

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

and

City of Cincinnati,

Respondent,

CASE NUMBER: 90-ULP-03-0148

OPINION

POTTENGER, Vice Chairman:

The 1988-90 collective bargaining agreement between the City of Cincinnati (Respondent) and Ohio Council 8, American Federation of State, County and Municipal Employees (AFSCME or Union) contained a provision which required that employees be afforded a pre-disciplinary hearing for all discipline except oral and written reprimands and failure to qualify at the end of a probationary period.¹ The contract was silent as to whether pre-disciplinary hearings could be tape-recorded.

The record indicates that pre-disciplinary hearings had routinely been tape-recorded in the Police Department, where some employees are represented by AFSCME, but such

¹Article XVI(G) of the parties' agreement provides: G. No employee shall be disciplined (except for oral and written reprimands and failing to qualify at the end of a probationary period) without a hearing by the head of his department, division or bureau, unless the employee specifically waives their hearing in writing. Notice of the reasons for the disciplinary action shall be given to the Local Union President at least three (3) working days prior to the date of the scheduled hearing. At this hearing the employee shall have the right to be represented by the Union. It is the responsibility of the official hearing the charges to advise the employee of his right to representation before the date of the hearing. In special cases the employee may be suspended pending a hearing, but such hearing shall be held within five (5) working days of the suspension.

hearings had only been sporadically tape recorded in other departments where AFSCME-represented employees worked. AFSCME routinely objected without success to the tapings, as it did to the recording of a pre-disciplinary hearing December 11, 1989, involving Police Department employee, Jeanette Self.

In a letter dated February 25, 1990, AFSCME requested that the Respondent discontinue the practice and begin negotiating with AFSCME over the issue. On March 1, 1990, Respondent declined to discontinue the practice but rather advised AFSCME that it would negotiate the use of tape recorders at pre-disciplinary hearings during upcoming contract negotiations.

The hearing officer concluded that the Respondent's tape recording of pre-disciplinary hearings constituted a mandatory subject of bargaining which it could not implement without bargaining with AFSCME.² Because the hearing officer found that the Respondent had not bargained before taping the hearings but insisted on taping over the Union's objections, the hearing officer found that the Respondent had violated O.R.C. §4117.11(A)(1) and (5).

The case is before us on exceptions filed by both the Respondent and AFSCME. Both excepting parties contend that the taping of pre-disciplinary hearings is a nonmandatory, or permissive, subject of bargaining. Based on that characterization, however, they urge that we reach contradictory conclusions. The Respondent argues that because the issue is permissive, it need not have been bargained at all. The Union urges that because the tape recording is a permissive subject, the Respondent violated O.R.C. §4117.11(A)(1) and (5) by insisting on it over the objections of the Union. The Complainant agrees with the hearing officer's conclusion that the tape recording of pre-disciplinary hearings is a mandatory subject of bargaining.

²An earlier HOPO in this matter, issued March 29, 1991, which recommended dismissal of the charge and complaint as untimely, was reversed by the Board and remanded to the hearing officer to take further testimony.

I.

As the Ohio Supreme Court has observed, Chapter 4117 anticipates three classifications of bargaining subjects long recognized in the private sector: mandatory, permissive and illegal. City of Cincinnati v. Ohio Council 8, AFSCME, 61 OS 3d 658 (1991).

The Court noted that "mandatory subjects" are listed in O.R.C. §4117.08(A), and are those subjects about which the statute requires the parties to bargain collectively, as defined in O.R.C. §4117.01(G), while "permissive subjects," enumerated in the statute at O.R.C. §4117.08(C), are those subjects about which the parties are neither required to nor precluded from bargaining.³ Citing NLRB v. Borg Warner, 356 U.S. 342, 249 (1958), the Court went on to observe that the only constraint on permissive bargaining is that a party cannot lawfully insist to impasse on the inclusion of a permissive subject in an agreement. City of Cincinnati, supra, at 660.

AFSCME has argued, and we agree, that because taping recording does not in and of itself affect wages, hours and terms and conditions of employment, it is a non-mandatory subject of bargaining.⁴ Because taping itself does not affect wages, hours and terms and conditions of employment, it is unnecessary to apply the balancing test we recently announced in SERB v. Ohio Department of Transportation, SERB 93-005 (April 29, 1993) to determine whether taping is a mandatory or permissive subject.⁵

³While the court found the nine enumerated management rights to be permissive subjects, it indicates that there may be other permissive subjects not listed in the statute Cincinnati v. Ohio Council 8, AFSCME, supra, at 665, fn 2.

