STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Pickaway County Department of Human Services,

Respondent.

CASE NUMBER: 86-ULP-10-0371

OPINION

MASON, Board Member:

On October 6, 1986, Wendy Lust (Intervenor), an employee of the Pickaway County Department of Human Services (Respondent), filed an unfair labor practice charge alleging that the Respondent violated O.R.C. 4117.11(A)(1) and (A)(3) by engaging in certain conduct during the period after the Communication Workers of America (Union) won a representation election, but before the Union was certified as the exclusive representative of the employees of the Pickaway County Department of Human Services.[1] On March 5, 1987 the Board found probable cause to believe an unfair labor practice had been committed. A hearing was held in October of 1988, and on January 17, 1989, the hearing officer issued the first proposed order in this case, recommending, inter alia, that the Board find a violation of O.R.C. 4117.11(A)(1) by the Respondent's refusal to allow the Intervenor union representation at a meeting to discuss the job abolishment, and by its abolishment of the part-time Income

[1]The unfair labor practice charge was later amended to include a violation of O.R.C. 4117.11(A)(5).

Maintenance Worker 3 position occupied by the Intervenor. On June 16, 1989, the Board issued an opinion, in which it found no violation in the refusal to allow union representation at the meeting, but did find that the Respondent violated O.R.C. 4117.11(A)(1) by abolishing the part-time position of Income Maintenance Worker 3 and laying off the employee occupying that position (Intervenor) while a question of representation was pending. In re Pickaway County Human Services Dept., SERB 89-014. Upon the appeal of the Pickaway County Human Services Department, The Pickaway County Court of Common Pleas reversed SERB's decision, finding no violation of Chapter 4117 at all, because the status quo issue had never been presented or argued at the hearing. Pickaway County Human Services Dept. v. SERB, 1990 SERB 4-7 (CP, Pickaway, 2-5-90). SERB appealed the Common Pleas Court's decision to the Fourth District Court of Appeals. On January 16, 1992, the Fourth District Court of Appeals remanded the case to SERB to "fully and fairly litigate the change in status quo issue." Pickaway County Human Services Dept. v. SERB, 1992 SERB 4-82 (4th Dist. Ct. App., Pickaway, 1-15-92). On February 7, 1992, the Board accepted the remand, and a hearing was held on the status quo issue. The post-hearing briefs were filed on September 11, 1992, and the record was closed that same day.

The sole issue upon remand was whether there was an improper alteration of the status quo when the position of Income Maintenance Worker 3 was changed from a part-time position to a full-time position. The hearing officer found that the status quo was impermissibly altered, because the Intervenor's terms and conditions of employment changed during the time period while post-election objections were pending, after the representation election but before the Union was certified. The Respondent filed exceptions to the Hearing

Officer's Proposed Order,[2] urging that under the circumstances of this case, there was no unlawful change in the status quo. For the reasons set forth below, we agree that no violation occurred and reverse the Hearing Officer's Proposed Order in that regard.

When a violation of O.R.C. 4117.11(A)(1) is alleged, the appropriate inquiry is an objective rather than subjective one. That is, we must determine whether under all the facts and circumstances, one could reasonably conclude that employees were restrained or coerced, or that their rights under O.R.C. 4117.03 had been interfered with, by the Respondent's conduct. This objective inquiry is used whether the alleged misconduct is a change in status quo, interrogation about union activity, or some other alleged interference with rights protected under Chapter 4117.

Accordingly, proper consideration of any O.R.C. 4117.11(A)(1) allegation must necessarily entail a thorough review of the circumstances under which the alleged misconduct occurred and its likely effect on the guaranteed rights of employees.

Here, the salient facts are undisputed. The Intervenor's job as a part-time Income Maintenance Worker 3 was abolished during the period after a SERB election and before certification of an exclusive bargaining representative. At the time of the abolishment, the Respondent was obligated to follow, and did follow, the procedures and rules for layoffs and job abolishments contained in the Ohio Revised Code and Ohio Administrative Code. In accordance with those procedures, the Respondent provided to the Intervenor a letter dated September 15, 1986 explaining its reasons for abolishing the part-time position. The letter

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[2]The Intervenor filed a response and a single exception, "to the finding that Respondent had no duty to recognize the right of Wendy Lust to have union representation in her personnel action which occurred after election but prior to certification." We note that this issue is not before us on remand.

