

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Akron,

Respondent.

CASE NUMBERS:           92-ULP-05-0313  
                                  92-ULP-05-0314  
                                  92-ULP-05-0315  
                                  92-ULP-05-0316  
                                  92-ULP-05-0317  
                                  92-ULP-05-0318

Opinion

MASON, Board Member:

This case comes before the Board on exceptions from a Hearing Officer's Proposed Order. There were two issues before the hearing officer. First, whether the Foremen and Supervisors Association (FSA) is a deemed-certified exclusive representative of a bargaining unit of employees of the City of Akron (Respondent, City) with the result that the bargaining obligations under Chapter 4117 apply. Second, whether the City's unilateral adoption and implementation of revisions to its civil service commission rules without bargaining constitutes an unfair labor practice in violation of O.R.C. §4117.11(A)(1) and (A)(5).

The hearing officer found that FSA is a deemed-certified exclusive bargaining representative, and that the Respondent, by unilaterally adopting changes in the civil service rules regarding promotions, violated O.R.C. §4117.11 (A)(1) and (A)(5).

For the reasons stated below, we do not agree with the hearing officer that FSA is the deemed-certified representative of certain employees of the Respondent. Accordingly, as to FSA, the Respondent has no bargaining obligations under Chapter 4117. However, we agree with the hearing officer's conclusion that the Respondent violated O.R.C. §4117.11(A)(1) and (5) by unilaterally adopting and implementing certain changes to the civil service rules governing promotions.

I.

#### STATEMENT OF THE CASE

A number of employee organizations represent employees of the City of Akron and enjoy deemed-certified status: Civil Service Personnel Association, Inc. (CSPA); Akron Nurses Association (ANA); Local 1360, American Federation of State, County and Municipal Employees (AFSCME); Akron Firefighters Association (AFA); and Fraternal Order of Police Lodge No. 7 (FOP)(Stip. 2). All have collective bargaining agreements with the City. (Stip. 5-9, Joint Ex. 1-5). The Foremen and Supervisors Association (FSA), whose status is at issue, has never had a written contract with the City. Rather, the City Council has passed ordinances giving wage increases and benefits to foremen and supervisors. (Stip. 10, Joint Ex. 6(a)-(n)).

Every year since at least 1980, the City has deducted dues from the paychecks of FSA members who have signed checkoff authorization cards. (Stip. 11, Joint Ex. 7(a) and 7(b)). Since April 12, 1967, FSA has had a three-step grievance procedure, with investigation and presentation of grievances by a five-member grievance committee and final determination by the Mayor. This written grievance procedure states: "This administration recognizes the Foremen and Supervisors Association, which includes Foremen and Supervisors." (Stip. 12, Joint Ex. 8). Under this procedure, FSA has filed grievances and the City processed them and met and discussed them with the FSA president. (Stip. 13, Joint Ex. 9(a), 9(b) and

9(c)). Over the years, FSA and the City have met and discussed concerns over the working conditions of employees who are foremen and supervisors. (Stip. 10, Joint Ex. 6(a)-(n)).

On January 21, 1992 City Personnel Director Richard Pamley sent a memorandum notifying the presidents of the employee organizations and all department and division managers that the City's Civil Service Commission was considering revising its rules and that the revisions would be considered for final approval on February 27, 1992. The City attached a copy of its proposed revisions to the rules. (Stipulation 14).

On February 18, 1992, Susannah Muskovitz, the attorney representing the CSPA, AFSCME, AFA, FOP and FSA, sent a letter to Mr. Pamley protesting the unilateral implementation of the revisions and requesting that the City bargain over the proposed revisions with the employee organizations. On February 27, 1992, City Deputy Mayor/Labor Relations Mathew L. Contessa notified the employee organizations' attorney that while the City was not unwilling to discuss the concerns on rule revisions, the City's position was that Civil Service Rule changes were not a negotiable matter. (Stipulation 15, Joint Ex. 16). On March 19, 1992, Mr. Pamley, Mr. Contessa, Ms. Muskovitz, and representatives for CSPA, AFSCME, AFA, FOP, FSA and ANA met and discussed the proposed revisions. (Stipulation 19). On March 20, 1992, the CSPA, AFSCME, ANA, AFA, FOP and FSA submitted a memorandum to the Commission outlining their objections to the proposed revisions and making recommendations.

At the Commission meeting of April 2, 1992, the employee organizations stated their objections to the proposed rule revisions, but no negotiations took place. (Stipulations 20, 22, Joint Exs. 15, 20). On or about May 1, 1992, Mr. Pamley submitted the final rules revisions proposal to the Commission. This package included the existing rules, the proposed changes, the testimony and written comments of the employee organizations, and the personnel department's response to the employee organizations' comments. This package was not served on the employee organizations. (Stipulation 24, Joint Ex. 19).

