

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

East Cleveland Education Association

Employee Organization,

and

East Cleveland City School District Board of Education

Employer

CASE NUMBERS: 94-STK-04-0002

OPINION

POHLER, Chairman:

I. Procedural Background and Facts

On April 18, 1994, at 2:06 p.m., the East Cleveland City School District Board of Education (Employer) filed a Request for Determination of Unauthorized Strike pursuant to Ohio Revised Code (O.R.C.) 54117.23. The Employer maintained that since the Ohio Supreme Court recently vacated the Franklin County Appeals Court decision in Ohio Council B AFSCME V. Summit Court Child Support Enforcement Agency, et al., the Board's decision that partial and intermittent strikes per se are not authorized under Chapter 4117 is the present state of the law in Ohio. The Employer further alleged that on March 31, 1994, the East Cleveland Education Association (Employee Organization) served notice on the Employer that the Employee Organization intended to begin a series of intermittent strikes commencing April 18, 1994 at noon, and the Employee Organization did initiate the partial strike pursuant to its notice. Therefore, according to the Employer, the Employee Organization's action constituted a partial and intermittent strike which is unauthorized pursuant to SERB's ruling in Summit County Child Support Enforcement Agency and Summit County Department of Human Services, Case No. 91-STK-04-0002 decided April 4, 1991.

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 10:00 a.m., April 20, 1994, at the Board's office. Prehearing procedures were conducted by the Board's General Counsel, and stipulations were agreed upon by the Employee Organization and the Employer. These stipulations are:

1. The East Cleveland City School District Board of Education (Employer) is a "public employer" pursuant to O.R.C. §4117.01(B).
2. The East Cleveland Education Association (Employee Organization) is an "employee organization" pursuant to O.R.C. §4117.01(D).
3. The parties' last collective bargaining agreement was effective by its terms from April 4, 1990, to April 3, 1993. A copy of the agreement is incorporated as part of these Stipulations and marked Attachment 1. The parties have been negotiating for more than one year for a successor agreement, and have had approximately 26 bargaining sessions.
4. The parties' agreement, described above in Paragraph 3, contains at Article II (G), a mutually agreed upon dispute settlement procedure (MAD), which consists of mediation only. Pursuant to this procedure, the parties have been utilizing the services of the FMCS since at least November 4, 1993, in an attempt to reach an agreement. The parties have met with an FMCS mediator on approximately 8 occasions.
5. On April 1, 1994, the Employee Organization filed with SERB a Notice of Intent to Strike or Picket, which had been hand-delivered to the Employer on March 31, 1994 (Attachment 2). Pursuant to the terms of the Notice, the strike was to begin on April 18 at noon and end on May 13. The striking employees would engage in a pattern of striking 24 hours, then working 24 hours.

6. On April 18, 1994, approximately 430 employees went out on a strike according to the Notice of Strike. Striking has proceeded at the times and dates announced in the Notice since that time.

7. On April 18, 1994, at 2:08 p.m. the Employer filed with SERB a Request for Determination of Unauthorized Strike.

8. On Friday, March 11, 1994, and on Monday, March 14, 1994, the employees were on strike half a day each day pursuant to a timely notice of strike. From March 15, 1994, until April 18, 1994, the employees worked their regular hours.

9. The Employer has filed unfair labor practice charges against the Employee Organization both in regard to the strike that occurred in March 1994 (Case Nos. 94-ULP-04-0218, 94-ULP-04-0220) and in regard to the Notice of Strike filed on April 1, 1994 (Case No. 94-ULP-04-0219). The Employee Organization has filed unfair labor practice charges against the Employer regarding alleged activities during the March strike (Case Nos. 94-ULP-03-0165, 94-ULP-03-0167, 94-ULP-04-0181, 94-ULP-04-0196).

10. By letter dated April 13, 1994, serving the unfair labor practice charge in Case No. 94-ULP-04-0219 (with respect with the April 1 Notice of Strike), the Employer advised the Employee Organization of its position that the Notice of Strike called for an unlawful partial strike and that the Employer would ask SERB to authorize the imposition of retroactive penalties in accordance with O.R.C. §4117.23 to the date of the start of the strike in the event the Employee Organization in fact struck in accordance with the Notice.

## II. Analysis

In re Summit County Child Support Agency and Summit County Human Services Dept.

SERB 91-006 (7-18-91),<sup>1</sup> we declared that partial, or intermittent, strikes are not authorized by Chapter 4117. In reaching that conclusion, we examined, among other things, the object sought to be attained by the Act, and found that the tactic of intermittent work stoppages did not comport with a legislative scheme of limiting the right to strike and promoting orderly and constructive relationships in the workplace.

We are not persuaded that a facial reading of O.R.C. §4117.01(H) requires us to rule otherwise. Without question, that section defines a strike as "concerted action in failing to report to duty; willful absence from one's position; stoppage of work; slowdown, or abstinence 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." (Emphasis added).

Clearly, pursuant to the statutory definition, partial or intermittent work stoppages are strikes and as such are subject to the provisions of Chapter 4117 regulating strikes. It does not follow, however, that every activity listed in the strike definition is authorized per se, pursuant to O.R.C. §4117.23. Such a reading would not only lead to absurd results but would condone the commission of unfair labor practices and encourage unprotected activity.

