

In re SERB v Youngstown City School Dist Bd of Ed, SERB 95-010 (6-30-95)
Case No. 93-ULP-01-0095

ORDER

Before Chairman Pohler, Vice Chairman Pottenger, and Board Member Mason: May 4, 1995.
POHLER, Chairman.

On December 30, 1994, the Hearing Officer's Proposed Order in the above-styled case was issued. On January 18, 1995, Respondent Youngstown City School District Board of Education filed exceptions to the Proposed Order. On February 9, 1995, the Complainant filed a response to the Respondent's exceptions. Also on February 9, 1995, the Intervenor, Youngstown Education Association, filed a response to the Respondent's exceptions.

The Board has reviewed the record, the Hearing Officer's Proposed Order, the Respondent's exceptions to the proposed order, and the Complainant's and Intervenor's responses to the exceptions.

For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the Stipulations, Findings of Fact and Conclusions of Law of the Hearing Officer's Proposed Order, also incorporated by reference. The Respondent is hereby ordered to:

A. CEASE AND DESIST FROM:

(1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Ohio Revised Code ('O.R.C.') Chapter 4117, and from refusing to bargain collectively with the representative of its employees certified pursuant to O.R.C. Chapter 4117 by unilaterally implementing an early retirement incentive program on January 28, 1993, and from otherwise violating O.R.C. §§ 4117.11(A)(1) and 4117.11(A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) Post for sixty (60) days beginning September 15, 1995, in all Youngstown City School District Board of Education buildings where the employees represented by the Youngstown Education Association work, the NOTICE TO EMPLOYEES furnished by the Board stating that the Youngstown City School District Board of Education shall cease and desist from the actions set forth in paragraph A and shall take the affirmative actions set forth in paragraph B.

(2) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

It is so ordered.

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

OPINION

POHLER, Chairman:

This case comes before the State Employment Relations Board ('SERB') on exceptions filed to the Hearing Officer's Proposed Order issued on December 30, 1994. For the reasons below, we find that the Youngstown City School District Board of Education ('Board of Education' or 'Employer') violated Ohio Revised Code ('O.R.C.') § 4117.11(A)(1) and (5) by unilaterally implementing a mandatory subject of

bargaining, specifically, an Early Retirement Incentive Plan ('ERIP'). We also find that the Youngstown Education Association, OEA/NEA ('YEA') did not waive its right to bargain over the 1993 ERIP. With respect to the remedy, we find that full relief was obtained through the grievance process, except the issuance of a cease and desist order with the posting of a notice to employees by the Employer must also be included as a part of this remedy.

I. BACKGROUND

The Board of Education recognized the YEA as the exclusive representative of a bargaining unit of the Employer's certificated employees in a collective bargaining agreement effective from September 5, 1990, until September 7, 1993 ('1990-93 CBA'). ERIPs were included in their collective bargaining agreements for 1985, 1986, 1987, 1990-93 and 1993-96. In particular, the ERIP in the 1990-93 CBA provided a one-year period to buy early retirement credit beginning September 1, 1990, and ending August 31, 1991. The plan limited the number of eligible employees who could opt for early retirement to a maximum of five percent, with seniority being the deciding factor if necessary. Employees could purchase one-fifth (1/5) of the employee's Ohio service or one year of service, whichever was less.¹

Following the issuance of a task force report for fiscal responsibility indicating the school district was generally over-staffed, particularly in the administrative areas, the Board of Education began bargaining in December 1992 with a group of employees, not represented by the YEA, to create a new ERIP. These employees, comprising the Employer's supervisory and administrative personnel, were represented by the Youngstown Association of Administrative and Supervisory Personnel ('ASP'). The Board of Education's goal was to restructure or reorganize the district by downsizing its administrative, supervisory and teaching personnel. Ultimately, the Employer reached an agreement with ASP on the 1993 ERIP, aware at the time of doing so that it would have to extend the same terms to employees of the YEA bargaining unit pursuant to the requirements of O.R.C. § 3307.35.²