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stated in pertinent part:

> During the time the two part-time employees shared a full caseload, there were some minor problems related to case action continuity and agency representation during State hearings; however, the major problems have occurred since the position has been worked with one part-time employee with a reduced caseload.
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> Currently, the position is being worked on a three-day-a-week basis with the employee carrying approximately 60% of the average caseload of a full-time caseworker. This has caused and will continue to cause problems when clients in this caseload have emergency assistance requests or changes which must be acted upon immediately. When this occurs, it forces another caseworker or the unit supervisor to, if possible, pick up the client request or change while attempting to carry out their normal activities. This would not be a major problem if it were on an occasional basis due to the absence of a full-time employee, but since it is a continually recurring situation, on a two-day-a-week basis, it has had a negative effect on our ability to serve clients in a timely and efficient manner and on unit morale.
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> With the coming of the Common Application Process and past increased caseload activity and requirements related to monthly reporting, which continue to expand, the elimination of this part-time position is imperative if the ADC Unit is to function at its peak efficiency with a high level of morale.
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> It could be argued that the department could correct this situation by creating another part-time position, thereby allowing the current worker and the new part-time person to share a full caseload as was done in the past. This is, however, not a viable option. Attempting to train an individual on a part-time basis is not possible, particularly with the coming of the Consolidated Application Process, which will require an IMW 3 to have a thorough working knowledge of not only ADC, Food Stamps and Emergency Assistance, but also General Relief, Medicaid and ADC-Related Medicaid. There are further problems related to both training and effective evaluation of a part-time employee when said employee will, during a 120-day probationary period, be working on a maximum of 35 days as opposed to the normal 83 to 86 working days of a full-time employee. Finally, if one of the two individuals leave (sic) the department which has happened in the past, or goes to a full-time position, which has also happened in the past, the department will be back in the same situation.

No evidence was introduced to dispute the Respondent's stated rationale for abolishing the part-time position, nor was there any evidence that the abolishment was prompted by

anti-union considerations. [3]

The number of bargaining unit employees was not reduced as a result of the abolishment.[4] Likewise, wage rates, starting times, lunch times, and quitting times for unit employees remained the same before and after the part-time position was abolished, and the Respondent's Personnel Policies and Procedures Manual remained in effect unchanged.

Since the Intervenor received a satisfactory rationale for the part-time job abolishment and the full-time job creation and no union animus was involved, it could not reasonably be concluded that employees were interfered with, restrained or coerced in the exercise of their protected rights under Chapter 4117 of the Ohio Revised Code.

The undisputed facts in this case lead us instead to the conclusion that the Respondent essentially maintained the status quo, maintaining business as usual during the post-election, pre-certification period. It followed its normal and required personnel mandates, followed the applicable statutory procedures, and kept the wages, hours, and working conditions of its employees intact for all but one unit employee, the Intervenor. Her layoff resulted not from any unlawful motive but rather from action taken by the Respondent to provide the public services it is required to provide. Although it is undisputed that the Intervenor submitted medical documentation that she was unable to work on a full-time basis, we do not believe that under these circumstances one could reasonably conclude that her layoff interfered with the rights of public employees under Chapter 4117. In so deciding, we are particularly

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[3]Our finding in this regard is consistent with the Hearing Officer's Proposed Order dismissing an alleged violation of O.R.C. 4117.11(A)(3) and her rationale for so doing at page 14 of the Proposed Order.

[4]The election petition in Case No. 89-REP-05-0199, which resulted in the election at issue here, indicates that there were approximately 27 employees in the unit. The petition was filed on May 29, 1986.

persuaded by the absence of any unlawful motive, the management justification for the change, and the fact that the justification was conveyed to the affected employee. However, we will continue to scrutinize carefully those situations where employers make changes which directly affect the employment terms of unit employees, during the post-election, pre-certification period.[5] Even though there is no duty to bargain before certification, we recognize that material changes, unjustified and unexplained, during this period could be coercive [6] At the same time, we recognize that management must be able to exercise normal discretion in maintaining its operations.

In finding an unlawful change in status quo in this case, the hearing officer relied on cases from other public sector jurisdictions and the NLRB. Those cases, too, state the general rule that an employer is constrained in making changes in the terms and conditions of bargaining unit employees in the time period after a representation election and prior to the certification of a bargaining representative. However, the cited cases are clearly

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[5]On the subject of status quo, we note that in its exceptions, the Respondent misstated our holding in SERB v. Chester Township Police Department, SERB 92-014. The Respondent asserted: "In Chester, the Board held that an employer was required to alter the status quo and grant a wage increase while a question of representation existed because such an increase had been uniformly granted in the past." (emphasis in original). Since the increases in Chester had been preannounced, they became part of the status quo.

