

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,

Complainant,

v.

Portage Lakes Joint Vocational School District
Board of Education,

Respondent.

CASE NUMBER: 90-ULP-05-0264

OPINION

OWENS, Chairman:

I.

This case comes before the Board on exceptions from a Hearing Officer's Proposed Order. The underlying unfair labor practice charge was filed by the Portage Lakes Education Association (Employee Organization) against the Portage Lakes Joint Vocational School District Board of Education (Employer). For the reasons stated below we agree with the hearing officer that the Employer violated Ohio Revised Code (O.R.C.) §4117.11(A)(1) and (A)(5) by unilaterally changing the hours and benefits of a unit position. However, we modify the remedy proposed by the hearing officer.

II.

On February 2, 1990, the Employer and the Employee Organization reached a collective bargaining agreement with terms retroactive to January 1, 1990. This was the parties' first collective bargaining agreement following SERB's certification of the Employee

Organization as an exclusive bargaining agent. The contract provided that employees working more than 30 hours per week received full benefits paid by the Employer, and employees working at least 20 hours per week but less than 30 hours per week received half benefits. (F.F. 8). Employees working less than 20 hours per week were not entitled to any medical benefits under the terms of this collective bargaining agreement. (F.F.12).

One bargaining unit position specified in the contract was that of Evening Secretary. In November 1989, following the resignation of its evening secretary, the Employer assigned the duties of the position to Tammy Louise Ray, who had been employed as a substitute secretary since October 19, 1989. She worked from 2:00 p.m. to 10:00 p.m. Monday through Thursday, a total of 32 hours per week. (F.F. 1-2).

On December 15, 1989, the position of Evening Secretary was posted at the Employer's facility, listing the hours as Monday-Thursday, 2:00 p.m.-10:00 p.m. The Adult Education Director, Joseph Smith, told Ms. Ray that he wanted her to apply for the job because he was pleased with her work. (F.F. 4-5) On January 17, 1990, Mr. Smith recommended to the Superintendent that Ms. Ray be hired as the Evening Secretary. (F.F. 11) Ms. Ray never formally applied for the Evening Secretary position. On February 12, 1990, Mr. Smith withdrew his recommendation to employ Ms. Ray in this position (F.F. 15).

On February 12, 1990, ten days after a collective bargaining agreement had been reached by the parties, the position of Evening Secretary was re-posted with the hours of work reduced to 19 hours per week. The terms of the collective bargaining agreement provided no medical benefits to any employee who worked less than 20 hours per week, and the Department of Adult Education did not want to pay any benefits for this position. (F.F.8, 12,14). Ms. Ray did not apply because with the reduction in hours, no medical benefits would be available to her. (F.F. 16).

The reduction in hours and hence in benefits for the Evening Secretary position were

not negotiated or discussed between the parties before or after the collective bargaining agreement was ratified. (F.F. 22). During contract negotiations, the subject of job descriptions was brought to the table. Both sides presented proposals and counterproposals. On November 9, 1989, the Employer made a proposal on job descriptions, which read as follows:

5.23 JOB DESCRIPTION

Each school support staff position shall have a job description which lists the position title, work year, supervisor, basic duties and qualifications.

On November 30, 1989, the Employee Organization sent counter-proposals to the respondent, which read as follows:

- A. Each school support staff position shall have a job description which lists position title, work year, work day, salary, holidays and vacations, benefits, supervisor, basic duties and minimum qualifications.
- B. Once agreed upon by the parties to this contract, the job description shall be maintained without change for the life of the contract.

Before signing the tentative agreement, both sides agreed, at the Employer's suggestion, to drop the issue from the table for lack of an agreement. The issue of job descriptions is not contained in the agreement between the parties.

III.

The Employer does not deny that the change in hours and hence in benefits for the position of Evening Secretary was made unilaterally and without bargaining. Nor does the Employer contest that hours and benefits are mandatory subjects of bargaining. Rather, the Employer argues that by agreeing to withdraw the proposals on job descriptions during the contract negotiations, the Employee Organization waived its rights to bargain about such

changes¹.

To support its waiver argument, the Employer cited Speidel Corp., 120 NLRB 733,42 LRRM 1039 (1958). However, a careful study of Speidel shows that it is clearly distinguishable.

In Speidel the union, during negotiations, proposed an article entitled "Maintenance of Privileges", the thrust of which was to ensure that all privileges enjoyed by the employees before the date of the agreement should continue during the contract term. The employer was fearful that the terms of the proposed clause were broad enough to include Christmas and Easter bonuses and Blue Cross insurance, which the Employer did not want a contractual obligation to provide. Accordingly, the employer objected to the proposed clause. During the course of negotiations, the employer specifically explained to the union that it rejected the proposed clause so as to avoid making contractual obligations of the bonuses and insurance which it insisted was within its management prerogative. The union did not comment upon the employer's interpretation of the proposed clause or upon its management prerogative position. Furthermore, the union neither pressed for the acceptance of the clause nor sought a counter-proposal from the employer. The new contract did not include this clause.

