

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Ohio Department of Transportation,

Respondent.

CASE NUMBER: 87-ULP-10-0473

OPINION

OWENS, Chairman:

This matter comes before the Board on exceptions to a hearing officer's recommendation that we dismiss a Complaint alleging that the Ohio Department of Transportation (ODOT or Respondent) violated Ohio Revised Code (O.R.C.) 4117.11(A)(1) and (5) by unilaterally implementing a no-smoking policy without first bargaining with Ohio Civil Service Employees Association, AFSCME (Charging Party or Union).<sup>1</sup> The Hearing Officer's

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<sup>1</sup>On March 3, 1993, the Charging Party filed a motion to withdraw unfair labor practice charge and dismiss complaint, inasmuch as the Governor of Ohio had on January 8, 1993, issued an Executive Order creating a smoke-free workplace for all state facilities, which superseded the smoking policy at issue in this case. On that basis, the Intervenor urged that the controversy was moot. On March 15, 1993, the Complainant filed a Response to the effect that it is within SERB's discretion to determine whether dismissal would serve the public interest. On March 23, 1993, the Respondent filed a Response, to which the Charging Party filed a Reply on March 26, 1993.

We hereby deny the Intervenor's motion to withdraw the charge, strike the Respondent's Response at untimely pursuant to Ohio Administrative Code 4117-1-04(B), and deny the Charging Party's Reply as moot. The controversy in this case raises issues as to the identification of mandatory and permissive subjects of bargaining and the waiver of statutory bargaining rights under Chapter 4117, which are of ongoing importance to public employers and employee organizations in Ohio.

Further, given the growing public health concerns associated with passive smoke, it

Findings of Facts are adopted herein.<sup>2</sup> Those relevant to our analysis are summarized below.

Sometime in early 1987, approximately 275 nonsmoking employees of ODOT circulated a petition expressing concern about the health hazards of inhaling passive smoke on the job at ODOT facilities. As a result of the petition and concern about agency liability for health problems, Director Warren Smith instructed Eugene Brundige, then ODOT's deputy director for labor relations, to develop a no-smoking policy for ODOT facilities state-wide.

Toward this end, Brundige established a task force of smokers and nonsmokers from ODOT facilities, to help formulate the policy. Among those invited to participate were several OCSEA representatives, whose input was sought pursuant to a contract provision requiring ODOT to give the Union notice and an opportunity to discuss any new work rules before implementing them. From the beginning, the Union viewed the policy as a mandatory subject of bargaining. Although its representatives attended the first task force meeting, they withdrew from the process upon learning that ODOT did not intend to engage in collective bargaining over the policy.

On September 25, 1987, ODOT notified employees that effective October 1, smoking would be prohibited in ODOT facilities except in designated areas during nonwork time. The policy, which incorporated a substantial number of task force recommendations, was implemented as a work rule and provided that employees who did not comply would be

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is appropriate to address the respective rights of public employers and employee organizations as they relate to implementing the Executive Order; to adopting smoking policies in those jurisdictions where the Order does not apply; and to implementing smoking policies in state facilities when the Executive Order ultimately expires by its terms.

<sup>2</sup> With the exception of the last sentence of Finding of Fact No. 9. A review of the record indicates that this portion of the Hearing Officer's finding amounts to an expression of opinion rather than a statement of fact.

subject to discipline.

At the time ODOT implemented the policy, there was a master labor agreement between OCSEA and the Office of Collective Bargaining (OCB), covering employees in State bargaining units 3,4,5,6,7,9,13 and 14, including all OCSEA-represented employees working at ODOT facilities. The agreement was effective by its terms from July 1, 1986, through June 30, 1989.

During contract negotiations, OCSEA had proposed that the rights of smokers and nonsmokers be determined in supplemental agreements and proposed specific language on the subject. The State, through its then chief negotiator Brundige, took the position that it did not wish to negotiate supplemental or department-by-department agreements but stood willing to negotiate smoking policies as part of a master agreement. Neither the Union, nor the Employer proposed further language pertaining to smoking policies for the master agreement. Furthermore, the agreement, which was finalized in May 1986, contained no provisions for regulating smoking. However, the agreement did contain a provision on work rules, a management rights clause and a zipper clause. Prior to the no-smoking policy that went into effect in October 1987, there were no restrictions on smoking in ODOT facilities. In their post-hearing briefs, the Complainant and Intervenor argued that the no-smoking policy was a mandatory subject of bargaining. Respondent argued that it was not a mandatory subject because the contract contains a provision for the promulgation of work rules.

Considering these arguments, the hearing officer concluded that the no-smoking policy was a mandatory subject of bargaining, but that the Respondent had not violated O.R.C. 4117.11 (A)(1) and (A)(5) because the union had waived its right to bargain about the policy.

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The Complainant and Intervenor have filed exceptions, each urging that the hearing officer erred in his analysis that the union had waived its bargaining rights. The Respondent filed a reply concurring generally with the hearing officer's recommendation that the Board dismiss the charge.