[6]The hearing officer argued that allowing the Respondent to make this change during this time period would "potentially allow an employer the latitude to weed out union supporters and pack the unit with non-union support prior to a potential rerun election." (Proposed Order at 15). Prior to a rerun election an employer may not lawfully pack the unit with non-union support. Such conduct, if proven, would clearly violate O.R.C. 4117.11(A)(1) and (3) and preclude the setting of a new eligibility date. See In re Montgomery County Combined Health District, SERB 92-003 (April 8, 1992). However, the change which occurred in the instant case does not approach that kind of conduct. No other changes were made in the unit, and the total number of unit employees did not change.

distinguishable from the matter at hand.

Many of the cases relied upon by the hearing officer involved unit-wide changes implemented by an employer in retaliation for a union election victory. See, e.g., NLRB v. McCann Steel Co., 448 F.2d 277 (6th Cir. 1971) (employer drastically reduced a regularly established Christmas bonus for all unit employees on the day after the representation election, in retaliation for the election vote); Chateau De Ville, Inc., 97 LRRM 1051 (1977) (in reprisal for a union election victory, an operator of dinner theaters violated the Act when it reduced the number of hours assigned to all of its waitresses and further reduced the hours of the pro-union waitresses; this case involved union animus); Zelrich Co. and International Laborers Union, 54 LRRM 1251 (1963) (employer withheld Christmas bonus unit-wide and discharged a known union adherent, without any legitimate business justification for this action); Cranston Print Works Co. and Textile Workers Union, 37 LRRM 1346 (1956) (violation when employer instituted new and restrictive plant rules after the union won an election, but no violation when, after the election but before the first bargaining conference, the employer made certain changes in working conditions, such as increased work load and discontinuance of fixed periods for break which had little effect on the working conditions of employees); Laney & Duke Storage Warehouse Co., 58 LRRM 1389 (1965) (employer discharged four employees who were union members in order to undermine the status of the union, unilaterally instituted a night shift and required employees to fill out new application forms containing new employment conditions); J.C. Penney Co. v. NLRB, 384 F.2d 479, 66 LRRM 2069 (10th Cir. 1967) (employer gave wage increase during the time a decision on the union's election petition was pending, in order to coerce employees into voting against the union).

Likewise, public sector cases relied upon by the hearing officer involve situations in which changes were either made unit-wide or were motivated by union animus. The cases cited follow the general rule that during the time period between the representation election and certification, as well as during union organizational campaigns, employers may not make unilateral changes which are designed to coerce employees in the exercise of their rights. See Illinois FOP and City of Peru, 9 NPER-IL-18017 (1986) (During union organizational campaign, employer unlawfully deviated from past practice by proposing to delete one benefit and grant another; this affected an entire unit of police officers below the rank of chief); Pittsburg Unified School District, 5 NPER-CA-05-14176 (1983) (school district unlawfully reduced the work year of many of its clerical employees while there was an unresolved question of representation); Town of Plymouth, 3-NPER-07-12041 (1981) (revocation of personnel rules and benefits was designed to thwart the union's organizational campaign); Upper Darby Township, 3 NPER-PA-40-12056 (1981) (unilateral wage increase was unlawfully granted to all unit members while a question of representation was still pending).

Finally, the hearing officer cited two cases from the Florida Public Employment Relations Commission (PERC) that make clear that if employees could reasonably interpret a wage increase or other change as an attempt to influence their votes, the employer is obligated to offer an explanation for the wage increase or change in order to dispel any unwarranted impression that the election was a motivating factor. The timing of the increase or change, if unaccompanied by any explanation of its origin or purpose, creates a strong inference that the increase or change was intended to influence the electorate. See City of Temple Terrace, 3 NPER-FL-10-12030 (1980) (wage increases to police officers 18 days before an election could reasonably be interpreted by officers to influence their votes); Miami-

Dade Community College, 3 NPER-FL-10-12041 (1980) (During post-election/pre-certification period employer lawfully amended faculty performance evaluation forms; employees could not have reasonably concluded that the change in evaluation forms was motivated by the representation petition, because inter alia, it was the sole term and condition changed).

Here, where there was no union animus, the change affected one part-time employee, who was offered a full-time position, and that employee received a rational explanation for the action taken, we find the Respondent did not violate R.C. 4117.11(A)(1).

OWENS, Chairman and POTTENGER, Vice-Chairman, concur.