

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 94-004

In the Matter of

Ohio Council 8, American Federation of State, County, And  
Municipal Employees, AFL-CIO, Local 2020-A,

Employee Organization,

and

City of New Lexington,

Employer

CASE NUMBER: 94-STK-01-0001

OPINION

OWENS, Chairman:

I Procedural Background and Facts

Pursuant to Ohio Revised Code (O.R.C.) 4117.23, the City of New Lexington (Employer) filed a Request for Determination of Unauthorized Strike with the State Employment Relations Board (SERB) on January 31, 1994, alleging that six out of eight employees who work in a bargaining unit represented by Ohio Council 8, American Federation of State, County, and Municipal Employees, AFL-CIO, Local 2020-A (Employee Organization or Union) had engaged in an unlawful strike by refusing to be available for call-in emergency repair work on Friday, January 28, Saturday, January 29, and Sunday, January 30, and by failing to report for their regularly assigned shift on Monday, January 31.

In order to act within the 72-hour deadline imposed by O.R.C. 4117.23, the Board scheduled a hearing to be held at 9:30 a.m., February 2, 1994, at the Board's office. Pre-hearing procedures were conducted by SERB's General Counsel and stipulations were agreed upon by the Employee Organization and the Employer. The parties also presented witnesses: City Administrator John Johnson for the Employer and Dan Hammer, a maintenance equipment operator and member of the Union negotiating team, for the Union. The stipulations

were as follows:

1. City of New Lexington ("City") is a "public employer" within the meaning of O.R.C. Sec. 4117.01(B).
2. Local 2020-A, Ohio Council 8 of the American Federation of State, County and Municipal Employees, AFL-CIO ("Union") is an "employee organization" within the meaning of O.R.C. Sec. 4117.01(D).
3. The Union is the deemed-certified representative for a unit of all service and maintenance employees of the City, including laborers, water/sewer plant operators, equipment operators/maintenance men, and meter readers/installers (the "Unit"). The employees so represented are in a category for whom strikes are permitted under Chapter 4117 of the Ohio Revised Code.
4. The City and the Union have been parties to a series of collective bargaining agreements, the first of which was effective sometime before 1984, the exact date being unknown. The most recent agreement was effective by its terms from December 24, 1992, through December 22, 1994. A copy of the most recent agreement is incorporated as part of these stipulations.
5. Article 15-Wages, Section 1 of the most recent agreement provides:  
Effective on the signing of this Agreement all employees shall receive a \$300.00 signing bonus. Effective October 26, 1993, there will be a wage reopener. All provisions of 4117 of the Ohio Revised Code shall apply.
6. Pursuant to the contractual provision described above in Paragraph 5, on October 20, 1994, the Union sent a Notice to Negotiate to the City.
7. On November 9, 1993, the parties met, and the Union gave the City a wage proposal

calling for a \$.60 per hour wage increase for Unit members. On December 7, 1993, the City countered with a proposal that the current wage table would remain unchanged for the remainder of the contract. No additional proposals were exchanged, impasse was declared, and a fact finder appointed. The fact finder held a hearing on December 21, 1993. The parties agreed that additional financial data could be sent to the fact finder by December 30, 1993, and mutually agreed to extend time for his report to be mailed on or about January 14, 1994. The report issued on January 14, 1994. On January 24, 1994, the Employer mailed a Certification of Fact-Finding Vote, indicating that the City had rejected the report by a vote of 6-0.

8. On Monday, January 31, 1994, those six of eight Unit employees reported off sick from their regularly assigned shift. On Tuesday, February 1, 1994, all Unit employees reported for work.

9. At no time relevant to this proceeding was a Notice of Intent to Strike provided to the Employer by the Employee Organization.

#### FINDINGS OF FACT<sup>1</sup>

1. No strike activity was in progress at the time of the hearing. The employees had returned to work and were cooperating with management in carrying out assigned tasks. (Tr. 19, 21, 39)

2. The parties' current collective bargaining agreement at Article XVI, Sec. 5 Call-In Pay states: "An employee who is called in to work at a time when he is not regularly scheduled and who does report to work shall be guaranteed three (3) hours pay. All call-in pay will be at the applicable hourly rate of pay." Attachment to Jt. Ex. 1

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<sup>1</sup>All references to the transcript of the hearing are indicated parenthetically by "Tr." followed by the page number(s). All references to exhibits are indicated parenthetically by "Jt. Ex", followed by the number. References to the transcript and/or exhibits in this Opinion are intended for convenience only and are not intended to suggest that such references are the sole support in the record for any particular Finding of Fact.