In finding that the policy had to be bargained, the hearing officer relied upon an interpretation of O.R.C. 4117.03 first espoused by SERB in In re Lorain City School Dist Bd of Ed, SERB 86-020 (5-15-86), and further developed in In re City of Lakewood, SERB 88-009 (7-11-88), i.e., that any management decision which affects wages, hours, or terms and conditions of employment must be bargained.

I.

The threshold issue in this case is whether the no-smoking policy implemented by ODOT was a mandatory subject of bargaining.

For the reasons set forth herein, we disagree with the hearing officer that the decision to implement a no-smoking policy was a mandatory subject of bargaining and with the Lorain/Lakewood interpretation of our statute, which led him to that conclusion.<sup>3</sup> The statute itself does not dictate such a broad definition of mandatory bargaining subjects. And as the

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<sup>3</sup>We are, of course, mindful that the Ohio Supreme Court in Lorain City School Dist Bd of Ed, 40 OS3d 257 (1988) approved of the same broad definition of mandatory subjects which we revisit here. However, we read that approval in the context of the controlling law of the case, i.e., that "(c)ourts must afford due deference to the State Employment Relations Board's interpretation of O.R.C. Chapter 4117." We note that the definition relied on by SERB and approved by the Court in Lorain did not appear in the court syllabus. We trust that the Court will continue to afford deference to SERB's interpretation of Chapter 4117, based upon SERB's growing experience applying the statute to labor disputes in the public sector. We further note that the syllabus in DeVennish v. Columbus, 57 Ohio St. 3d 163 (1991) limited appropriate subjects for bargaining to "All matters affecting promotions..." (Emphasis added).

administrative agency charged with administering Ohio's public sector collective bargaining law, we have found that the Lorain/Lakewood definition, which required bargaining over every decision which affects wages, hours, terms and conditions of employment, has virtually eliminated the concept of management rights for Ohio's public employers -- a result not contemplated by the law itself. For that reason, we shall, in this opinion, re-examine O.R.C. 4117.08 with a view toward reconciling its seemingly contradictory language with both the legislative intent and the reality of public sector bargaining.

Admittedly, O.R.C. 4117.08 is not without ambiguity as it seeks to define exactly what must, and what need not, be bargained about by Ohio public employers.

O.R.C. 4117.08(A) provides:

All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section (Emphasis added).

At the same time, O.R.C. 4117.08(C) provides:

Unless a public employer agrees otherwise in a collective bargaining agreement (emphasis added), nothing in Chapter 4117 of the Revised Code impairs the right and responsibility of each public employer to: (1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology and organizational structure; (2) Direct, supervise, evaluate, or hire employees; (3) Maintain and improve the efficiency and effectiveness of governmental operations; (4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted; (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees; (6) Determine the adequacy of the work force; (7) Determine the overall mission of the employer as a unit of government; (8) Effectively manage the work force; (9) Take actions to carry out the mission of the public employer as a governmental unit.

The Employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement...(Emphasis added).

The statute is hardly a model of clarity as Subsections (A) and (C) spell out facially contradictory statements regarding management's bargaining obligations and its rights to make management decisions. The legislature on the one hand seems to indicate in Subsection (A) that bargaining is appropriate for "all matters pertaining to wages, hours, or terms and other conditions of employment" (emphasis added) while simultaneously indicating in Subsection (C) that "nothing in Chapter 4117 impairs the right and responsibility of each public employer to: determine matters of inherent managerial policy...direct, supervise, evaluate, or hire employees..." etc. If these categories in Subsections (A) and (C) were mutually exclusive of each other, there would be no problem. However, labor agencies and courts alike when confronted with specific cases have concluded that almost any managerial policy will have some impact on conditions of employment. <sup>4</sup>

The (A) and (C) subsections, read together, illustrate an effort by the drafters to somehow balance the needs of public employers to make management decisions, against the right of public employees to bargain about their working conditions. This aim is not realized, however, by requiring bargaining over every management decision that impacts employee working conditions, i.e., virtually every management decision, no matter how remote.

Rather, the aim of the statute is better realized by our adopting a new standard, in the form of a balancing test, to identify those subjects about which public employers must bargain in Ohio. This standard seeks to balance the right of employers to run the public business with

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<sup>4</sup>See, e.g., AFSCME v. SLRB, 546 N.E. 2d 687, at 691 (Ill. App. 1 Dist. 1989).

the right of their employees to engage in collective bargaining.

Accordingly, in this matter and henceforth, if a given subject is alleged to affect and is determined to have a material influence upon wages, hours, or terms and other conditions of employment and involves the exercise of inherent management discretion<sup>5</sup>, to determine whether it is a mandatory subject of bargaining, we will weigh (1) the extent to which the subject is logically and reasonably related to wages, hours, terms and other conditions of employment; (2) the extent to which the employer's obligation to negotiate may significantly abridge its freedom to exercise those managerial prerogatives set forth in and anticipated by C.R.C. 4117.08(C), including an examination of the type of employer involved and whether inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and obligations to the general public; (3) the extent to which the subject matter had been addressed or preempted by legislation; and (4) the extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties, are the appropriate means of resolving conflicts over the subject matter.<sup>6</sup>

Those management decisions which we find are, on balance, areas of management discretion, can be implemented without bargaining unless a contract provision prohibits it. Any

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<sup>5</sup>Subjects which affect wages, hours or terms and conditions of employment but do not involve the exercise of inherent management rights need not be balanced. They will simply be found to be mandatory subjects.

