

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Youngstown State University,

Respondent.

CASE NUMBERS: 89-ULP-12-0680
89-ULP-12-0681

OPINION

MASON, Board Member:

In his proposed order, the hearing officer has recommended that we find the Respondent violated Ohio Revised Code (O.R.C.) §4117.11 (A)(1) and (A)(5) by unilaterally implementing a policy which prohibited smoking in a number of campus facilities, without first notifying and bargaining with two of the unions which represent affected employees, i.e., Youngstown State University (YSU) Association of Professional/Administrative Staff (APAS) and YSU Association of classified Employees (ACE). It is undisputed that the policy was bargained with a third employee organization, the YSU Chapter of Ohio Education Association (OEA), which represents the faculty.

The Respondent's exceptions raise essentially three issues: (1) whether implementation of the no-smoking policy was a mandatory subject of bargaining; (2) if so, whether the APAS and ACE waived their right to bargain over the policy; and finally (3) if a violation occurred, whether it is an appropriate remedy as a matter of public policy to require the Respondent to rescind a policy which was properly bargained with another employee organization, and which benefits the health of faculty, staff and students.

The record indicates that in March 1988, the Respondent had invited representatives of both unions to serve on an ad hoc committee to recommend changes in the Respondent's smoking policy. The committee was not formed to bargain, and the ACE and APAS members who ultimately participated did so more in an individual capacity than on behalf of the bargaining representative. In November, 1988, the committee issued a proposed no-smoking policy, which the Respondent distributed to the university community including union representatives for comment in January, 1989.

The Respondent never stated it intended to implement the proposed policy and in fact, some nine months later, in October, 1989, implemented a more stringent policy, which it had bargained with the YSU Chapter of OEA. In response to an ACE member grievance, the Respondent took the position that it had the management right to implement the policy unilaterally.

On or about November 20, 1989, the OEA Uniserv representative to both APAS and ACE served Respondent's agent, Dr. Taylor Alderman, with a demand that Respondent cease and desist from implementing the effects of the no-smoking policy and that Respondent bargain on all matters pertaining to restrictions on smoking. Respondent replied that it had the managerial right to unilaterally implement the policy but indicated a willingness to meet with ACE representatives on a meet-and-confer basis. (I-F No. 10, Jt. Ex. 7(A) and 7(B)).

I.

We recently concluded in In re Ohio Department of Transportation, SERB 93-005 (4-29-93), the decision to implement a no-smoking policy was a permissive subject of bargaining, but that an employer must bargain over the wages, hours, or terms and other conditions of employment affected by the policy.

Important to that decision was the requirement of O.R.C. 3791.031 that in certain

state facilities, including universities, smokers must be separated from non-smokers, either by designating certain areas or entire buildings as non-smoking. The same statutory provision applies in this case, and we reach the same conclusion as to the parties' bargaining obligations.

II.

The Respondent in its exceptions argues that the employee organizations waived their right to bargain over the no-smoking policy. Specifically, it argues that during contract negotiations which postdated the policy's implementation, APAS could have bargained over the policy but chose to pursue its unfair labor practice charge instead. Likewise, the Respondent contends that because ACE representatives did not respond to an invitation by the Respondent to meet and confer after the policy was implemented, ACE also waived its right to bargain over the policy.

As we stated in ODOT, supra:

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.

What constitutes reasonable advance notice 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 the good-faith bargaining would likely consume. If an employer offers no reasonable basis for giving little advance notice, 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. Certainly, if the employer gives no advance notice and opportunity to bargain

about an intended change, the union has no burden to request bargaining.

Here, the Respondent unilaterally implemented a campus-wide no-smoking policy in October, 1989, at least nineteen months after it began to study the issue through an ad hoc committee. It never advised ACE or APAS in advance that it intended to implement this particular policy. Although it had earlier distributed committee recommendations to APAS and ACE representatives for comment, it never advised the employee organization that it intended to implement the recommendations and in fact implemented a more restrictive policy. The Respondent failed in its duty to provide clear advance notice of its intended policy. There is no evidence that the employer was operating under any emergency which would have prevented adequate notice. The unions were presented with a fait accompli, which did not give rise to any obligation on their part to request bargaining over employment terms affected by the policy.¹ Accordingly, by implementing the policy without giving the unions an opportunity to bargain the employment terms affected by it, the Respondent violated O.R.C. §4117.11(A)(1) and (5).

Some weeks later, when ACE and APAS, through the OEA Uniserv representative, requested that the Respondent cease and desist and bargain, the Respondent offered only to meet and confer. The offer was too little, too late. The unions' failure to pursue it does not constitute waiver.

¹At page 12 of his Proposed Order, the hearing officer stated: "...nothing in 4117, et seq., requires an employee organization to file a formal demand to bargain over a policy which affects the wages, hours, terms and conditions of employment of the employees it represents in order to preserve its right to do so." In support of that proposition he cited Highway Safety Department, State Highway Patrol v. SERB, (1989), SERB 4-76 (CP, Franklin, 6-13-89). It is important to note that the "formal demand" not required by the Board in that case was a 4117.14 notice to negotiate. We agree that a 4117.14 notice to negotiate is not required when mid-term bargaining is desired, but, as stated in this opinion, the union must make a timely request to bargain.

Neither is waiver evidenced by ACE's conduct during subsequent contract negotiations. As discussed in QDOT, waiver is sometimes found through the union's agreement to specific language in a zipper clause negotiated before an alleged unilateral change. Here, the Respondent appears to base its waiver argument on after-agreed zipper language. In any event, we agree with the hearing officer that the zipper clause in the parties' agreement is not sufficiently specific to constitute a waiver of the union's bargaining rights. Accordingly, we find that by failing to give the union an opportunity to bargain over the employment terms affected by its unilaterally implemented policy, the Respondent violated O.R.C. §4117.11(A)(1) and (5).

III.

Consistent with our finding, we shall order the Respondent to bargain upon the union's request, over the employment terms affected by the unilateral implementation of a no-smoking policy, rather than rescind the policy as recommended by the hearing officer. If the Respondent has banned smoking from its facilities in response to Executive Order 93-01V, our order shall be deemed complied with to the extent that the Respondent has, upon the union's request, bargained over those employment terms affected by the ban.

Owens, Chairman and Pottenger, Vice Chairman, concur.