

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

American Association of University Professors,

Employee Organization,

and

University of Cincinnati,

Employer.

CASE NUMBER: 93-STK-03-0002

OPINION

MASON, Board Member:

**I. Procedural Background and Facts**

On March 29, 1993, at 8:57 a.m., the University of Cincinnati filed a Request for Determination of Unauthorized Strike pursuant to Ohio Revised Code (O.R.C.) Sec. 4117.23. The Employer maintained that a strike begun on March 29, 1993, by the American Association of University Professors was unauthorized because the parties' collective bargaining agreement had not expired.

In order to act within the 72-hour deadline imposed by O.R.C. Sec. 4117.23, the Board scheduled a hearing to be held at 10:30 a.m., March 30, 1993, at the Board's office. Prehearing procedures were conducted by the Board's General Counsel, and stipulations were agreed upon by the Association and the Employer. The stipulations are:

1. University of Cincinnati "(University)" is a "public employer" within the meaning of O.R.C. Sec. 4117.01(B).

2. American Association of University Professors ("Association") is an "employee organization" within the meaning of O.R.C. Sec. 4117.01(D).

3. The Association is the deemed-certified representative for a unit of all faculty and librarians holding unqualified titles, full-time faculty with qualified titles; and other faculty 65% or more of full-time employed by the University, excluding ROTC faculty, certain administrators and medical faculty as described in Article 1.2 of the parties' collective bargaining agreement (described below in Paragraph 4), and visiting faculty. The parties so represented are in a category for whom strikes are permitted under Chapter 4117 of the Ohio Revised Code.

4. The University and the Association have been parties to a series of collective bargaining agreements, the first of which became effective before 1984, the most recent of which was effective by its terms from September 1, 1989, through August 31, 1992. The agreement was extended by agreement of the parties to October 31, 1992. A copy of the most recent agreement is incorporated as part of these stipulations.

5. Article 38.2 of the parties' collective bargaining agreement, described above in Paragraph 4, ("Agreement") provides, in pertinent part: The Agreement shall continue in effect from year to year ....unless either party notifies the other in writing not less than ninety (90) calendar days prior to the expiration date that

a modification or termination of the Agreement is desired. Should either party to this Agreement serve such notice upon the other party the University and the AAUP shall meet for the purpose of negotiation and shall commence consideration of proposed changes or modification in the Agreement not less than sixty (60) calendar days prior to the expiration of the Agreement.

6. Article 38.3 of the Agreement provides: If, pursuant to such negotiations, an agreement on the renewal or modification of this Agreement is not reached prior to the expiration date, this Agreement shall continue in effect unless terminated by either party upon seven (7) calendar days written notice to the other; provided, however, that in any event the recognition of the AAUP shall continue in accordance with Article 34, Decertification.

7. In Article 39.1 of the Agreement, the University and the Association specifically agree to substitute a private dispute resolution procedure for the procedures specified in O.R.C. Section 4117.14.

8. Article 39.2 of the Agreement states: Should either party, pursuant to Article 38, give notice to the other that a modification or termination of the Agreement or negotiation of a successor Agreement is desired, that party shall simultaneously notify the State Employment Relations Board by serving upon the

Board a copy of the notice and a copy of the existing collective bargaining Agreement.

9. Article 39.3 of the Agreement states, in pertinent part: In the event a settlement has not been reached by the expiration date of the Agreement, the parties may jointly agree to continue negotiations and/or request mediation. If negotiations continue and settlement has not been reached within seven (7) calendar days after the expiration of the Agreement, either the University or the AAUP may declare that the parties are unable to reach an agreement and can request mediation. The parties shall mutually request the appointment of a Mediator from either the Federal Mediation and Conciliation Service (FMCS) or the State Employment Relations Board (SERB).

10. Article 39.4 of the Agreement states: The parties shall meet with the Mediator and provide the Mediator with any information requested to facilitate mediation. If the Mediator is unable to effect a settlement within a period not to exceed fifteen (15) calendar days after appointment, and if the Mediator declares that fact-finding is appropriate to the resolution of the differences, either party may, by written notification to the other, request that their differences be submitted to a fact-finding panel.