Although the unions objected, on May 7, 1992, the Commission implemented changes in the following rules: Rule 3, Section 6 (giving the City's Personnel Director the right to set psychological standards for applicants and require psychological testing); Rule 3, Section 12(2) (allowing examinees to protest exam questions anonymously); Rule 4, Sections 4(4) and (6) (concerning reasons for which eligible candidates may be removed from the eligibility list); Rule 6, Section 5 (concerning appointing authorities' objecting to or substituting candidates on the eligibility list); and Rule 8, Section 4 (regarding the grading of promotional exams). Proposed revisions in several other rules were not opposed or were never implemented: Rule 10, Section 3(2); Rule 12, Section 2; and Rule 15, Section 2. (Stipulation 25, Joint Ex. 20).

II.

ANALYSIS

A. WHETHER FSA IS A DEEMED-CERTIFIED REPRESENTATIVE

Only the status of Board-certified or deemed-certified exclusive representative endows an employee organization with the statutory right to bargain. FSA was never certified by the Board. Thus, the determination of whether the City has a statutory duty to bargain with FSA rests upon whether FSA is a deemed-certified representative.

An employee organization has deemed-certified status if, at the time Chapter 4117 went into effect, it was recognized by the employer as the exclusive bargaining representative of certain employees of an employer in a specific bargaining unit. Thus, the crucial time for determining deemed-certified status is the law's effective date, April 1, 1984.<sup>1</sup> The policy

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<sup>1</sup>O.R.C. §4117.05(B), Amended Substitute Bill 133 Section 4(A) and 4(B) of the Temporary Law.

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behind creating deemed-certified status was to preserve the status quo when the new law took effect and to ensure stability in public sector labor relations as the state entered an era of regulated collective bargaining.

The controlling factor in determining deemed-certified status is the type of relationship existing between the employee organization and the employer on April 1, 1984, specifically whether the employer exclusively recognized the employee organization as the representative of certain employees of an employer in a given bargaining unit at that time. Obviously, the most significant indicator of exclusive recognition is a collective bargaining agreement or memorandum of understanding between the employee organization and the employer in effect on that date, which by its terms recognizes the employee organization as the exclusive representative. However, exclusive recognition not specifically written might be proven through tradition, custom, practice, election, or negotiation.<sup>1</sup>

SERB earlier examined the concept of exclusive recognition established through tradition, practice and negotiation in SERB v. City of Bedford Hts., SERB 87-016 (7-24-87), aff'd 41 Ohio App. 3d 21 (11-25-87), a case cited by the hearing officer as well as the Complainant and FSA in arguing that FSA is deemed certified. In that case, unlike the one before us now, a memorandum of understanding was in effect from January 1984 to December 1985,<sup>2</sup> which encompassed the crucial time for deemed-certified status. However, the memorandum contained no provision recognizing the employee organization as the exclusive representative of the employees. Because the contract was silent on the issue of exclusive recognition, the Board looked to the parties' tradition, custom, and negotiation to ascertain the employee organization's status.

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<sup>1</sup>See Section 4(A) of the Temporary Law, supra.

<sup>2</sup>Finding of Fact No.7, Hearing Officer's Proposed Order in Bedford Hts., SERB 87-016 (7-24-87) at 3-59.

Although the Complainant and Intervenor view Bedford Hts. as controlling, it is significantly different from this case, where the parties have never entered into a contract. Here, the absence of any collective bargaining agreement on April 1, 1984, or since, presents particular difficulties in establishing exclusive recognition. Although exclusive recognition may conceivably be established without a formal contract in existence on April 1, 1984, the party seeking to prove such status without a contract has a substantial burden, not met in this case. A collective bargaining agreement, even one without an exclusive recognition clause, is probative of the parties' relationship and may contribute to establishing exclusive recognition. The existence of a contract shows that the employer and the employee organization conducted negotiations on terms and conditions of employment. Typically, the contract identifies the employees covered by the contract or the bargaining unit. Where no contract exists, status must be proven solely by evidence of live conduct and interaction between the parties, which rises to the level of exclusivity.

Here, without a contract, the Complainant and Intervenor rely heavily on dues deductions and grievance processing to establish exclusive representative status as of April 1, 1984. These factors alone are not persuasive. Under Section 4(C) of the temporary law, an employer cannot refuse to make dues deduction under written authorization where no certified representative exists. But 4(C) does not vest an employee organization with deemed-certified status. Under Section 4(F) of the temporary law, an organization does not even have to be an employee organization to be allowed to continue processing grievances and have dues deducted if such was done as of June 1, 1983. Clearly, such an organization does not become deemed certified only by processing grievances and having dues deducted.