On January 28, 1993 the agreed-upon 1993 ERIP was formally adopted, pursuant to Board Resolution No. 17-93, as to ASP's bargaining unit. Also on January 28, 1993, the 1993 ERIP was formally adopted as to YEA's bargaining unit, pursuant to Board Resolution No. 18-93, with an effective date of February 1, 1993.³ Approximately one hundred sixteen YEA members, eligible to retire under the 1993 ERIP, were made aware of the plan by information packets from the Board of Education placed in their school mail boxes. Of these eligible YEA members, fifty-four accepted the 1993 ERIP, thirty rejected it, and thirty-two remained silent. The Employer set a March 31, 1993 deadline for applying for early retirement under the 1993 ERIP; the eligible employees had to retire within ninety days because the Employer wanted them off its payroll by July 31, 1993, due to the school district's financial condition.⁴

Board Resolution No. 18-93 unilaterally extended the 1993 ERIP contract supplement with ASP to all certificated members of the YEA-represented bargaining unit without prior notice to or negotiation with the YEA. The YEA President first learned unofficially of the 1993 ERIP when Board Resolution 17-93 was passed on January 28, 1993. He received official notification on February 11, 1993, by letter from the Superintendent dated February 10, 1993, who offered to bargain the effects of Board Resolution No. 18-93 on YEA bargaining unit members. On February 19, 1993, the YEA sent a response to the Board of Education requesting that the Employer cease and desist implementation of the 1993 ERIP, as it related to YEA bargaining unit members, and that the Employer then bargain over the issue. On February 26, 1993, the Employer notified the YEA that it would not take the requested actions. The YEA decided it did not wish to engage in effects bargaining because

¹ Finding of Fact ('F.F.') No. 1; Stipulation of Fact ('Stip.') No. 4.

² F.F. Nos. 2 and 3.

³ Joint Exhibits ('Jt. Exh.') B and C.

⁴ F.F. No. 6; Stip. No. 5.

it was already too late to change the terms of the 1993 ERIP, which had already been adopted and distributed to YEA unit employees.⁵

The YEA filed an unfair labor practice charge with SERB on February 17, 1993, pursuant to O.R.C. § 4117.12(B). The YEA also filed a grievance on the 1993 ERIP that ended in a decision issued by an arbitrator on August 28, 1993. The arbitrator's award required the Board of Education to negotiate an ERIP with the YEA with terms no less favorable than the 1993 ERIP with ASP. Following the issuance of the arbitration award, the YEA and the Employer concluded negotiations on a 1993-96 collective bargaining agreement on October 5, 1993, which contained an ERIP beginning September 1, 1995 and ending August 31, 1996. This 1995 ERIP provided that the Board of Education purchase one-fifth (1/5) of each eligible employee's total Ohio service or two years of service, whichever is less. The 1995 ERIP is similar to the 1993 ERIP, except that the 1993 ERIP did not limit the maximum number of eligible employees who could opt for early retirement to five percent.⁶

On November 24, 1993, SERB determined there was probable cause for believing the Board of Education had committed an unfair labor practice and issued a complaint on February 25, 1994. Following a hearing on the matter, a Hearing Officer's Proposed Order was issued on December 30, 1994, concluding that the Board of Education had violated O.R.C. § 4117.11(A)(1) and (5) by implementing the 1993 ERIP without prior notice to or negotiation with the YEA, and that the YEA had not waived its right to bargain over the 1993 ERIP based upon the facts presented. The hearing officer also proposed that all of the Board of Education's employees eligible to retire under the terms of the 1993 ERIP be given sixty days from the date the order in this case becomes final to notify the Employer of their desire to retire under the same terms as were available in the 1993 ERIP or, at the employees' sole option, to retire under the terms of the ERIP negotiated within the 1993-96 collective bargaining agreement. The Employer filed exceptions to the Hearing Officer's Proposed Order on January 18, 1995. The YEA and the Complainant filed responses to the exceptions on February 9, 1995.

II. DISCUSSION

A. Balancing Test Is Announced

O.R.C. § 4117.08(A) provides:

All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section. (emphasis added).

At the same time, O.R.C. § 4117.08(C) provides in part:

Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

- (1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology and organizational structure;
- (2) Direct, supervise, evaluate, or hire employees;
- (3) Maintain and improve the efficiency and effectiveness of governmental operations;
- (4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

⁵ F.F. No. 5; Stip. Nos. 7, 9, 10, and 11.

⁶ FN6. F.F. No. 8.

- (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;
- (6) Determine the adequacy of the work force;
- (7) Determine the overall mission of the employer as a unit of government;
- (8) Effectively manage the work force;
- (9) Take actions to carry out the mission of the public employer as a governmental unit.

The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement. (emphasis added).