When the employer did not give the Easter bonus to the employees, the union filed an unfair labor practice charge alleging a refusal to bargain and a unilateral change in conditions of employment. In finding no violation, the NLRB emphasized that during the negotiations the employer made it clear to the union that it understood that the proposed "Maintenance of Privileges" clause covered bonuses and insurance, and that it was adhering to its position that

¹The Employer also raised a past practice argument based on the statement that historically, the unilateral changes were within management rights. This argument must be discarded since the so called "past practice" occurred before the Employee Organization was certified by SERB and hence before the Employee Organization and the Employer came under the statutory framework of Chapter 4117. Without a specific agreement between the parties, a past practice of making unilateral changes regarding subjects covered under Chapter 4117 cannot carry over from the pre-certification period.

bonuses were matters of management prerogative when it objected to the inclusion of the clause in the collective bargaining agreement. The employer's clear explanation of its position at the table, specifically that the insurance and benefits were management rights and that on this specific ground it objected to the inclusion of such clause, coupled with the union's complete silence, its failure at any time thereafter to contradict the employer's interpretation, and its withdrawal of the proposal from the table, was perceived by the NLRB to mean a clear understanding between the parties that the subject of bonuses would remain a management right. In these circumstances the NLRB found a waiver by the union in the matter of bonuses.

The key elements in finding a waiver in Speidel are the employer's clear warning that the contract language did not obligate it to pay the bonuses, and the union's acquiescence demonstrated by its willingness to execute the contract without objection despite the warning².

In our case, these key elements are missing. The record lacks a clear warning, or any warning, by the Employer that hours and benefits for certain positions in the bargaining unit are management prerogatives which can be unilaterally changed without bargaining. The record also lacks any evidence that the Employee Organization acquiesced or even appeared to acquiesce in such a position. There were only vague statements offered by Employer's witnesses to support a waiver.³ Such testimony can hardly be characterized as a clear warning or understanding that hours and benefits might unilaterally be changed by the Employer.

²See Park-Ohio Industries v. NLRB, 112 LRRM 3089 (6th Circuit, 1983) fn.1.

³For example: "If I recall, we were involved with a federal mediator at that time. Specifically, the comment came to us, I - I'm sure the source of that comment was the team. I'm not sure who made the comment that that's our position, those are our responsibilities, management's responsibilities, for job descriptions, and that it would not be in the agreement." Or "...I remember statements to the effect that, that we had looked at job descriptions, we couldn't really come up with, with a solution, and that the Association realized that we were the ones which needed to make those management decisions. Those were the decisions we were getting paid to do, that we would write the job descriptions." (Tr.51,98).

To summarize, the Speidel waiver argument of the Employer has no merit. On the contrary, applying Speidel to the case at issue mandates a finding that the Employee Organization did not waive its statutory right to bargain about hours and benefits.

A few comments are warranted. The issue before us is the narrow question of whether the Employer here was privileged to unilaterally change working hours and benefits of a bargaining unit position, not the more general question whether an employer may determine job descriptions. The Employer proposed that the job description for each position list the position title, work year, supervisor, basic duties and qualifications. The Employee Organization, on the other hand, proposed that the list should also include work day, salary, holidays and vacations, and benefits. In addition, the Employee Organization proposed to include a zipper clause to the effect that the job description shall be maintained without change for the life of the contract. However, nowhere in the proposals is mentioned the existence or the nonexistence of the duty to bargain on hours and benefits. Nothing in the proposals mentions a procedure whereby the Employer may make changes in hours and benefits of certain positions without bargaining. Moreover, a waiver by the Employee Organization cannot be inferred in this case when the record shows that the Employer initiated the exchange of job descriptions proposals and their withdrawal, and when both the Employer and the Employee Organization mutually withdrew their proposals when no agreement was reached (F.F. 19, 20). Thus, where there is no clear and specific message at the bargaining table that the Employer interpreted certain proposals to allow it a free hand in changing hours and benefits, and where the record shows that the proposals were withdrawn for lack of agreement and not in a silent acquiescence by the Employee Organization with the employer's position, no waiver of the Employee Organization's right to bargain on hours and benefits can be inferred. The waiver of a statutory right must be clear and unmistakable.⁴ This is not the case here. Not finding a waiver, we uphold the hearing officer's finding that the Employer violated O.R.C. §4117.11 (A)(1) and (A)(5) when it unilaterally changed the hours and benefits of the Evening Secretary position.

⁴In re Ohio Department of Transportation SERB Opinion 93-005 (4-29-93)

IV.

The hearing officer proposed as a remedy the reinstatement of Tammy Louise Ray to the position of Evening Secretary to Adult Education under the same job description with the hours and benefits as existed prior to the illegal change, with back pay. We do not agree. Ms. Ray had neither applied for nor been hired into that position, and it would be too speculative to assume that had no changes taken place she would have applied and been hired.

The proper remedy is for the Employer to immediately restore the position of Evening Secretary to Adult Education to the same number of hours as existed prior to the unlawful action by the Employer, 32 hours per week, with the benefits and all other terms and conditions of employment in accordance with the collective bargaining agreement. A change in hours and benefits, if necessary, can only be accomplished through good faith negotiations with the Employee Organization.⁵

POTTENGER, Vice-Chairman and MASON, Board Member, concur.

⁵Because Ms. Ray has no right to reinstatement, and because the current employee accepted the position with no benefits and fewer hours knowingly, voluntarily, and intentionally, backpay is unwarranted.