A)(1) and (5) by denying the second-year anniversary increases.

Crucial to our decision today is the notice that the employees in question received. In line with an established practice, the Township adopted a new wage scale including increases of 85¢ per hour for applicable employees to receive on their second anniversary dates. The Township announced this wage increase eight days before the re-run election.

For policy reasons we hold that it is a violation for an employer to withhold such an increase, which has been promised before the date of certification. Whatever commitment the employer makes during that time, it must uphold the commitment after certification unless it is modified through the collective bargaining process. Modification may occur by mutual agreement of the parties, by acceptance of a related fact-finding report, or by determination of a related conciliation report. For strike-permitted employees, modification also may occur when the parties have reached an ultimate impasse in negotiations at which time the employer may implement

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its last best offer.³ Without these restrictions, an employer could make any promises it chooses whether prior to or during the union campaign, and not follow through after certification. We do not want to provide incentives for employers to make superficial promises before elections.⁴

In their Responses and Cross-Exceptions to Complainant's Exceptions to Hearing Officer's Proposed Order, Respondents argue that the employees in question will get "two bites of the apple." This is not the case. Although it is true that the employees benefit from the collectively bargained agreement between the parties, it is noted that the agreement did not take effect until January 1, 1991. For 1990, the employees lost their second anniversary wage increases which had been promised to them. The remedy ordered here will make those employees whole only for the amount of wages they lost in 1990.

As for the allegation that the Respondents' conduct violated O.R.C. §4117.11 (A)(1), we find that an announcement to grant a wage increase

3 The patrol officers and dispatcher involved in this case are not strike-permitted employees. For strike-prohibited employees, the employer cannot impose unilaterally any changes and must maintain the status quo until resolved by dispute resolution procedures or the parties have an agreement on the terms at issue. For strike-permitted employees, implementation also can occur when ultimate impasse is reached. See, In re Vandalia-Butler City School District Board of Education, SERB 90-003 (2-9-90).

4 In so ruling, we recognize that normally promises of benefit made during election campaigns constitute a violation of O.R.C. §4117.11(A)(1) or objectionable conduct which, when challenged, may warrant ordering a new election. Here, the employer's promise of anniversary increases was not challenged as either objectionable or an unfair labor practice and appears to be simply a confirmation that a well-defined practice would continue.

shortly before an election, then an abrupt withdrawal of the increase after union certification can only interfere with, restrain or coerce employees in the exercise of the rights guaranteed in O.R.C. Chapter 4117. Accordingly, we find a violation of O.R.C. §4117.11 (A)(1) on this basis.⁵

⁵ In this case, although we find a make-whole remedy is appropriate to remedy the §4117.11 (A)(1) and (A)(5) violations, we do not find a separate violation of §4117.11 (A)(3). Although the Complaint originally alleged at Paragraph 13 that certain named non-unit employees continued to receive the anniversary increases while unit employees did not, we note that the pleadings as amended do not contain that specific allegation of disparate treatment. There is not enough information in the record about what other, non-unit employees did or did not receive in terms of scheduled wage increases to sustain a separate violation of §4117.11 (A)(3).



NOTICE TO EMPLOYEES FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE
STATE EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and abide by the following:

A. WE WILL CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117 of the Revised Code and from refusing to bargain collectively with the exclusive representative of its employees recognized or certified pursuant to Chapter 4117 of the Revised Code and from otherwise violating Sections 4117.11 (A)(1) and (A)(5).

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them under Chapter 4117 of the Revised Code.

B. WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty (60) days in all the Chester Township Police Department Buildings where bargaining unit employees work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the Chester Township Police Department and Chester Township Trustees shall cease and desist from the actions set forth in paragraph (A).
- (2) Make Dispatcher Danicic and Officers Purchase, Davis, and McBrayer whole for any losses of wages occasioned by the above-noted withholding of Police Wage Scale, Number 2, experienced during the period from March 23, 1990 to December 31, 1990, with interest on monetary losses experienced.
- (3) 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.

CHESTER TOWNSHIP POLICE DEPARTMENT AND
CHESTER TOWNSHIP BOARD OF TRUSTEES
90-UPL-04-0239
90-UPL-12-0735

DATE

BY

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED