

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Otsego Educators Association
Employee Organization,

v.

Otsego Local School District Board of Education
Employer

CASE NUMBER: 91-ULP-05-0323

OPINION

Owens, Chairman:

The Board has historically recognized that it is appropriate in some cases to dismiss an unfair labor practice charge which has already been addressed by an arbitrator.

Recently, in In re Upper Arlington City Bd of Ed, SERB 92-010 (1-30-92), we clarified and simplified our deferral policy. In that opinion, we reaffirmed the practice described as Option No. 1 in In re Miamisburg School Dist Bd of Ed, SERB 86-001 (1-15-86), which provided for the Board to retain jurisdiction of certain unfair labor practice charges during the pendency of a related grievance procedure.

Although both opinions provided for limited Board review of arbitration awards, the Board has not set out specific standards under which arbitration awards will be reviewed. In Miamisburg, the

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Board simply stated that in cases where the grievance was not settled nor the unfair labor practice charge withdrawn, the Board could provide:

...a limited review of the arbitration decision...to determine whether the unfair labor practice issues were considered and decided in conformity with due process of law and the arbitration proceeding. If the review discloses that the arbitration process has not provided substantive and procedural due process, the Board will process the unfair labor practice. Otherwise, the unfair labor practice will be dismissed.

Likewise, upon motion, we provided for review of arbitration awards in Upper Arlington, supra, so that we could "determine whether the unfair labor practice issue(s) were adequately resolved with consideration for due process rights of the parties."

The instant case, where the parties have extensively argued the propriety of deferring to a particular arbitrator's award, presents an opportunity for us to clarify the standards by which we will review arbitration awards in those cases where we have deferred to the grievance procedure but retained jurisdiction.

Although we are not bound by National Labor Relations Board precedent, we are persuaded that its standards for arbitral review, developed under a longstanding deferral policy, are worthy of our consideration.

In Spielberg Manufacturing Company, 112 NLRB 1080 (1955), its landmark case on post-arbitral deferral, the NLRB held that it would defer to arbitration awards where "the proceedings appear to

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have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."

The NLRB expounded on the Spielberg decision in Olin Corporation, 268 NLRB 573 (1984), an opinion which further clarified and refined the NLRB's post-arbitral deferral policy. In Olin, the NLRB stated that it would find an arbitrator had adequately considered an unfair labor practice if: "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."

In determining whether an arbitrator's decision is "clearly repugnant," the NLRB in Olin stated that it "would not require an arbitrator's award to be totally consistent with Board precedent." Rather, the NLRB stated that it would defer "unless the award...is not susceptible to an interpretation consistent with the Act...."

Finally, in Olin, the NLRB held that the party opposing deferral must affirmatively demonstrate the defects in the arbitration process or award, which make deferral inappropriate.

Considering these standards, we shall defer to arbitration awards where the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. In determining whether the decision is repugnant, we will

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defer if the award is susceptible to an interpretation consistent with the Act. The party opposing deferral must affirmatively demonstrate the defects in the arbitration process or award, that make deferral inappropriate.

BACKGROUND OF THIS CASE

On March 19, 1991, the School Board adopted a resolution to transfer the control and responsibility for all aspects of the learning disability program to the Wood County Office of Education effective July 1, 1991. In its unfair labor practice charge, the Association charged the School Board with unilaterally transferring five bargaining unit members from the Board of Education to the Wood County Office of Education. The Association charged that because the School Board neither consulted nor negotiated with them prior to acting, the action was unlawful and in violation of O.R.C. §4117.11 (A)(1) and (A)(5).

In addition to the charge, the Association also filed a grievance over the transfer of the Learning Disability Tutors. On or about May 6, 1991, the grievance was denied at Step 2 with a statement that no violation of the collective bargaining agreement had occurred. The grievance proceeded to the arbitration stage and a hearing was held on November 15, 1991.

Shortly after the Otsego School Board notified the Learning Disability Tutors that they would not be re-employed at the

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expiration of their current limited contracts, the Association filed a grievance on behalf of the entire professional teaching staff claiming a violation by the School Board of the Recognition clause in Article I of the parties' collective bargaining agreement and the Salary provision for Learning Disability Tutors set forth in Article VIII. In the grievance, the Association argued that the School Board's unilateral action in removing the Tutors from the bargaining unit was not only in violation of specific "mutually agreed to" provisions in their contract, but would also create disparity for most of these employees because they would be forced to pay their own contribution to MediCare. The grievance sought the continuation of the Learning Disability Tutor program at present compensation and benefit levels for the five affected learning disability tutors for the 1991-1992 school year.

At the arbitration hearing the parties stipulated to the following issue:

"Whether Otsego School Board violated the "Recognition' clause, Article I (A), and/or learning disability tutor salary clause, Article VII, of the Otsego Local Schools Master Agreement (July 1, 1990 - June 30, 1992) when the Board adopted a resolution to transfer control and responsibility for all aspects of the Otsego School District's learning disabilities program to the Wood County Board of Education, effective July 1, 1991."

The arbitrator ruled on December 30, 1991, denying the grievance and noting in the opinion both that (1) the contract did not guarantee the tutors continued employment and in fact

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authorized the Employer to make reductions in force and that (2) although the Association had been notified of the Board's intended action, it had never requested bargaining on the issue. The Association filed a request for SERB to continue processing the unfair labor practice charge. The basis for this request, in sum, was that the arbitration proceeding did not provide substantive due process because the arbitrator did not apply the grievant's statutory rights; the arbitrator did not address the issue of whether the unilateral transfer of the tutors constituted an unfair labor practice and a violation of O.R.C. Sections 4117.11 (A)(1) and (A)(5); and finally, that the arbitrator's emphasis on the Association's failure to request bargaining is inaccurate as a matter of law.

The School Board, on the other hand, argues that the Association was afforded substantive and procedural due process in the arbitration hearing, thereby requiring dismissal of the ULP charge pursuant to Option 1 of Miamisburg, supra.¹

In our review of an arbitration hearing and award, we must determine whether the proceedings were fair and regular, whether the parties agreed to be bound, whether the contractual issue is factually parallel to the unfair labor practice issue, and whether

¹ Charged Party's Brief in Opposition to Continued Processing of Unfair Labor Practice Charge. See page 2.

the arbitrator was presented generally with facts relevant to resolving the unfair labor practice issue, and finally, whether the award is susceptible to an interpretation consistent with the Ohio Public Employees Collective Bargaining Act.

The Board has thoroughly considered the Association's objections to the Arbitration Opinion and Award raised in their motion for review as well as all subsequent briefs filed by both parties. For the reasons set forth in the following discussion and pursuant to the aforementioned post-arbitration deferral standard adopted by SERB, we find that continued deferral to the arbitration opinion and award is appropriate in this case and therefore, the unfair labor practice charge is dismissed.

THE PROCEEDINGS APPEAR TO BE FAIR AND REGULAR

In its reply brief, the Association contends that it was denied substantive and procedural due process required by Miamisburg Option No. 1.² (Emphasis added). As the School Board points out in its response, the Association lumped the terms "procedural" and "substantive" due process together but failed to identify any specific deficiencies which would constitute denial of procedural

² Charging Party's Response to Charged Party's Brief In Opposition to Continued Processing of Unfair Labor Practice Charge; See pages 7, 11.

due process.³

It appears that both parties had agreed to be bound by the arbitrator's award,⁴ that they were afforded notice and an opportunity to be heard, that the parties were represented competently and in good faith, that the underlying issues were investigated, and that the Arbitrator made his ruling based on reliable evidence. Accordingly, from the record before us, we conclude that the proceedings were fair and regular.

THE ALLEGED UNFAIR LABOR PRACTICE WAS ADDRESSED

The facts considered by the Arbitrator in the grievance proceeding are essentially the same facts required to resolve the unfair labor practice charge.

Specifically, the Arbitrator pointed out that in their most recent contract negotiations the parties had agreed on an Association proposal that the School Board's learning disability tutors be placed on a salary schedule, rather than the stipulated hourly rate arrangement contained in their previous agreement.

However, interpreting the contract language of the salary

³ Charged Party's Reply Brief; See page 2.

⁴ Article IV, Step 4, of the Collective Bargaining Agreement.

schedule, together with the contract recognition clause, and reduction in force provisions,⁵ he found that the contract did not

⁵ The parties agreement provides:

Article I, A. RECOGNITION

The Otsego Board of Education, hereinafter referred to as "Board" recognizes the OEA-NEA affiliated Otsego Educators Association, hereinafter referred to as the 'Association', as the sole and exclusive bargaining representative for a bargaining unit comprised of all full-time and part-time (three or more hours) certificated teachers employed in a position requiring a teaching certificate under 3319.22 and excluding Superintendent, Principals, Assistant Principals, substitutes and confidential, supervisory or management employees as defined in Chapter 4117 of the Ohio Revised Code. All rights and prerogatives of the Board and Administration are reserved to management unless expressly altered by the terms of this Contract. The above definition of part-time shall not impact on employees hired prior to adoption and ratification of this Agreement in terms of recognition as a part of the bargaining unit during the life of this Agreement.

Article IV, M. REDUCTION IN FORCE

When by reason of decreased enrollment of pupils, return to work of regular bargaining unit members after leaves of absence, or by reason of suspension of schools or territorial changes affecting the district or due to the loss, reduction or inadequacy of funds for current operation, discontinuance of instructional programs and/or for other reasons as authorized by law, the Board decides that it will be necessary to reduce the number of bargaining unit members, it may make a reasonable reduction pursuant to Section 3319.17 of the Ohio Revised Code.

Article VII LEARNING DISABILITY TUTORS

Learning disabilities tutors will be placed on the salary schedule at BA/O effective 1990-91.

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assure the tutors continued employment and in fact authorized the School Board to eliminate them from the unit for economic reasons, under reduction in force procedures. Accordingly, he found that the School Board had not violated the contract when it passed the March 19 resolution transferring the control and responsibility for all aspects of the learning disabilities program to the Wood County Office of Education effective July 1, 1991.

Further, there is no question that the arbitrator examined the issue of whether the Association was notified prior to the School Board's change in operations, and whether the Association requested bargaining.

On this issue, he observed: "Notably, the change in operations here was not undertaken by stealth or without the full knowledge of the Association. Several meetings were held, beginning as early as February of 1991, in which the Association was fully advised of the Board's projected plans. [As early as February 21, 1991, Superintendent Busdeker wrote the Association President Genson, inviting her to discuss any questions she might have concerning the Board's intention to reassign 'control and direction of all aspects of the Learning Disabilities program to the Wood County Office of Education.' This followed earlier informal discussions]. No request to negotiate was made by the

Association."⁶

He further observed: "In its post-hearing brief....the Association noted that there is currently pending an unfair labor practice charge which, presumably echoes the claim....that the District unilaterally altered terms and conditions of employment without bargaining. It appears, however, that despite knowledge of the intended plans to eliminate the tutors from the bargaining unit, the Association made no request to bargain about it."⁷

Thus, as previously noted, it appears that the alleged statutory violation was intertwined with the grievance filed by the Association and indeed was addressed by the arbitrator.

THE ARBITRATION AWARD IS NOT REPUGNANT TO THE ACT

First, the arbitrator concluded that the Employer was entitled

⁶ Arbitration Opinion and Award, page 10. We note that the Association argues in part that continued deferral to the arbitration proceeding is inappropriate because Step 4, Article IV of the collective bargaining agreement limited the arbitrator's authority to the precise issue presented for arbitration. See Charging Party's Brief In Support of Continued Processing of Unfair Labor Practice Charge, pages 4-6. However where, as here, the contractual and unfair labor practice issues are so thoroughly intertwined and are ultimately addressed by the arbitral process, we find deferral appropriate.

⁷ Arbitration Opinion and Award, page 11

under the contract to eliminate the tutor positions. He based this upon the language of the Recognition Clause reserving to management "All rights and prerogatives of the Board and Administration ...unless expressly altered by the terms of the Contract," coupled with specific authorization accorded to management to reduce force for "inadequacy of funds for current operations" or "for other reasons as authorized by law." He found "substantial evidence that the Board's decision was based upon the need to economize."⁸

On this basis alone, deferral would be appropriate.⁹ In determining the merits of an alleged unilateral change, contractual authorization for the action would be determinative. Where a contract authorizes management to take specific action, the action, when undertaken, does not become an unlawful unilateral change. Here, because the issue resolved by the arbitrator is factually parallel to the issue before us, the unfair labor practice would be resolved.

⁸ Id. at page 9.

⁹ The arbitrator observed both that nothing in the contract prohibited the employer's action and that the action fit within the requirements of the reduction in force clause of the agreement. It is upon the latter that we rely in finding this initial basis for deferral. The mere observation by an arbitrator that a contract did not prohibit certain action would not in and of itself suffice to show that an alleged unilateral change had been adequately considered.

However, we need not defer on that basis alone. Even if the arbitrator had not found that the contract authorized the Employer's action, its responsibility was to give the union notice of the intended change and an opportunity to bargain about it.¹⁰

Although the Association contends that the School Board acted unilaterally and failed to negotiate, the arbitrator also found that the change in operations was undertaken with full knowledge of the Association. According to the award, several meetings were held in which the Association was fully advised of the School Board's projected plans, but still the Association made no request to negotiate. These meetings and discussions took place prior to the March 19, 1991 adoption of the School Board resolution transferring the learning disability program to the Wood County Office of Education.¹¹

Here, the arbitrator found that the employer gave the employee

¹⁰ We do not quarrel with the Association's contention that the transfer of unit work is a mandatory subject of bargaining. The Ohio Supreme Court so held in Lorain City Bd of Ed. v. SERB, 40 Ohio St. 3d 257 (1980).

¹¹ Arbitration Opinion and Award, page 11

organization clear notice of its intent to transfer unit work and an opportunity to bargain.¹² This is consistent with the bargaining obligation which SERB has placed upon employers who wish to make changes in mandatory subjects of bargaining.

In In re Mayfield City School Dist Bd of Ed, SERB 89-033 (12-20-89) we held that "...the obligation to bargain is a mutual one. If the mutual obligation is to have meaning, the party wishing to make a change, at the very least, must give timely notice of the change to the other party. Otherwise the bargaining obligation is unfulfilled."

Likewise, the Board has held that employee organizations have a concomitant responsibility to request bargaining. It was stated in In re Pickaway Ross Joint Vocational School Dist Bd of Ed, SERB 87-027 (11-19-87), that "...it is axiomatic in labor/management relations that when one party fails to comply with statutory mandates, past practices or contractual commitments, through innocence or indifference, the responsibility for initiative action toward compliance is vested in the other party." See also In re Findlay City School Dist. Bd of Ed., SERB 88-006 (5-13-88).

¹² We are unconvinced by the Association's argument that it is somehow absolved from making a bargaining request because the contract provided that notification for proposed contract changes had to be given no earlier than 150 days and no later than 120 days before the expiration of the contract. The arbitrator found that the action taken was permitted by the existing contract language.

The Board's rationale and position in these two opinions parallels that of the private sector.¹³ In National Labor Relations Board v. Columbian Enameling & Stamping Company, 306 U.S. 292, 297 (1939), cited by the arbitrator, the Supreme Court held:

Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer--when he has not refused to receive communications from his employees--without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or expressed desire to bargain, communicated to their employer.

Accordingly, we are unconvinced that the arbitration process in this case failed to provide substantive and procedural due process. Because the contractual issue factually paralleled the unfair labor practice charge, the arbitrator was presented with the facts the Board would find relevant to resolving the alleged unfair

¹³ The Association has cited as supplemental authority two recent cases, Columbian Chemicals Co., 307 NLRB No. 105 (May 15, 1992) and Mid-State Ready Mix, 307 NLRB No. 129 (May 29, 1992), in which the NLRB found employers had refused to bargain over the implementation of an absenteeism policy and the laying off unit employees and replacing them with a non-unit employee, respectively. In Columbian Chemicals, the NLRB specifically declined to defer the matter to an arbitrator's award. We have reviewed these cases and find them distinguishable from the case at hand. In Columbian Chemicals, the Union, receiving notice of intended implementation, had replied it considered the policy to be a negotiable item. Nonetheless, the employer implemented it without response. In Mid-State Ready Mix, the employer laid off the unit employees without first notifying the union and affording an opportunity to bargain.

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labor practice. The outcome reached by the arbitrator can be interpreted in a manner consistent with SERB precedent with respect to bargaining obligations.

Thus, pursuant to the standards adopted today in this opinion and the Board's earlier pronouncement in Miamisburg, we find continued deferral is appropriate and that no probable cause exists to issue a Complaint in this matter. The unfair labor practice charge is dismissed.

Pottenger, Vice Chairman, and Sheehan, Board Member, concur.