Divisions (A) and (C) of this section spell out facially contradictory statements regarding a public employer's bargaining obligations and its right to make management decisions. The legislature on the one hand seems to indicate in division (A) that bargaining is appropriate for 'all matters pertaining to wages, hours, or terms and other conditions of employment' (emphasis added) while simultaneously indicating in division (C) that 'nothing in Chapter 4117 ... impairs the right and responsibility of each public employer to ... [d]etermine matters of inherent managerial policy which include ... its overall budget ... and organizational structure; [e]ffectively manage the work force; [and] ... [t]ake actions to carry out the mission of the public employer as a governmental unit.' (emphasis added). If these categories in divisions (A) and (C) were mutually exclusive of each other, there would be no conflict. However, labor agencies and courts alike, when confronted with specific cases, have concluded that almost any managerial policy will have some effect on conditions of employment. See, e.g., *American Federation of State, County and Municipal Employees v. State Labor Relations Bd.*, 546 N.E.2d 687, 135 L.R.R.M. 2224 (Ill. Ct. App. 1989).

In statutory interpretation, words should not be ignored or deleted, and such words must be presumed to have had an intended meaning if one can be found. O.R.C. § 1.47(B) and (C) state that, in enacting a statute, it is presumed that the entire statute is intended to be effective and a just and reasonable result is intended. The interpretation of statutes was addressed by the court in *SERB v. Belmont County Engineer*, 1989 SERB 4-126 (7th Dist Ct App, Belmont, 10-30-89). In that case, the court concluded:

In the interpretation of statutes, it is the duty of courts and administrative bodies to clarify uncertainties and harmonize results with justice. The court, in the construction of the statute, must be guided by it as it exists, in other words, as the legislature enacted it. A court has the duty to adhere to a statute as it is written and enforce its literal terms. In interpreting a legislative enactment, the courts may not simply rewrite it on the basis that they are thereby improving the law, or write what they consider better acts, or read into a statute that which is not found there.

Id. at 4-128.

The Board previously attempted to reconcile these contradictions in *In re City of Lakewood*, SERB 88-009 (7-11-88). The Board interpreted the phrase 'as affect' in division (C) as creating 'a clear standard for resolving this tension between the enumerated management rights and the subjects-of-bargaining provisions: when a matter 'affects' wages, hours, terms and other conditions of employment, that matter is subject to bargaining.' Id. at p. 3-44--3-45. Under this interpretation, the inherent management rights delineated in division (C) were essentially deleted. Similarly, if the legislature had intended that 'all matters pertaining to wages, hours, or terms and conditions of employment' be subject to collective bargaining regardless of the impact on inherent management rights and responsibilities, the additional quoted phrase at the end of division (A)--'except as otherwise specified in this section'--would have been unnecessary.

We reject the interpretation of O.R.C. § 4117.08 in *Lakewood*, supra. The statute itself does not dictate such a broad definition of mandatory bargaining subjects. Recognizing that the Ohio Supreme Court's majority opinion in *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 1989

SERB 4-2, 533 NE(2d) 264, approved of the same broad definition of mandatory subjects as was espoused in *Lakewood*, supra, it must also be noted that the definition did not appear in the Supreme Court's syllabus. Rule 1(A) of the Supreme Court Rules for the Reporting of Opinions states: 'The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.' Hence, under the Supreme Court's own rules, the majority opinion's discussion is dicta and not precedential.

Divisions (A) and (C) of O.R.C. § 4117.08, when read together, illustrate an effort by the legislature to somehow balance the needs of public employers to make management decisions against the right of public employees to bargain about their working conditions. In establishing what issues must be submitted to the process of collective bargaining, the legislature had no expectation that the elected exclusive representative would become an equal partner in the running of the business enterprise in which the employee organization's members are employed. See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 101 SCt 2573, 69 LEd(2d) 318, 107 L.R.R.M. 2705 (1981). The statute's aim is not realized by requiring bargaining over every management decision that affects employee working conditions.

The aim of the statute is better realized by adopting a standard, in the form of a balancing test, to identify those subjects about which public employers must bargain in Ohio. This standard must balance the right of employers to run the public business with the right of their employees to engage in collective bargaining. The balancing test also must comport with generally accepted rules of statutory construction in Ohio, as recited both in case law and the Ohio Revised Code, giving effect to and harmonizing all the words of O.R.C. § 4117.08(A) and (C).