3. In the past, when a street department employee was not available for emergency or call-in work, the City would either call an employee from another department or if need be, call in an outside contractor. There have been other instances when none of the street department employees could be reached and work was done by contractors. (Tr. 23)
4. Dan Hammer is employed by the City of New Lexington as a Maintenance Man and Equipment Operator. He is a member of the union's negotiating team, which is currently negotiating a contract with the Employer. (Tr. 21,22, 42)
5. On Friday evening, January 28, after a dispatcher was unable to contact the street department supervisor and a unit employee to repair a traffic light, City Administrator John Johnson attempted unsuccessfully to reach the supervisor and all six street department employees. Further efforts failed Saturday, January 29, to contact the supervisor and unit employees to repair the traffic light and to turn on a water valve that had been mistakenly shut off. Finally, on Sunday, Johnson attempted unsuccessfully to reach the street department supervisor and six unit employees to turn off a water valve at a water break on private property. (Tr. 9-13; Affidavit of John Johnson)
6. On Sunday, January 30, 1994, Mr. Hammer received a call from the City Administrator, John Johnson, inquiring as to his availability to work that day. Mr. Hammer indicated that he would not be available because he was going to attend a Super Bowl party. (Tr. 22, 23; Affidavit of John Johnson)
7. Only Mr. Hammer actually declined call-in work. The other employees were never reached by phone. (Tr. 10, 22, 23, 40; Affidavit of John Johnson, City Administrator)
8. On Monday, January 31, 1994, Mr. Hammer called in sick. Following the procedures under the contract, when he could not reach his supervisor to inform him he would not be in that day, he called the police department to indicate such. (Tr. 24)
9. On September 30, 1993, six employees in the bargaining unit called off sick. (Tr. 41-

42, 44).

## II. ISSUE

The alleged job action ceased on February 1, 1994, one day before the hearing and nearly 48 hours before the deadline for decision under O.R.C. 4117.23. Accordingly, with all alleged strike activity having concluded, we must determine whether the unauthorized strike procedures outlined at O.R.C. 4117.23 are appropriately invoked.

## III. ANALYSIS

In In re Akron City School Dist Bd of Ed, SERB 89-031 (10-27-89), SERB held that O.R.C. 4117.23 applies only to live, continuing conduct. Once the employees have returned to work, the urgency for action is lost, and adequate redress and remedy for such action are then available through unfair labor practice proceedings. The Board went on in Akron to note that "...where it is apparent that there is a risk of reoccurrence, repeated action, or continuing harassment through alleged strike activity, the processes of O.R.C. 4117.23 may...remain available."

The Board reaffirmed this holding in In re Jefferson County Human Services Dept., SERB 92-015 (9-25-92) and further placed a burden on employers to produce affidavit evidence establishing facts upon which it could reasonably conclude that an alleged strike may reoccur, if O.R.C. 4117.23 relief is sought for alleged strike activity that has ceased.

In this matter, the Employer offered an affidavit and testimony from City Administrator John Johnson, in an effort to establish that the alleged job action would likely reoccur. Johnson testified that on Friday evening, after a dispatcher was unable to contact the street department supervisor and a unit employee to repair a traffic light, he attempted unsuccessfully to reach the supervisor and all six street department employees. He stated that further efforts failed Saturday to contact the supervisor and unit employees to repair the traffic light and to turn on a water valve that had been shut off earlier during a repair job.

Finally, on Sunday, Johnson stated that he attempted to reach the street department supervisor and six unit employees to turn off a water valve at a water break on private property.<sup>2</sup>

Johnson further testified that on Monday, January 31, all six street department employees called off sick. Finally, he stated that these same employees had initiated a "Blue Flu" some four months earlier, on September 30, 1993.

The Employer argues that these recent events, coupled with the earlier alleged "Blue Flu" episode, support a likelihood that the alleged strike activity may reoccur. The suggestion is that a pattern has emerged, where employees, believing sick-outs to be an acceptable way of protesting employment terms, may likely engage in the same conduct in the future when unhappy with working conditions or, in this case, with the state of contract negotiations. Although we agree that a likelihood of reoccurring strike activity may be established by such a pattern, we find the evidence presented in this case failed to establish such a pattern.

It is important to note that the more recent events before us involve two separate incidents. The first pertains to the employees' unavailability for call-in work beginning Friday, January 28, 1994, and ending Sunday, January 30, 1994; the second involves the failure of these same employees to report for their regularly assigned shift the following Monday, January 31, 1994.