11. Article 39.7 of the Agreement states, in pertinent part: Notwithstanding

the dispute settlement procedures described above, 39.7.1: The AAUP reserves the right to strike, under Section 4117.14(D)(2) and otherwise, at any time after the expiration of the Agreement, upon giving ten (10) days notice to the Administration and SERB.

12. Neither party filed a notice to negotiate with SERB pursuant to O.R.C. Sec. 4117.14(B)(1)(c) or Article 39.2 of the Agreement, nor did either party file a notice to terminate the agreement under Article 38.

13. On or about February 3, 1992, the University and the Association began bargaining for a successor agreement. The parties held bargaining sessions throughout the year but had not reached any agreement by August 31, 1992, when the contract was to expire by its terms.

14. On or about August 31, 1992, the parties entered a Memorandum of Understanding in which they "mutually agree(d) to extend the expiration date of the collective bargaining agreement currently in effect until October 31, 1992."

15. During November 1992, the Association suggested that pursuant to Article 39.3 of the Agreement, the parties secure the services of a mediator. The parties mutually agreed to the appointment of an individual as mediator who was

neither from SERB nor FMCS, and continued negotiations with that mediator in November and December 1992.

16. A tentative agreement was reached on December 11, 1992, but it was rejected by the Association membership on or about February 8, 1993.

17. The parties resumed bargaining on March 1, 1993. Since that time, they have engaged in more than 10 bargaining sessions, utilizing the services of a SERB mediator at one session, on March 28, 1993.

18. On March 17, 1993, the Association served a Notice of Intent of Strike or Picket on the University, stating an intent to strike and picket at 7 a.m. Monday, March 29, 1993. The Notice was filed with SERB on March 18th.

19. On March 26, 1993, the Association served two additional Notices of Intent to Strike or Picket on the University, stating an intent to strike and picket at 7 a.m. on April 7, 1993, in one notice, and at 7 a.m. on April 8, 1993, in the other. The two additional notices were filed with SERB on March 29, 1993. The University President was informed by Betsy Sato, AAUP Executive Director, that the April 7th and April 8th strike notices were not intended to cancel or replace the March 29, 1993, strike notice.

20. On March 29, 1993, at 7 a.m., employees in the unit described above in Paragraph 3, went on strike. The strike is in progress at this time.

## II. Issues<sup>1</sup>

1. Whether the parties' contract was expired at the time of the strike, as required by O.R.C. Sec. 4117.14(D) and the parties' agreement.

2. Whether the strike is unauthorized by the failure of the parties to file a notice to negotiate as required by O.R.C. Sec. 4117.14(B)(1)(c) and Article 39.2 of the parties' agreement.

## III. Analysis

### A.

The parties' collective bargaining agreement allows AAUP the right to strike "....under Section 4117.14(D)(2) and otherwise, at any time after the expiration of the Agreement, upon giving ten (10) days notice to the Administration and SERB." Article 39.7.1, emphasis added. This requirement of contract expiration is consistent with O.R.C. Sec. 4117.18(C), which

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<sup>1</sup> It is undisputed that at the time of the strike, the Association had multiple, overlapping strike notices on file. (See Stipulation No. 19). In a recent opinion, we announced a prospective policy that when multiple overlapping notices are on file at the time of a strike, we will find the latest-filed notice to have superseded the earlier one(s). In re Dayton City School Dist Bd of Ed, SERB 93-003 (April 15, 1993). We do not address the issue of multiple notices here, inasmuch as it was not raised as an issue by the parties and the Dayton policy was announced after the hearing was conducted and determination issued in this case.

prohibits striking during the term of a collective bargaining agreement or during the pendency of dispute settlement procedures specified in O.R.C. 4117.14.

At issue here is whether the contract had expired when the Association went on strike.

Article 38.1 of the Agreement provides that the contract shall "continue in full force and effect to and including August 31, 1992." On or about August 31, 1992, the parties entered a Memorandum of Understanding in which they "mutually agree(d) to extend the expiration date of the collective bargaining agreement currently in effect until October 31, 1992."

However, Article 38.3 of their Agreement provides that if the parties do not reach an agreement before the contract expiration date, "...this agreement shall continue in effect unless terminated by either party upon seven (7) calendar days written notice to the other;...." Neither party filed a formal notice of contract termination.