⁴Exceptions to Hearing Officer's Report and Recommendation and Brief of Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO to SERB, p.5, fn. 1

⁵Only those subjects which both have a material influence upon such employment terms and involve the exercise of inherent management discretion are subject to the ODOT balancing test. SERB v. ODOT, supra, slip op. at p. 7.

Further, tape recording pre-disciplinary hearings is reasonably contemplated by O.R.C. §4117.08(C), which specifically gives public employers the right to "suspend, discipline, demote or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees." (Emphasis added). Here, taping the hearings was in furtherance of the Respondent's right and responsibility to discipline for just cause. The hearing officer found in his Proposed Order, and the record verifies, that the Respondent clearly believed that it needed tape recordings or stenographic notes to accurately produce the recommendations of the individual conducting the pre-disciplinary hearing. As the hearing officer also acknowledged, the tapes were, in fact, used at times to clarify recommendations on discipline that arose from the hearings. Accordingly, we find that taping pre-disciplinary hearings is contemplated by O.R.C. 4117.08(C) and so is a permissive subject of bargaining.⁷

II.

Still at issue is whether the Respondent could lawfully insist upon taping pre-disciplinary hearings over the Union's objections.

As noted, the Ohio Supreme Court has recognized only one constraint on permissive subjects, i.e., that a party cannot lawfully insist to impasse on the inclusion of a permissive subject in an agreement. Clearly, no party here has insisted upon a contract provision that pre-disciplinary hearings be taped.

In urging a violation, however, the Union relies upon public and private sector cases holding that a party bargains in bad faith by insisting on the tape recording of collective

⁶O.R.C. 4117.08(C)(5)

⁷In so ruling, we note that in accordance with the Ohio Supreme Court ruling in City of Cincinnati v. Ohio Council 8, AFSCME, supra, if parties choose to bargain about tape recording pre-disciplinary hearings and incorporate a provision on the subject in their collective bargaining agreement, it will have the same force as an agreed-upon mandatory subject.

bargaining negotiations or grievance proceedings.⁸

The rationale for finding a violation in the context of taping bargaining sessions or grievance hearings is the principle that although parties need not bargain at all about permissive subjects, they cannot condition bargaining over mandatory subjects, e.g., terms of a contract or grievance settlement, upon reaching agreement on permissive subjects. NLRB v. Borg-Warner, supra. Under this line of cases, for example, a party bargains in bad faith if it refuses to participate in contract or grievance talks unless they are tape recorded. Further, the insistence upon taping, even where the bargaining or grievance session proceeds, has been found to have a chilling effect upon the free exchange of proposals and ideas.⁹

If pre-disciplinary hearings serve as a bargaining forum, it follows that one party cannot insist, over the other's objections, on tape-recording them. However, our review of the record does not convince us that the purpose of pre-disciplinary hearings is to bargain about appropriate discipline or that the taping of these hearings has a chilling effect on the pre-disciplinary procedure.

Article XVI(G) of the parties' agreement provides for a union representative to be present at a pre-disciplinary hearing. It does not state that the representative's role is to bargain about prospective discipline. Rather, the contract is clear that it is the Respondent's right to discipline for just cause.¹⁰ The pre-disciplinary hearing serves simply as an

⁸ See, e.g., NLRB v. Pennsylvania Telephone Guild, supra; NLRB v. Bartlett-Collins, supra; Latrobe Steel Co. v. NLRB, 630 F.2d 171 (3d Cir. 1980) cert. denied, 454 U.S. 821 (1981); Illinois Nurses Association v. County of Cook, 3 PERI 3013 (1987).

⁹ See cases cited in fn. 8

¹⁰ Article VI "Management Rights" lists among other things, the right to "3. Suspend or discharge employees for just and proper cause."

Article XVI "Discipline" states: "B. The Union recognizes the right of the City to take disciplinary action against employees for just and proper cause. Penalties for disciplinary action may include oral and written reprimands, loss of all or part of vacation, off days or Holidays, suspension; reduction of pay to the next lower step within the pay range, demotion or dismissal."

information-gathering tool to assist management in determining whether just cause exists.