Moreover, the record does not establish that the City ever actually negotiated with FSA. The record only shows that "over the years, FSA and the City have met and discussed concerns over working conditions of employees who are foremen and supervisors." (Emphasis added) (Stipulation 10). There is no record evidence establishing that these discussions culminated in any particular negotiated employment terms. Simply meeting and

discussing concerns with no direct effect on terms and conditions of employment does not by itself establish that the employee organization is the exclusive bargaining representative of employees.

The only documentary evidence of pre-April, 1984 contact between the Respondent and FSA are two letters, one dated January 6, 1977, and the other dated June 28, 1982. (Joint Exs. 6(a) and 6(b)). The first is a copy of a letter from Robert G. Beagel, the City's Deputy Mayor of Labor Relations to all the presidents of the City's employee organizations, stating that the City desired to discuss (but not negotiate) its' sick leave program with all employee groups in the same meeting. In the letter, Beagel apologized to each employee organization for his failure to complete the project in a timely manner. The second letter notified all the employee organizations that a resolution was pending before City Council to implement an employee suggestion system. The letter solicited comments on this idea. At most, these letters are an invitation to comment, not an indication of exclusive recognition.

The earliest documentation of specific discussions on working conditions between the City and FSA are the notes of a meeting between the City and FSA which took place on December 12, 1989. (Jt. Ex. 6(d)). Clearly such discussions, even if they culminated in a written collective bargaining agreement, could not make FSA a deemed-certified representative since the critical date, April 1, 1984, had long passed. Private agreements reached after April, 1984 cannot bestow on the employee organizations involved deemed-certified status and do not confer 4117 rights.<sup>4</sup>

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<sup>4</sup> Even if later discussions were somehow relevant to determining FSA's status, the record does not show that these discussions were a driving force behind the City ordinances establishing the salaries and other working conditions of the employees involved. Joint Ex. 6(K), which is the list of ordinances submitted for passage, includes one ordinance applicable to "all non-bargaining and unclassified personnel" which provides for 3 percent increase in compensation rates. There is nothing in the record to show that this raise was negotiated or even discussed with the FSA before it was implemented. This lack of proven connection between implementation of changes in conditions of work and the City's discussion with the

It is also unclear who is in the unit represented by FSA. The recognition language in the grievance procedure does not define a unit, it only recognizes the FSA "which includes foremen and supervisors." This language does not reveal whether FSA represents only foremen and supervisors (and does not also include, for example, the appointed employees), or if it represents all the supervisors and the foremen in addition to those who are FSA members. Thus, the unit represented by FSA might be members only, which means that the FSA has a nonexclusive status and is not an exclusive representative. What makes the determination of the unit even more difficult is the fact that some of the relevant ordinances passed by the City apply to all "non-bargaining unit employees," and some apply to "non-bargaining unit and appointed employees," neither of which is defined. Nor is it clear how many employees are represented by FSA. Joint Ex. 6(h) mentions 200 to 250 employees in connection with the FSA, while Joint Ex. 6(g) mentions 500 employees in the City who are not members of any certified bargaining unit. Appointed employees may account for the differences in numbers, but this is not established by the record.

The weakness of the evidence supporting exclusive recognition in this case is highlighted when comparing the facts before us with those before the Board in Bedford Hts. In Bedford Hts. the City and the firefighters had negotiated wages, hours, terms and conditions of employment every two years since at least 1969.<sup>5</sup> In Bedford Hts., there were

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FSA can be further illustrated by studying Joint Exs. 6(h), 6(i) and 6(j). Joint Ex. 6(h), consists of recorded notes from a meeting on April 15, 1991, between management and FSA to discuss working conditions. Ex. 6(g) is an internal memo dated April 11, 1991, four days before the April 15 meeting, which suggests that the City had already decided what changes to make in the non-bargaining unit employees' conditions of employment without any input from the FSA. In a memo dated May 7, 1991, Ex. 6(i), from the City to the representatives of FSA, the City, while acknowledging the April 15 meeting, notified FSA of the changes it had already made.

<sup>5</sup>F.F.3 of the hearing officer in Bedford Hts.

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25 firefighters in the fire department for the last 10 years prior to the hearing,<sup>6</sup> and in those years 23 of the 25 were members of Local 1497. At the time of the hearing all 25 were members of Local 1497.<sup>7</sup> In Bedford Hts., during the negotiations in 1984, the City announced that if the three negotiating members of the fire department were representing Local 1497, it would not negotiate with them. The three firefighters, which included the President of Local 1497, decided not to make an issue of recognition and to try to reach an agreement on a contract. The negotiations continued and agreement was reached resulting in a memorandum of understanding that was in effect from January 1984 to December 1985.<sup>8</sup>

In sum, the parties in Bedford Hts. engaged in regular, full-fledged contract negotiations. The parties here simply met and discussed with no documented regularity or result. In Bedford Hts., the unit was clear, all firefighters in the Bedford Hts. fire department. Here, we are unsure who is in the unit. And finally, in Bedford Hts. the employee organization had a written memorandum of understanding with the City effective January 1984 to December 1985, even though the written agreement was silent on the recognition issue. In the instant case, there was never a written agreement signed between the City of Akron and FSA.