In the case of intermittent strikes, a striking union actually changes the hours of employment in the unit, proclaiming that employees will work only in the morning or in the afternoon, or for a few hours here and there. Because hours are a mandatory subject of collective bargaining pursuant to O.R.C. §4117.08(A), such action, which would upon the filing of a proper charge, constitute a failure to bargain in violation of O.R.C. §4117.11(B)(3), cannot be "authorized" as strike activity under O.R.C. §4117.23.

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<sup>1</sup>Ohio Council 8, AFSCME v Summit County Child Support Enforcement Agency, 1992 SERB 4-61 (10th Dist Ct App, Franklin, 9-24-92), affirming SERB's Summit ruling in part and reversing it in part, was vacated by the Ohio Supreme Court on all issues except those dealing with the trial court's jurisdiction and lack of jurisdiction to hear the union's appeal, and remanded to the trial court for ruling on the merits. 68 Ohio St. 3d 488 (March 23, 1994).

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Such an application of the strike definition would lead to other absurd results. The strike definition also anticipates abstinence from the "full, faithful, and proper performance" of employment duties. Rubbish collectors collecting only half the garbage, equipment operators who stop servicing their equipment, and water treatment operators who stop chlorinating the water would all be deemed to be engaging in authorized strike activity.<sup>2</sup>

Such a reading of the strike definition renders the Act internally inconsistent. Because the definition becomes ambiguous in application, a reading in accordance with the Act's policy objectives is required to avoid absurd results. Accordingly, it is appropriate to read the definition in pari materia with O.R.C. §4117.22, which provides:

Chapter 4117 of the Revised Code shall be construed liberally for the accomplishment of the purpose of promoting orderly and constructive relationships between all public employers and their employees. (Emphasis added).

As we stated in Summit:

Before they strike, public employees must be prepared to assume the worst risks of striking and a loss of all pay and employer-paid benefits. They cannot try to maintain the advantages of remaining in a paid employee status while refusing to perform all of the work they were hired to do. Holding otherwise would fly in the face of the Act's policy objectives. If public employees could strike intermittently and thereby lessen the risks of striking by remaining in paid employee status, they would be more inclined to strike than otherwise and would experience less economic pressure to settle, leading to an overall prolongation of disputes. The Act's strike objectives do not countenance either result. Neither does the Act's

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<sup>2</sup>Memorandum in Support of Jurisdiction of Appellant SERB, OCB AFSCME v. Summit County Child Support Enforcement Agency et al., Case No. 92-AP-304, filed November 19, 1992 in Ohio Supreme Court.

policy of encouraging the parties to resolve their differences through negotiations and voluntary settlement. (Emphasis added).<sup>3</sup>

Further, in relationship to strikes, the "orderly and constructive relationships" referenced in O.R.C. §4117.22 must be read in the context of the Act as a whole, which provided for only a limited right to strike. Under Chapter 4117, only selected groups of public employees can strike and then, only after the exhaustion of dispute resolution mechanisms and never, except in the case of wage reopeners, during the term or extended term of a contract. In this context, it would be absurd to conclude that the legislature intended to authorize strike conduct which would prolong disputes, encourage the commission of unfair labor practices, and allow employees to engage in mass unprotected activity.

The Act's policy objectives are met and absurd results are avoided by reading the strike definition of O.R.C. §4117.01(H) not as a list of activities unequivocally condoned by the Act but of activities sought to be regulated by it. Under this logical application of the definition, employees cannot engage in improper performance of duties, intermittent strikes and slowdowns and claim that they are not striking. At the same time, when such strike activity occurs, SERB can regulate it, as the legislature intended, pursuant to O.R.C. §4117.23 and determine whether it is authorized.

In the matter before us, we acknowledge that the intermittent work stoppage by the East Cleveland Education Association is a strike. Now, pursuant to the mandate of O.R.C. §4117.23, we must determine whether it is authorized. Because intermittent strike activity does not comport with the policy objectives of Chapter 4117 and by its nature allows the union to unilaterally set hours of employment, itself an unfair labor practice, SERB finds that such activity is not authorized under Chapter 4117.

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<sup>3</sup>In re Summit County Child Support Agency and Summit County Human Services Dept., SERB 91-006 at 3-39.

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Also in this matter, the Employer has requested that retroactive penalties be applied. Such imposition of penalties is authorized by O.R.C. §4117.23(B)(3), which provides, in pertinent part:

Notwithstanding the provision in this section that authorizes certain penalties to commence one day after a public employee is notified that the board has determined the employee is engaged in an unauthorized strike, the board may authorize the public employer, if the public employer requests it, to impose the penalties contained in this section retroactive to the date the unauthorized strike commences.

Here, although the Employer notified the Union that it intended to seek retroactive penalties if the intermittent strike proceeded, it offered no compelling reasons at hearing for imposing them. Accordingly, we decline to exercise our discretion to grant them in this case, particularly under these circumstances, where the law through the appeals process, had become unsettled on the status of intermittent strikes under O.R.C. §4117.23.<sup>4</sup>

POHLER, Chairman; POTTENGER, Vice Chairman; and MASON, Board Member, concur.

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<sup>4</sup>This case has presented us with our first opportunity to re-visit the issue of intermittent strikes since the Ohio Supreme Court vacated a decision by a three-member panel of the 10th District Court of Appeals, overturning our ruling in Summit.

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