Likewise, areas of inherent management discretion which do not affect wages, hours or terms and conditions of employment will be found permissive, without further inquiry.

<sup>6</sup>The parties may develop a dispute settlement procedure which applies to this form of mid-term bargaining. The statutory dispute settlement procedure is not applicable for mid-term bargaining other than for an official reopener of the collective bargaining agreement.

reasonably foreseeable wages, hours or terms and other conditions of employment which are affected by those decisions, must be bargained as soon as possible and, whenever reasonably practicable, before the announced implementation date if the union makes a timely request to bargain.

This test, more than any rigid definition of mandatory subjects, resolves the natural tensions between O.R.C. 4117.08(A) and 4117.08(C), in a manner contemplated by principles of statutory construction set forth in Ohio statute and caselaw, and offers a reasonable solution to defining bargaining subjects, similar to that which has been utilized by other public sector jurisdictions and the NLRB. Section 4117.08 was never intended to be a precise formula for easily resolving all scope of bargaining issues, but rather was intended as a bill of rights for employee organizations, employers, and the general public. As is the case with any bill of rights, where rights conflict and parties cannot resolve the dispute, a tribunal may be called upon to effectuate the necessary interpretation and balancing of those rights on a case-by-case basis.<sup>7</sup> We believe that the test announced today fulfills the Legislature's intention to reserve exclusively to the public employer those inherent managerial prerogatives essential to the fulfillment of the employer's missions and its concomitant obligations to the public, while leaving for the bargaining process those matters of vital interest to the employees

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<sup>7</sup>The U.S. Congress adopted a similar approach when it enacted the National Labor Relations Act: "The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors. What are proper subject matters for collective bargaining should be left in the first instance to employers and trade-unions, and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be strait-jacketed by legislative enactment." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 34-35 (1947).

regarding their wages, hours, and working conditions.

In many cases, we do not foresee that the application of the test will compel a result different from that required under Lakewood/Lorain.<sup>8</sup> However, in those difficult cases where the public employer's bargaining obligations conflict with the rights and responsibilities anticipated in Subsection C, the balancing test seeks to achieve an equitable resolution.

*The Balancing Test is a Reasonable Construction of O.R.C. 4117.08.*

The balancing test comports with generally accepted rules of statutory construction in Ohio, as recited both in caselaw and the Revised Code.

Some of these principles were recently summarized in the case of Ohio Historical Society v. SERB, 1991 SERB 4-107 (10th Dist Ct App, Franklin, 10-29-91):

As a basic principle of statutory construction, the language employed in a statute should be accorded its common, ordinary and usually accepted meaning in the context in which it is used, and the statutory provisions should be given a fair and reasonable interpretation in conformity with their general object in order to effectuate their purpose. Indus. Comm. v. Roth, 98 Ohio St. 34 (1918); Mutual Bldg & Investment Co. v. Efros, 152 Ohio St. 369(1949); State ex. rel. Brown v. Dayton Malleable, 1 Ohio St. 3d 151 (1982).

In attempting to ascertain a statute's legislative intent, a court's duty is to give effect to the words employed in that statute and not to delete words used or to add words not used. Wheeling Steel Corp. v. Porterfield, 24 Ohio St. 2d 24, 25 (1970); Radcliffe v. Artromick Internatl. Inc., 31 Ohio St. 3d 40 (1987); State ex. rel. Celebrezze v. Slien Cty Bd of Commrs, 32 Ohio St. 3d 24, 27 (1987); and In re Burchfield, 51 Ohio App. 3d 138, 152 (1988).

Additionally, various statutory provisions relating to the same subject matter may be read in pari materia. State ex. rel. Shipman v. Young, 175 Ohio St. 215

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<sup>8</sup>It is particularly important to note that no matter how a particular subject might fare under the balancing test announced here, it is considered a mandatory subject of bargaining once it has been included in a collective bargaining agreement. City of Cincinnati v. Ohio Council 8, AFSCME, 61 Ohio St. 3d 658 (1991). Further, O.R.C. 4117.10(A) requires that a contract term prevails over conflicting statutes, except those designated in that subsection.

(1963), and if so, these provisions should be harmonized, if at all possible, to give effect to all the provisions. State ex rel Pratt v. Weygant, 164 Ohio St. 463 (1956); Southern Surety Co. v. Standard Slag Co., 117 Ohio St. 512 (1927); and City of Cincinnati v. Connor, 55 Ohio St. 82, 44 N.E. 582 (1896).

Here, by formulating a balancing test, all the words of 4117.08(A) and (C) are given effect and harmonized. Under the Board's previous interpretation of Subsection (A), the inherent management rights delineated in Subsection (C) were essentially deleted. Likewise, if the drafters had intended that "all matters pertaining to wages, hours, or terms and conditions of employment" be subject to collective bargaining regardless of the impact on inherent management rights and responsibilities, the additional quoted phrase at the end of Subsection (A) would have been unnecessary. As previously noted, in statutory interpretation, words should not be ignored or deleted, and such words must be presumed to have had an intended meaning if one can be found.