With respect to the alleged refusal of employees to accept call-in work, the record evidence is insufficient to establish that the street department employees were acting concertedly to withhold their services for the purpose of inducing, influencing, or coercing a change in wages, hours, terms and other conditions of employment.<sup>3</sup> During the weekend

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<sup>2</sup>Finding of Fact No. 5

<sup>3</sup>O.R.C. 4117.01(H) defines strike as follows:

....concerted action in failing to report to duty; willful absence from one's position; stoppage of work; slowdown, or abstinence

period when the Employer attempted to contact the street department employees for repair work, only one employee Dan Hammer, was actually spoken to and declined to work the extra hours. He testified that he was unavailable because he had plans to attend a Superbowl party. The others were unavailable to either accept or reject offers of work. Additionally, unrebutted testimony was offered that there had been other occasions when none of the employees in the street department could be reached for such assignments, and the work had to be performed by outside contractors.<sup>4</sup>

Therefore, we turn to the activities of September 30, 1993, and Monday, January 31, to predict whether it is likely that the alleged strike activity will reoccur.

On September 30, 1993, six of eight unit employees called in sick.<sup>5</sup> The only evidence suggesting that the incident might have been a strike were references in John Johnson's affidavit to a newspaper article, never introduced into evidence, that employees were protesting a reduction in hours. Dan Hammer testified that the same article quoted the local mayor as saying the employees were sick.<sup>6</sup> There is no evidence that the Employer responded to the call-off consistent with a belief that it was a "Blue Flu." Although the Employer argues here that employees engaged in such activity should be sent "a clear message...that this conduct is not to be tolerated" and that the message should be sent "at a time as close as

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in whole or in part from the full, faithful, and proper performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in wages, hours, terms and other conditions of employment....

<sup>4</sup>Findings of Fact Nos. 5, 6 & 7. Inasmuch as the evidence does not support any concerted action with respect to the employees' unavailability for call-in work, we need not reach the question of whether the work the Employer wished to offer was required to be accepted under the parties' agreement or past practice. Compare In re Shelby City Bd of Ed, SERB 93-017 (10-10-93), distinguishing In re Western Reserve Transit Authority, SERB 90-007 (5-23-90).

<sup>5</sup>Finding of Fact No. 9

<sup>6</sup>Tr. 43-44

possible to the occurrences"<sup>7</sup> we find nothing in our records to indicate that the Employer responded to the September call-off by filing an unfair labor practice charge or a Request for Determination of Unauthorized Strike. In sum, we are unable from such sketchy accounts of the alleged job action to conclude that the incidents complained of in this Request were part of a pattern of "Blue Flu" call-ins.

As for January 31, it is undisputed that six of eight AFSCME street department employees reported off sick from their regularly assigned shift. In In re City of Youngstown SERB 87-002 (1-30-87), the Board found that a unit-wide "illness," not unlike that presented by the January 31 conduct here, constituted a strike. Having found insufficient evidence that the September call-off or the difficulty in reaching street department workers the previous weekend were concerted work-related protests, we are left to decide whether it is likely that the alleged strike activity of January 31 will reoccur.<sup>8</sup>

Here, the record lacks evidence from which we can reasonably conclude that any alleged strike activity may reoccur. The employees who were absent from work on Monday, did report for their regularly scheduled duties on Tuesday and at the time of the hearing, were cooperating with management to perform their work.<sup>9</sup> The Employer offered no evidence that the Union or any employees had threatened further call-offs or were conducting themselves in such a manner at work that one might reasonably conclude that a concerted slowdown was in progress or that other strike activity was imminent. As noted, the evidence presented was insufficient to establish that a pattern of sick-outs had emerged at the workplace, so as to

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<sup>7</sup>Memorandum in Support of Employer's Request for Determination of Unauthorized Strike, p. 6.

<sup>8</sup>The Union directs us to In Re Newton Falls Exempted Village School Dist. SERB 86-032 (9-5-86), a case in which the Board concluded that a one-day absence by some employees was not, by itself, an illegal strike under O.R.C. 4117.23. To the extent that Newton Falls might suggest that a single-day sick-out by employees cannot constitute an unauthorized job action within the meaning of O.R.C. 4117.23, we must overrule it. A strike of one day or one hour, for that matter, could be found unauthorized under this section, even though it has ceased, if the employer has demonstrated a reasonable likelihood of recurrence.

<sup>9</sup>Finding of Fact No. 1

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justify a finding that such conduct would likely reoccur.

As we stated in Jofferson, supra, "The Employer presented no evidence that employees had threatened not to report for work, or any circumstantial evidence which would tend to show that they anticipated calling off work *en masse* on some other occasion." Here, as in that case, we decline to predict a likely reoccurrence of alleged strike activity based upon mere speculation.

In sum, since the Employer failed to demonstrate that the alleged strike conduct continued or that there was some urgency warranting the extraordinary procedures of O.R.C. 4117.23, the unfair labor practice procedure is the appropriate forum to address the matter.

The Request for Determination of Unauthorized Strike is therefore dismissed.

Pottenger, Vice Chairman, and Mason, Board Member, concur.

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