Pursuant to O.R.C. § 4117.08, a public employer is required to bargain with an exclusive representative on all matters relating to wages, hours, or terms and other conditions of employment. The Ohio Supreme Court recognized 'mandatory,' 'permissive' and 'illegal' subjects of bargaining under this section. *Cincinnati v. Ohio Council 8, American Fedn. of State, Cty. & Mun. Emp., AFL-CIO* (1991), 61 Ohio St.3d 658, 1991 SERB 4-87, 576 NE(2d) 745. Illegal subjects of bargaining are those described in O.R.C. § 4117.08(B). Mandatory subjects are those which O.R.C. § 4117.08(A) requires the parties to bargain over in good faith. *Id.* at 663. 'A 'permissive' subject of collective bargaining is one whose inclusion in the agreement is not prohibited by law, but which is not one of the mandatory subjects of bargaining listed in R.C. 4117.08(A). While parties to a collective bargaining relationship are required to bargain over mandatory subjects, they are not required to do so with regard to permissive subjects.' *Id.* at Syllabus 2.

It is well established that when a subject matter affects wages, hours, terms and other conditions of employment, the answer to whether bargaining is required on the employer's decision and how the decision affects wages, hours, terms and other conditions of employment, or only on how the decision affects wages, hours, terms and other conditions of employment, depends upon whether the subject is a mandatory or permissive subject of bargaining. See, e.g., *First National Maintenance Corp. v. NLRB*, supra. SERB first established a balancing test that weighed certain factors in order to make this determination in *In re Transportation Dept.*, SERB 93-005, (4-29-93), aff'd sub nom. *Ohio Civil Service Employees Assn., AFSCME Local 11, AFL-CIO v. Ohio Dept. of Transportation*, Case No. 93-CVF-04-3413 (CP, Franklin, 08-09-94), rev'd on other grounds, Case No. 94APE08-1252 (CA, Franklin, 06-01-95) (hereinafter ODOT). Since the court of appeals has directed the common pleas court to vacate SERB's decision in ODOT, supra, due to mootness of the underlying dispute, it is necessary to set a standard by which the determination, whether subjects of bargaining are mandatory or permissive, can be made. In so doing, we reassert our commitment to the balancing test in ODOT and hereby affirm that standard with a slight modification to make its application easier.⁷ Accordingly, in this matter and henceforth, if a given subject is alleged to affect and is determined to have a material

⁷ FN7. Although the balancing test first announced in ODOT, supra, listed statutory preemption as a prong of the test, it is removed here because it is not, strictly speaking, part of a balancing test, although the results concerning bargaining obligations may be similar. Furthermore, to state that the legislature can preempt a Board determination is axiomatic.

influence upon wages, hours, or terms and other conditions of employment and involves the exercise of inherent management discretion, the following factors must be balanced to determine whether it is a mandatory or permissive subject of bargaining:

- 1) The extent to which the subject is logically and reasonably related to wages, hours, terms and 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. 4117.08(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 its obligations to the general public; and
- 3) 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.

Those management decisions which are found, on balance, to be permissive subjects, can be implemented without bargaining the decision unless a contract provision would conflict with it. Any reasonably foreseeable changes in wages, hours, or terms and other conditions of employment that are affected by those decisions and are determined to be permissive subjects of bargaining under the above test must be bargained as soon as practicable and, whenever reasonably practicable, before the announced implementation date if the employee organization makes a timely request to bargain.

By interpreting O.R.C. § 4117.08 to require a balancing of interests, this test is consonant with the object of the section, i.e., balancing the rights of management and labor, which will have as its consequence the bargaining of those subjects most appropriate for negotiation. These are valid considerations when interpreting ambiguous statutes in Ohio. The previous SERB decision in Lakewood, supra, expressing the test for determining mandatory or permissive subjects of bargaining which conflicts with this Opinion and Order is expressly overruled.

The test herein is consistent with the presumed intention of legislative enactments, i.e., to affect a just and reasonable result feasible of execution. Further, this test is consistent with the mandate of O.R.C. § 4117.22 to construe O.R.C. Chapter 4117 liberally to promote orderly and constructive relationships between all public employers and their employees.

B. Balancing Tests Are Well-Accepted Tools for Resolving Conflicting Rights

The construction of a balancing test to determine whether certain subjects are mandatory or permissive is a generally accepted principle of labor law, utilized and approved by reviewing courts in other public sector jurisdictions such as California, Pennsylvania and Illinois and by the NLRB with U.S. Supreme Court approval in *First National Maintenance Corp. v. NLRB*, supra.