Moreover, by interpreting O.R.C. 4117.08 to require a balancing of interests, we are devising a test which is consonant with the object of the section, i.e., to balance the rights of management and labor, and which will have as its consequence the bargaining of those subjects most appropriate for negotiation. These are valid considerations when interpreting ambiguous statutes in Ohio. O.R.C. 1.49. By moving away from the Lorain/Lakewood standard, which in effect required bargaining on every conceivable management decision, the new test is consistent with the presumed intention of legislative enactments, i.e., to effect a just and reasonable result feasible of execution. See O.R.C. 1.47 (C); Johnson's Markets, Inc. v. New Carlisle Dept. of Health, 58 Ohio St. 3d 28, 35-36 (1991). Further, the new test is consistent with the mandate of O.R.C. 4117.22 to promote orderly and constructive relationships between all public employers and their employees through liberal construction

of the statute.

To read the statute otherwise requires that labor and management be partners in managing the public employer's business -- an enterprise which involves both its employees and the general public.

*Balancing Tests Are Well-Accepted Tools for Resolving Conflicting Rights*

Further, the construction of a balancing test to determine whether certain subjects are mandatory or permissive is a generally accepted principle of labor law, utilized and approved by reviewing courts in other public sector jurisdictions and by the NLRB with U.S. Supreme Court approval in First National Maintenance Corp. v. NLRB, 452 U.S. 666, 107 LRRM 2705 (1981).

For example, the supreme courts of Pennsylvania, Illinois and California have all approved balancing tests, similar to the one we adopt here today, to resolve conflicts between the bargaining and policymaking obligations of public employers under their collective bargaining laws.<sup>9</sup>

The three-prong balancing test developed by the California Public Employment Relations Board is similar to the test we adopt today. PERB's test finds a subject to be "negotiable, even though not specifically enumerated"<sup>10</sup> if it (1) is logically and reasonably related to hours, wages

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<sup>9</sup>See, e.g., PLRB v. State College Area School Dist., 90 LRRM 2081 (1975)(Pennsylvania); Central City Education Association, IEA/NEA, 599 N.E. 2d 892 (1992)(Illinois); San Mateo City School Dist. v. PERB, 33 Cal. 3d 850 (1983).

<sup>10</sup>California Government Code Section 3543.2 provides, in pertinent part: (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53220, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures

or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission." Anaheim Union High School District, PERB Decision No. 177 (1981).

*An Administrative Agency Should Apply Standards Which Effectuate the Statutory Scheme*

It is well-settled that an administrative agency not only can but should change its position on an issue when its experience demonstrates that change is warranted.

As stated by U.S. Supreme Court in NLRB v. Weingarten, Inc., 420 U.S. 251 at 266-66, 88 LRRM 2689, 2694 (1975):

The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision making. Cumulative experience begets understanding and insight by which judgments...are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 31 LRRM 2237 (1953).

In administering the Ohio Public Employees Collective Bargaining Act, we have observed that strict adherence to SERB's earlier definition of mandatory subjects has rendered virtually every subject, even those enumerated in O.R.C. 4117.08(C), subject to bargaining. Such a

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for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code....Section 3543.3 provides in pertinent part: A public school employer...shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

broad definition is not mandated by the statutory language and in practice undercuts a clear legislative intent to require bargaining on some subjects but not others. We believe that the balancing test we announce today will allow us to administer the law in a manner consistent with that intent.

*The Decision to Implement a No-Smoking Policy Is a Permissive Subject Under the Balancing Test*

As previously stated, under the balancing test, we will weigh (1) the extent to which the subject is logically and reasonably related to wages, hours, and terms and conditions of employment; (2) the extent to which the employer's obligation to negotiate may significantly abridge its freedom to exercise those managerial prerogatives set forth in and anticipated by O.R.C. 4117.08(C), including an examination of whether inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and its obligations to the general public; (3) the extent to which the subject matter had been addressed or preempted by legislation; and (4) the extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties are the appropriate means of resolving conflicts over the subject matter.

Applying the balancing test to the facts of this case, we conclude that ODOT's decision to implement a no-smoking policy which designated certain areas as smoking and others as non-smoking was a permissive subject of bargaining. In furtherance of its responsibilities to protect the health of the general public, including its employees, and to shield the state from liability for smoke-related health claims, it was free to decide where smoking could and could not take place or, if it had so chosen, to ban smoking from its facilities altogether.

In so concluding, we acknowledge that the policy is logically and reasonably related to some of the employees' terms and conditions of employment. For example, under the policy, smoking in all ODOT facilities was prohibited except in designated areas during nonwork time, and a violation of the policy could result in discipline.

However, because a result of the decision was to fulfill its obligation to protect the public, of which employees are a subset, our inquiry does not end there. Also at issue is the extent to which requiring bargaining on the decision to implement a no-smoking policy, would abridge the employer's freedom to achieve its essential mission and its obligations to the general public. Because this employer, a state department, also has certain statutory obligations to both employees and the general public, to maintain smoke-free areas or facilities, we will consider the second and third prongs of the test together.