That pre-disciplinary hearings are fact-finding procedures used to gather information rather than to bargain, is verified by a review of transcripts of two earlier pre-disciplinary hearings taped by the Respondent and submitted as evidence in this matter. (R. Ex. 1 and 2). At both these proceedings, the hearing officer alternately questioned a management official involved in the discipline and the charged employee and her union representative, about the events leading to the charge of misconduct against the employee. At the close of the hearing, the union official was given an opportunity to present any argument supporting mitigation of any penalty recommended by the hearing officer. Based on the evidence, including testimony of witnesses, exhibits offered, and mitigation argued, the hearing officer was to recommend whether the charges against the employee should be sustained and if so, with what penalty.

It is clear that the union representatives' role at such proceedings is not to bargain about what discipline the employee is to receive but rather to provide the hearing officer with the complete facts and rationale for making a just cause determination.¹¹

We decline to find, as AFSCME seems to urge, that because pre-disciplinary hearings are required by the contract, they are de jure part of the bargaining process without regard to the actual character of the proceeding.

It is instructive that the NLRB, concluding that grievance meetings are part of the collective bargaining process, has not simply relied on the fact that they are referenced in a collective bargaining agreement. Pennsylvania Telephone Guild, 277 NLRB 501, 120 LRRM 1257 (1985). Rather, it has focussed on their actual function as an extension of the collective bargaining process, where the union and employer may trade proposals with the

¹¹AFSCME urges that because only disciplinary actions which result in written reprimands and suspensions of less than three days may be grieved, it follows that the pre-disciplinary hearing in effect replaces the grievance hearing for more severe discipline. We are not persuaded that a pre-disciplinary hearing is somehow transformed into a grievance procedure because a grievance procedure is otherwise lacking.

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primary goal of reaching a mutually acceptable agreement. It was the chilling effect that the tape recording could have on this give-and-take process, which prompted the finding in Pennsylvania Telephone Guild, that a union could not insist on taping grievance meetings. In that decision, the NLRB specifically distinguished grievance meetings from more formal adversarial proceedings where the purpose of the proceeding, as in the pre-disciplinary hearing here, is to determine the truth.

Following that same line of thought, the Illinois Local Labor Relations Board found that an employer did not violate its statutory bargaining obligation when it insisted on taping pre-disciplinary hearings. In so concluding, the Illinois Board noted that the U.S. Supreme Court had found that bargaining obligations did not vest during investigative meetings which could result in discipline, even though a union representative was present. Illinois Nurses Association v. County of Cook, 3 PERI 3013 (1987), citing NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).

Significantly, SERB has also distinguished investigative meetings from bargaining sessions. In Trotwood-Madison, SERB 89-012 (5-19-89), the Board stated that at an employer-employee encounter about work evaluation, where a union representative has a statutory right to represent the employee, the employer was not "required to engage in ad hoc collective bargaining with the union."

We find that in an investigatory proceeding such as a pre-disciplinary hearing, management has a compelling interest in obtaining the most accurate record possible in order to meet its obligation to discipline for just cause. We believe, like other jurisdictions, that in a formal hearing the presence of a tape recorder is more likely to ensure the truthfulness of testimony than to inhibit it.¹² Therefore, while the presence of a tape recorder during a grievance meeting or collective bargaining session might inhibit free discussion, we are not

¹²See, e.g., NLRB v. Pennsylvania Telephone Guild, 799 F.2d 84 (3d Cir. 1986); NLRB v. Bartlett-Collins, 639 F.2d 652 (10th Cir.), cert. denied, 452 U.S. 961 (1981); Rosario v. Amalgamated Ladies' Garment Cutters Union, Local 10, 605 F.2d 1228 (2d Cir. 1979).

persuaded that it inhibits the fact-finding process but rather may enhance it.

In sum, because it is clear that pre-disciplinary hearings are investigative, not bargaining forums, it would be a distortion of the law and the facts for us to construe a pre-disciplinary hearing as an extension of the bargaining process and to argue that by insisting on tape recording, the Respondent is somehow conditioning the bargaining of mandatory subjects on a permissive subject.

Accordingly, we find that it was not a violation of O.R.C. §4117.11(A)(1) and (5) for the Respondent to insist on tape recording pre-disciplinary hearings. Because we do not view the tape recording as a mandatory subject of bargaining, we need not address the question, raised in Respondent's exception, of whether the Union waived its bargaining rights.

The Complaint is dismissed.

Owens, Chairman and Mason, Board Member, concur.