The three-prong balancing test developed by the California Public Employment Relations Board ('PERB') is nearly identical to the test adopted herein.⁸ PERB's test finds a subject to be 'negotiable, even

⁸ California Government Code Section 3543.2 provides in pertinent part: '(a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment.' 'Terms and conditions of employment' mean health and welfare benefits, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security, procedures for processing grievances, and the layoff of probationary certificated school district employees. Section 3543.3 provides in pertinent part: 'A public school employer ... shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.'

though not specifically enumerated if it (1) is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.' Anaheim Union High School Dist., PERB Decision No. 177 (1981). This test was approved by the California Supreme Court in San Mateo City School Dist. v. PERB, 33 Cal.3d 850, 663 P.2d 523 (Cal. S.Ct. 1983).

The Pennsylvania Supreme Court has also approved a balancing test in Penn. Labor Relations Bd. v. State College Area School Dist., 90 L.R.R.M. 2081 (1975). In that case, the court was called upon to:

[S]trike a balance wherein those matters relating directly to 'wages, hours and other terms and conditions of employment' are made mandatory subjects of bargaining and reserving to management those areas that the public sector necessarily requires to be managerial functions. In striking this balance the paramount concern must be the public interest in providing for the effective and efficient performance of the public service in question. ...

It is the duty of the Board ... to determine whether the impact of the issue on the interest of the employe (sic) in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.

Id. at 2085.

In a similar fashion, the Illinois Supreme Court used a balancing test to resolve conflicts between the bargaining and policy-making obligations of public employers under its collective bargaining law. In Central City Education Assn. v. Ill. Educational Labor Relations Bd., 599 N.E.2d 892 (1992), the Supreme Court of Illinois reconciled statutory language requiring public employers 'to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives,' but not requiring them to 'bargain over matters of inherent managerial policy,' through the use of a three-part balancing test. If the Illinois Board determines the matter concerns 'wages, hours and terms and conditions of employment' (part one) and it is also one of 'inherent managerial policy' (part two), the Board must determine which interests are greater (part three). Id. at 899.

C. An Administrative Agency Must Apply Standards That Effectuate the Statutory Scheme

It is well-settled that an administrative agency not only can but should change its position on an issue when its experience demonstrates that change is warranted. As the U.S. Supreme Court stated in NLRB v. Weingarten, Inc., 420 U.S. 251, 266-67, 95 SCt 959, 43 LEd(2d) 171, 88 L.R.R.M. 2689, 2694 (1975):

The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision making. Cumulative experience begets understanding and insight by which judgments ... are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 73 SCt 287, 97 LEd 377, 31 LRRM 2237 (1953).

In administering the Public Employees' Collective Bargaining Act, we have observed that strict adherence to SERB's earlier definition of mandatory subjects in Lakewood, supra, has rendered virtually every topic, even those enumerated in O.R.C. § 4117.08(C), subject to bargaining. Such a broad definition is not

mandated by the statutory language and in practice undercuts a clear legislative intent to require bargaining on some subjects but not others. The balancing test announced herein will allow the law to be administered in a manner consistent with that intent.

D. Balancing Test Is Not Always Necessary

It should be stressed that this three-part balancing test is not necessary or appropriate in every situation. Only those subjects that both have a material influence upon wages, hours or terms and other conditions of employment and involve the exercise of inherent managerial discretion are subject to the three-part balancing test. The balancing test analysis is not necessary when the subject matter at issue is an inherently managerial prerogative not affecting wages, hours or terms and conditions of employment; pertains only to wages, hours, or terms and conditions of employment; or is preempted by legislation.

For example, in a case involving the tape recording of a pre-disciplinary hearing by an employer, SERB held that because the taping itself did not affect wages, hours, terms and other conditions of employment, it was unnecessary to apply a balancing test to determine whether taping is a mandatory or permissive subject of bargaining. In re City of Cincinnati, SERB 93-010, (6-10-93). In a case involving the unilateral changing of hours and benefits of a bargaining unit position by the employer, again SERB did not rely on a balancing test to reach the conclusion that hours and benefits are mandatory subjects of bargaining and, therefore, a unilateral change without bargaining constituted a violation of O.R.C. § 4117.11(A)(1) and (5). In re Portage Lakes Joint Vocational School Dist Bd of Ed, SERB 93-009 (6-2-93), aff'd 1994 SERB 4-88 (CP, Summit, 9-27-94). In both cases, since it was readily apparent the subject matters at issue were not a mixture of inherently managerial prerogatives and wages, hours, terms and other conditions, application of a balancing test was unnecessary.