We take administrative notice of O.R.C. 3791.031<sup>11</sup>, which requires that smoke-free areas be designated in all places of public assembly, including state buildings such as those at issue in this case, and allows the Director of Administrative Services to designate an entire place of public assembly as a no-smoking area.<sup>12</sup>

In enacting this legislation, the General Assembly clearly intended to protect the public

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<sup>11</sup>O.R.C. 3791.031(B) provides that "for the purpose of separating persons who smoke from persons who do not smoke for the comfort and health of persons not smoking," a no-smoking area must be designated in all places of public assembly. The law goes on to provide that a no smoking area may include the entire place of public assembly. Relevant inclusions in the definition of "place of public assembly" for purposes of this case are "buildings and other enclosed structures owned by the state, its agencies, or political subdivisions... office buildings...and vehicles used in public transportation." R.C. 3791.031(A)(2).

<sup>12</sup>Although not in effect at the time of the alleged violation, Executive Order 93-01V, issued January 8, 1993, bans smoking, with limited exception, in all state buildings and vehicles.

from harmful secondary smoke by regulating smoking in places of public assembly. At issue here is the extent to which a public employer must bargain with a union before meeting health and safety obligations to the general public and to its employees, some of whom are in bargaining units and some of whom are not, who themselves are a subset of the general public.

The issue is complicated by the nature of the conduct being regulated. Cigarette smoke, airborne and hazardous, is not confined to distinct areas. Smoke generated from a work area can travel to areas frequented by the public, and vice versa. By leaving the issue of smoke control to the bargaining table, public health may be compromised in search of an agreement. Our concern in this regard is heightened by recent studies showing the carcinogenic effect of secondary smoke on nonsmokers. The U.S. Environmental Protection Agency estimates that 2,500 to 3,000 lung cancer deaths per year among nonsmokers, are attributable to secondary smoke, and that smoking is a leading preventable cause of indoor air pollution. There is mounting evidence that passive smoke is a significant health threat to nonsmokers. In one hour in a smoke-filled environment, nonsmokers may inhale as much of a cancer-causing agent as is found in 5 to 30 cigarettes.<sup>13</sup> That the workplace contributes to this hazard is undeniable. Employers, like the Respondent in this case, are increasingly concerned about liability as courts hold employers responsible for the consequences of passive smoke on nonsmokers.<sup>14</sup> Clearly, Ohio's statute seeking to protect its citizens from cigarette

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<sup>13</sup>R. Ex. 2; U.S. Environmental Protection Agency report, "Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders," dated December 1992.

<sup>14</sup>See Parodi v. Merit System Protection Board, 690 F. 2d 731 (9th Cir. 1983) holding that where an employee established that she suffered serious health problems working in the presence of cigarette smoke, she was entitled to disability retirement benefits because her

smoke, is grounded in legitimate public health and liability concerns.

Historically, where a statute offers alternative means of compliance, the Board has required bargaining over the effects of the alternative chosen if the choice affects wages, hours, or terms and conditions of employment. In re Wilmington City School Dist Bd of Ed, SERB 87-005 (4-9-87). Here, the strong public health interest expressed in the statute weighs particularly in favor of allowing management to decide unilaterally how best to control the hazards of secondary smoke and then to bargain the wages, hours, or terms and other conditions of employment attached to that choice.

Finally to be weighed is the extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties are the appropriate means of resolving conflicts over a no-smoking policy. This issue is best resolved by examining the very nature of union representation and collective bargaining. At the negotiating table, representatives of labor and management trade proposals and seek compromises which will serve the interests of their respective constituencies on wages, hours, and other terms and conditions of employment. However, the subject of smoking tends to pit smokers against nonsmokers rather than management against unions. When a proposed smoking policy comes to the table, labor must inevitably represent a divided constituency.

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employer did not offer her an alternative working environment; Smith v. Western Electric Co., 643 S.W. 2d 10 (Mo. Ct. of App. 1983), holding that an employee may enjoin his employer from permitting him to be exposed to tobacco smoke in the employees' workplace because of his medical reaction to the smoke. The court found that the employer had a common-law duty to provide the employee with a safe workplace.

In this case, employee petitions requested immediate smoking restrictions and specifically notified the Respondent of its common law responsibility to provide a healthful work environment. The petition stated, in part: "The common law of each state requires the employer to keep abreast of new scientific information and protect employees from all recognized hazards." R.Ex. 1.

Where the employees themselves are deeply divided on a health issue, this factor weighs heavily in favor of letting the decision of whether and how to implement a policy on the employer, who must assume the liability for potential health claims.<sup>15</sup> The right to strike and to pursue the impasse resolution mechanisms are hardly appropriate for a subject with such broad public health implications.

Accordingly, we find that the decision to implement a facility-wide smoking ban or to prohibit smoking from certain areas is one which an employer may make unilaterally, without bargaining. We reach this conclusion because the impact on employees' terms and conditions of employment is outweighed by the employer's responsibility to public health as articulated in R.C. 3791.031, by liability concerns, and by the inherent difficulties in bargaining about a subject on which labor itself is divided.