Section 4 of the Temporary Law was designed to maintain the status quo in those public sector employer-employee collective bargaining relationships predating April 1, 1984. But not all the degrees, shapes and forms of collective bargaining permitted by Chapter 4117

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<sup>6</sup>Date of hearing was March 11, 1993.

<sup>7</sup>F.F.4 of the hearing officer in Bedford Hts.

<sup>8</sup>F.F.7 in Bedford Hts.

result in deemed-certified status.<sup>9</sup> Only the existence of exclusive recognition on April 1, 1984 creates deemed-certified status after April 1, 1984. The record in the case at issue does not establish that the relationship between the City and the FSA rose to the level of exclusive recognition. Thus, we find that the FSA is not a deemed-certified representative of any employees of the City of Akron.

**B. Implementation of Civil Service Rules**

The second issue in this case is whether the City's unilateral adoption and implementation of revisions to its civil service commission rules without bargaining constitutes an unfair labor practice in violation of O.R.C. §4117.11(A)(1) and (5). On this issue we agree with the findings of the hearing officer that the civil service rules governing promotions are a mandatory subject of bargaining and that the City violated O.R.C. §4117.11(A)(1) and (5) by implementing them unilaterally. In In re Transportation Dept., SERB 93-005 (4-29-93) (QDOT), we set forth a four-part balancing test for identifying mandatory vs. permissive subjects of bargaining. We stated :

{If a given subject is alleged to affect and is determined to have a material influence upon wages, hours, or terms and other conditions of employment and involves the exercise of inherent management discretion (footnote omitted), to determine whether it is a mandatory subject of bargaining, we will weigh (1) the extent to which the subject is logically and reasonably related to wages, hours, terms and other conditions of employment; (2) the extent to which the employer's obligation to negotiate may significantly abridge its freedom to exercise those managerial prerogatives set forth in and anticipated by O.R.C.

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<sup>9</sup>For example, under Section 4(D) of the temporary law, nonexclusive recognition is not as protected as exclusive recognition and even though a nonexclusive recognition is accompanied by a contract the Board may determine an appropriate unit, remove, if needed, classifications from the nonexclusive bargaining unit, conduct an election and certify an exclusive bargaining agent. Thus, maintaining the status quo in a nonexclusive recognition situation does not lead to deemed-certified status, even though the employer and the employee organization were involved in a variety of collective bargaining activities.

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54117.08(C), including an examination of the type of employer involved and whether inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and obligations to the general public; (3) the extent to which the subject matter had been addressed or preempted by legislation; and (4) the extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties, are the appropriate means of resolving conflicts over the subject matter. (Footnote omitted.) Id. at 3-26.

We agree with the hearing officer that under the ruling of the Supreme Court in Devannish v. City of Columbus, 57 Ohio St. 3d 163 1991 SERB 4-7, as well as the Tenth District Court of Appeals in City of Columbus v. SERB, 1990 SERB 4-60, (10th Dist. Ct. App., Franklin, 9-4-90), promotions and demotions are clearly logically and reasonably related to wages, hours, terms and other conditions of employment. Having found compelling evidence in support of the first prong of the QDOT test, we would have to find counterbalancing evidence in support of the remaining elements of the test in order to conclude that the rules governing promotions were a permissive subject of bargaining. As the hearing officer observed, such evidence is lacking. Accordingly, we conclude that the civil service rules in regard to promotions and demotions are mandatory subjects of bargaining.

We also agree with the hearing officer that neither the LEGAL CONFLICT clause nor the EFFECT OF AGREEMENT clause of the parties' contract constitutes a waiver. Neither mentions changes in civil service rules and the record does not show that such changes were contemplated when these clauses were negotiated.

However, of the eight rules contested by the various employee organizations and found by the hearing officer to have been unlawfully implemented, we find that only five are the product of unlawful conduct. With regard to Rule 10, Section 3(2), while the civil service commission adopted the City's proposed revision the employee organizations are on record as not objecting to the revision. No violation of unilateral implementation can be found where the employee organization has acquiesced in the implementation. With regard to Rule 12,

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Section 2 and Rule 15, Section 2, no violation has been proven because no implementation occurred. Thus, in our order, the hearing officer's recommendation is modified accordingly.

Pohler, Chairman, and Pottenger, Vice Chairman, concur.

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