If the parties' agreed-upon extended expiration date of October 31st is viewed as contract expiration for purposes of striking, there is no question that the contract had expired before the strike began on March 29th. Further, by mutually agreeing to engage in mediation on March 28, 1993, the parties implicitly acknowledged that their contract had expired. Article 39.3 of the Agreement makes contract expiration a prerequisite to the mediation process. Even if the termination point of the contract, which under Article 38.3 requires a party to file a notice of termination, is the controlling point for the purpose of striking, we find that contract termination had occurred by the strike date.

In essence, Article 38.3 provides for a special arrangement to come into play after the expiration date of the contract when no new agreement has been reached. Under this arrangement, the terms of the contract will continue indefinitely unless either party chooses to terminate upon seven days' notice. By filing its March 18th notice of intent to strike, the AAUP filed the equivalent of the notice of contract termination required by Article 38.3.

We are unconvinced by the University's argument that a March 15, 1993, memo from the Association complaining about an alleged unilateral change in the University's workload policy, constitutes evidence that the contract had not expired. The memo preceded the Association's notice of intent to strike, which we have found tantamount to a notice of contract termination. Even if it had followed the filing of the strike notice, the memo is not inconsistent with contract expiration. The essence of the Association's complaint was that the University appeared to be in the process of unilaterally changing the policy without bargaining with the union, in derogation of its statutory bargaining obligations and in violation of a contract provision requiring negotiations over policy changes. It is a well-established principle of collective bargaining law that even after contract expiration, parties can change employment terms only through mutual agreement or, if ultimate impasse is reached, through the employer's implementation of its last best offer. NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962).

Therefore, we find that by filing a notice of intent to strike, the union fulfilled its contractual obligation to give notice of contract termination and thereby triggered contract termination before the strike. The parties further evidenced an understanding that the contract had expired by engaging the services of a mediator, and the Association acted

consistent with contract expiration when it insisted that the University bargain about any changes in employment terms.

B.

Also at issue is whether the strike is unauthorized because no notice to negotiate was filed by either party. It is undisputed that neither the University nor the Association filed a notice to negotiate as required by O.R.C. Sec. 4117.14(B)(1)(c) or Article 39.2 of their agreement, before they began bargaining for a successor agreement on or about February 3, 1992. The bargaining followed a November 22, 1991, letter from University President Joseph Stager to Association President Norman H. Murdoch, asking the Association to make "a commitment to conclude mutual gains negotiation by April 1, 1992."<sup>2</sup>

We decline to find on the facts of this case that the failure of either party to file a notice to negotiate so flawed the process that the strike was unauthorized. Our ruling is consistent in this respect with a prior Board's ruling in In re Central Ohio Transit Auth, SERB 86-007 (11-25-86), where a notice to negotiate was deemed waived by the lack of timely objection and the parties' conduct in proceeding to bargaining. Here, it appears that the University, which pressed for an early conclusion to mutual gains bargaining, had at least an equal obligation to file the notice but for whatever reason, did not. It would not be equitable under these circumstances to allow the University to profit from its own lack of action by declaring the strike unauthorized.

Although we conclude that this strike is authorized, we are compelled to observe that

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<sup>2</sup>Association Ex. 6

both issues presented to us for resolution arose from the parties' failure to adhere strictly to their own agreed-to negotiations procedure, i.e., the failure of either party to file a notice to negotiate or a notice of contract termination. Although in the particular circumstances of this case<sup>3</sup> we found the conduct here not to have fatally flawed the process, it is important to note that parties operate at their peril and face stiff repercussions when they fail to fulfill each step in the statutory process or in their own negotiated process. For example, when no notice to negotiate has been filed, the Board may exercise its discretion not only to declare a strike unauthorized but also order the parties back to the bargaining table to resume the dispute resolution process. Although the O.R.C. Sec. 4117.14(C)(1)(f) clearly authorizes parties to devise private settlement procedures in lieu of those specified in O.R.C. 4117.14, it is imperative that once adopted, those procedures must be followed.

Owens, Chairman and Pottenger, Vice Chairman, concur.

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<sup>3</sup>Here, the University had at least an equal obligation to file a notice to negotiate and so should not benefit from its own failure to act by receiving a determination on that basis that the strike is unauthorized. Further, the Association, by its conduct in filing a notice of intent to strike, demonstrated an intent to terminate the contract.