We recognize that the decision we reach today, allowing employers to decide unilaterally to implement no-smoking policies, is not yet the majority view in our sister jurisdictions. While at least two other public sector jurisdictions have allowed public school managers to implement no-smoking policies unilaterally as part of the schools' educational mission and in order to discourage students from smoking,<sup>16</sup> the majority view in the public and private sectors has been that where there is an exclusive bargaining representative, smoking

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<sup>15</sup>In our experience handling unfair labor practice cases, where a refusal to bargain over a smoking policy is alleged, a pivotal issue is frequently whether the union waived its right to bargain over the smoking policy. In our view, this is no accident but rather grows out of a practical dilemma faced by employee organizations. Internal divisions over smoking policies tend to freeze employee organizations into inaction so as to paralyze the bargaining process.

<sup>16</sup>See, e.g., Eureka City School District 16 PERC 23168 (Cal. PERB, 10-27-92); Riverside Unified School District, 13 PERC 20147 (Cal. PERB, 6-29-89); Chambersburg Area School Dist. v. PLRB, 110 LRRM 2251 (Pa. Commonwealth Ct., 6-12-81).

policies which affect unit employees must be bargained.<sup>17</sup>

We are convinced, however, that our approach is correct for the Ohio public sector. The General Assembly's clear policy statement in O.R.C. 3791.031, coupled with the growing evidence of health problems caused by secondary smoke and accompanying potential for liability, justifies the unilateral designation of smoking areas, or banning of smoking altogether, by public employers. This is so because the physical mode of implementing the decision is so fundamental to the employer's ability to serve the public interest and to fulfill its responsibility to insuring employee health, that it should not be subject to compromise or abrogation at the bargaining table.<sup>18</sup>

*Wages, Hours, or Terms and Other Conditions Affected By The Policy Must be Bargained*

Nonetheless, even where a permissive subject, involving the exercise of management discretion, is at issue, the employer, before implementation, must bargain about wages, hours, or terms and other conditions of employment affected by its decision.<sup>19</sup> Where a smoking policy is concerned, unless a union has waived its right to bargain, appropriate subjects for

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<sup>17</sup>See, e.g., Cahokia Community Unit School District 187, 7 PERI 1083, (Ill. ELRB, July 8, 1991); In re Rush-Henrietta Central School District, Case Nos. U-9463, U-9464, U-9477 (New York Public Employment Relations Board, April 27, 1988); Commonwealth v. PLRB, 113 LRRM 3052 (Pa. LRB affirmed, April 28, 1983). See also Allied-Signal, Inc. v. Kansas City Division, 307 NLRB No. 108 (May 29, 1992); Albert's, Inc., 213 NLRB 686, 87 LRRM 1682 (1974) (requiring bargaining over no-smoking policies in the private sector.)

<sup>18</sup>Although Chapter 4117 does not compel either party to reach agreement (O.R.C. 4117.01(G)), the reality of collective bargaining is that some mandatory subjects will be compromised in order to reach agreement on others. Public health responsibilities should not be subject to such compromise.

<sup>19</sup>Where the employer's decision itself is a mandatory subject of bargaining, these procedures must be applied to the decision as well as the employment terms affected by the decision.

pre-implementation bargaining might include items such as discipline, breaktime to allow for smoking away from no-smoking work areas, and availability of smoking-cessation programs.

Where a smoking policy is implemented mid-term in a contract, the employer should give the union reasonable advance notice both of the policy it intends to implement and the projected date of implementation. The union will be required to make a timely request to bargain.

If the bargaining representative states that it does not wish to bargain or does not request bargaining within a reasonable time, then it will be found that it has waived its rights or slept on its rights too long, respectively.

What constitutes reasonable conduct by the employer and a reasonable time to request bargaining by the union will depend on the facts and circumstances in each case, with consideration both for the urgency with which the employer must act and the amount of time that good-faith bargaining would likely consume. If an employer offers no reasonable basis for giving little or no advance notice and when bargainable subjects are affected by the management decision, the intended implementation may be found to be a fait accompli for which a bargaining request by the union would have been futile and therefore is not required. Where the employer does not give the union a reasonable time to bargain over related mandatory subjects, the employer could face rescission of any unilaterally imposed employment terms incident to the policy change, pending bargaining, including expungement of discipline.

Once notice has been given and mid-term bargaining requested, the parties must bargain in good faith to a legal impasse on the wages, hours or terms and other conditions of

employment affected by the implementation of the policy. SERB has historically held that statutory impasse procedures do not apply to mid-term contract disputes. In re Franklin County Sheriff, SERB 90-012 (7-18-90). We adhere to this principle. Although the employer can implement at impasse, the union is statutorily precluded from striking. O.R.C. 4117.18. In mid-term bargaining such as this, the employer may implement its last best offer when the parties have reached an ultimate impasse in bargaining or when the employer has made good faith attempts to bargain the matter before time constraints necessitated the implementation of its last best offer. The employer, however, is not relieved of its mid-term bargaining obligations upon implementation of its last best offer. In this situation, issues which require mandatory mid-term bargaining and which are not resolved by mutual agreement are subject to negotiations at the expiration of the contract. At that time, the employee organization may pursue the unresolved issues as part of its overall contract negotiations including the submission of the issues to any applicable dispute settlement procedure which may include binding conciliation or arbitration, or the right to strike as permitted by statute.

To determine whether impasse has been reached, we see no need to depart from those factors examined in the private sector for that purpose, i.e., the bargaining history of the parties, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement and the contemporaneous understanding of the parties as to the state of negotiations. Taft Broadcasting Co., 163 NLRB 475, 64 LRRM 1386 (1967), *aff'd* 395 F. 2d 622, 67 LRRM 3032 (CA DC 1968).

However, in concluding whether impasse has been reached in the public sector, we will also consider as relevant, the type of public employer involved and any public policy

considerations requiring that a particular policy be implemented expeditiously. If, for example, the parties following reasonable, good-faith negotiation, were unable to agree on the issue of a smoking cessation program, we would find that the employer could lawfully implement its no-smoking policy along with its last, best offer on that subject.

II.

In this case, it is undisputed that the Respondent implemented its no-smoking policy without first engaging in collective bargaining over any specific employment terms which would be affected by the policy. Rather, the Respondent implemented the policy unilaterally as a work rule. Accordingly, the remaining issue before us is whether the Union in this case waived its right to bargain by agreeing to a contract work rule provision.

It is well-settled that the waiver of a statutory right to bargain over a mandatory subject must be established by clear and unmistakable action by the waiving party. Additionally, SERB has historically required that as a "threshold requirement," precise terminology must be contained in a collective bargaining agreement before contract language can be held to override the statutory right to bargain. In re City of Lakewood, SERB 88-009 (7-11-88).

In this case, the hearing officer found that the contract language at Sections 43.03 and 43.05, together with the parties' overall bargaining history, constituted a waiver.

First, we agree with the hearing officer that it is proper to consider bargaining history and extrinsic evidence of the parties' conduct at the bargaining table, together with contract language in determining whether a statutory right has been waived. Contrary to any suggestion otherwise by a prior Board in Lakewood, we do not believe that contract language must specifically waive the right to bargain over a particular issue before the conduct of the

parties can be considered. Rather, a party's intent can best be determined by examining all the foregoing factors together.<sup>20</sup>

Accordingly, a review of the parties' contract negotiations as well as the applicable contract provisions is in order here.

During the 1986 negotiations, the Union sought to negotiate smoking policy provisions on a department-by-department or unit-by-unit basis. The State, on behalf of ODOT and other public employers, indicated that it did not desire to engage in such supplemental agreements on a unit-by-unit basis, but left open the idea of bargaining on a smoking policy in the master agreement. Neither the State nor the Union made further proposals on the subject. In May 1986, the parties reached agreement on a master agreement (Jt. Ex. 1), which is silent on the subject of smoking.

In early 1987, six months or so after the master agreement had been signed, the Respondent's director decided to create a task force to study and make recommendations on a no-smoking policy. The Union was invited to participate on the task force of employees organized by the Respondent to study the issue, but declined to attend such meetings after the first one, because it was concerned it might compromise its right to bargain by its further participation on the task force after it became clear that the task force was not going to involve any collective bargaining on the subject. The Union informed the Respondent that it wanted to bargain the issue instead. The Respondent declined. Ultimately, it adopted one of

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<sup>20</sup>This concept of waiver is consistent with that espoused by the NLRB and reviewing courts in Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 709, 103 S. Ct. 1467, 1478, 75 L. Ed. 2d 387, 401 (1983); Indianapolis Power & Light Co., 273 NLRB 1715, 118 LRRM 1201 (1985), rev'd and remanded sub nom. Local 3269 (D.C. Cir. 1986); Unit Drop Forge Division Eaton Yale & Towne, 171 NLRB 600, 68 LRRM 1129 (1968), enf'd in relevant part 412 F. 2d 108, 71 LRRM 2519 (7th Cir. 1969).

the union's suggestions for providing cessation-of-smoking information for employees, but otherwise adopted a no-smoking policy unilaterally on September 25, 1987, to be effective on October 1, 1987.

There is no evidence that during the 1986 negotiations, the Respondent had given the Union any notice that it had any imminent intentions of proposing or implementing a no-smoking policy.

Nonetheless, the Respondent urges that the language of Article 43 of the master agreement, specifically 43.03 and 43.05, amounted to a contractual waiver of the right to bargain over any aspect of the no-smoking policy. Those sections provide:

**43.03 -- Work Rules**

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

**43.05 -- Duration of Agreement**

This Agreement shall continue in force and effect for three (3) years from its effective date of July 1, 1986, and shall constitute the entire Agreement between the parties. All rights and duties of both parties are specifically expressed in this Agreement. This Agreement concludes the collective bargaining for its term, subject only to a desire by both parties to agree mutually to amend or supplement it at any time.

Article 43.05 is what is commonly referred to as a "zipper" clause in a collective bargaining agreement. We concur with those labor jurisdictions which have concluded that general language in a management rights clause or in a "zipper" clause without more will not

be interpreted as a clear and unmistakable waiver of a union's right to bargain.<sup>21</sup> For a zipper clause or work rule provision to give rise to an effective waiver, the party advocating waiver must show clear evidence that it was negotiated at arms' length and that there was mutual understanding, evidenced by contract language, statements at the bargaining table, and/or past practice, that bargaining rights for a particular subject or category of subjects were affirmatively abandoned.

Here, we do not find that the zipper clause in conjunction with a general work rule provision makes out a waiver of the right to bargain about the employment terms affected by the no-smoking policy.<sup>22</sup> The subject of a no-smoking policy was neither specified in the contract as a work rule, treated historically as a work rule, nor discussed at the bargaining table as a work rule. The parties' discussions on a smoking policy were framed not in the context of work rules but of bargaining. The Union offered a bargaining proposal that the rights of smokers and nonsmokers would be determined in supplemental agreements and a Unit 4 proposal that "there shall be one smoking area within each work area to be designated

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<sup>21</sup>For example, see, East Richland Unit School District No. 1 Bd of Ed. supra, 173 Ill. App. 3d 878 at 891-907, 528 N.E. 2d 751 at 758-68; Hillsborough County PBA, Inc. v. City of New Port Richey, 12 FPER #17040 (Fla. PERC 1985) (rev'd on other grounds, 505 So.2d 1096)(1987); and AFC Industries, Inc. v. NLRB, 592 F. 2d 422, 429 (8th Cir. 1979).

<sup>22</sup>We find this case distinguishable from a recent NLRB ruling where a union was found to have waived its right to bargain over a no-smoking policy by entering a contract which contained both a zipper clause and a health and safety provision. The latter provision allowed the employer to "continue to make reasonable provisions for the health and safety of its employees during the hours of their employment." The NLRB noted in that case that their parties' agreements over a number of years had contained this language, and that the employer's practice under it had been to adopt smoking regulations without objection from the union. It relied upon the zipper clause only insofar as it confirmed the parties' history of allowing the employer to act unilaterally in the area of smoking regulation. Allied-Signal, Inc. v. Kansas City Division, 307 NLRB No. 108 (May 29, 1992).

jointly by the union and the employer." The Respondent offered to entertain such a proposal but only for the master contract and at one point, according to testimony of Eugene Brundige, offered to let the Union designate the areas itself -- hardly the sort of offer that would leave the Union to believe the Respondent viewed a smoking policy as a work rule. Because the subject of a no-smoking policy was raised as a subject for bargaining and was never discussed at the table as a work rule, then it can hardly be inferred that by agreeing to the work rule provision, the Union clearly and unmistakably waived its rights to bargain about all the employment terms attached to the implementation of a smoking policy.<sup>23</sup>

Neither do we find that the Union's failure to pursue its contract proposal on the no-smoking policy amounted to a waiver of its right to bargain. Whether a party's withdrawal of a contract proposal amounts to a waiver of its bargaining rights will depend upon what is said and understood at the table. If a party withdraws a proposal for a specified quid pro quo or chooses not to pursue it with full knowledge of what it is relinquishing, then waiver may be found. See Speidel Corp., 120 NLRB 733, 42 LRRM 1039 (1958). However, a party which raises an issue during bargaining but which drops the matter without further discussion cannot be said to have "clearly and unmistakably" waived the right to bargain the subject matter where the resultant contract is silent on the issue and where there is no pre-contract

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<sup>23</sup>We recognize that the record reflects one point in negotiations where the Respondent offered to negotiate about the smoking policy and even to let the union designate the no-smoking areas. (Tr. 104) We do not interpret the union's ensuing silence as a waiver. The invitation was issued strictly on the employer's terms, i.e., that a procedure for bargaining no-smoking policies had to be bargained at main table, with all facilities covered, rather than by supplemental agreements. It is generally accepted that waiver cannot be inferred from silence. Certainly here, where the union had been clear that it wished to bargain the issue on the basis of supplemental agreements, a general waiver cannot be implied from its failure to respond.

policy in existence on that subject.<sup>24</sup>

Finally, we do not find that the offer by the Respondent in 1987 to let Union representatives participate on the task force to develop the smoking policy has fulfilled any bargaining obligations in this instance. The task force was not the exclusive bargaining representative of the employees but rather a creature of the Respondent's making.

Accordingly, for the reasons stated herein, we reverse the recommendations of the hearing officer, and conclude that by failing to bargain over the employment terms affected by its no-smoking policy, including the disciplinary aspects of the policy, the Respondent violated 4117.11(A)(1) and (A)(5).

### III.

As previously noted, the work facilities at issue here are currently subject to a smoking ban, placed in effect by Executive Order 93-01V. Consistent with that order, we shall order the Respondent to post the attached Notice to Employees and if the Union has made a timely request to bargain pursuant to the Executive Order, the Respondent must bargain those terms and conditions of employment affected by banning smoking from its facilities and vehicles, including the possible rescission of any discipline given pursuant to the no-smoking policy implemented on October 1, 1987. To the extent that bargaining may have already occurred, our order will be deemed complied with.

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<sup>24</sup>For example, see Village of Oak Park v. ISLRB, 168 Ill. App. 3d 7, 118 Ill. Dec. 706, 522 N.E. 2d 161 (1988); and Mundelein Elementary School Dist. No. 75, 3 PERI 1115 (Ill. ELRB, 1-9-87).