Although the foregoing cases were decided under the ODOT balancing test, the results would have been identical under the test herein.

E. Balancing Test Analysis Is Necessary In This Case

It is argued that once a subject is included in a collective bargaining agreement, it becomes a mandatory subject of bargaining regardless of how it might fare under a balancing test, and the subject of an ERIP was bargained and included in the parties' 1990-93 CBA. Based upon the facts of this case, we do not find this argument persuasive.

The parties' bargaining obligations cannot be circumvented by application of the balancing test. As the Ohio Supreme Court stated in *City of Cincinnati v. Ohio Council 8, AFSCME*, supra, at 664-665:

A permissive subject is one whose inclusion in the agreement is not prohibited by law, but which is also not a mandatory subject of bargaining ... While parties to a collective bargaining relationship are required to bargain over mandatory subjects, they are not required to bargain over permissive subjects, though nothing prevents them from doing so. ... If, however, the parties choose to bargain on a permissive subject, and reach agreement on a provision relating to it, the provision is just as much a part of the contract, and therefore just as enforceable, as a provision governing a mandatory subject of bargaining.

Thus, once a permissive subject has been included in a collective bargaining agreement, it does not become transformed into a mandatory subject of bargaining. The included subject is enforced like a mandatory bargaining subject, but its continuation depends upon the contract terms. The 1990-93 CBA contained a provision for an ERIP from 1990-91 that had expired before the Employer's unilateral implementation of the 1993 ERIP. Complainant contends that the 1993 ERIP was a 'continuation, modification, or deletion' of a provision in the 1990-93 CBA, and therefore, under O.R.C. § 4117.08(A), could not be adopted without collective bargaining. Respondent, on the other hand, argued that because the ERIP provision in the 1990-93

CBA had already terminated when the new 1993 ERIP program was announced, the earlier ERIP was no longer an existing provision of the 1990-93 CBA.

The parties submitted this contractual interpretation dispute to an arbitrator pursuant to the grievance/arbitration procedure in their collective bargaining agreement. In his ruling, the arbitrator rejected YEA's argument that the Board of Education's 1993 ERIP was a 'continuation, modification, or deletion' of the existing contractual ERIP because that ERIP had already expired and had ceased to exist prior to when the Respondent implemented its 1993 ERIP.

SERB is not legally bound to accept an arbitrator's interpretation of a contract in an unfair labor practice case. SERB is also not compelled to give deference to an arbitrator's award. SERB is free to devise the remedial scheme it deems appropriate to remedy an unfair labor practice. *SERB v. East Palestine City School Dist Bd of Ed*, 1988 SERB 4-57 (7th Dist Ct App, Columbiana, 6-29-88). In the present matter, however, we do agree with the arbitrator's interpretation of the 1990-93 CBA since that interpretation does not appear to be repugnant to the purposes and policies of O.R.C. Chapter 4117. Therefore, because the 1990-91 ERIP had already expired by agreement of the parties before the expiration date of the 1990-93 CBA and before the Board of Education's unilateral implementation of the 1993 ERIP, it was no longer enforceable like a mandatory subject of bargaining.

A question arising herein is whether the subject matter at issue has been preempted by legislation. We recognize that the Employer had certain statutory obligations to fulfill, pursuant to O.R.C. 3307.35,⁹ once it had negotiated the 1993 ERIP with the ASP. However, the Employer was still obligated to bargain with the YEA over this subject matter prior to the unilateral implementation pursuant to O.R.C. Chapter 4117. Nothing in O.R.C. § 3307.35 was intended to preclude collective bargaining of ERIPs. The Employer could have simultaneously bargained with YEA and ASP over the ERIP provisions since the deadline for non-renewing contracts with administrative staff is a month earlier than for teaching staff. Because the statute permitted, but did not require, ERIPs under the facts herein, these two statutes are not mutually exclusive. Both statutes must be reconciled and given effect. Consequently, while the subject matter was addressed by legislation, we conclude that bargaining over the 1993 ERIP was not preempted by O.R.C. § 3307.35.

F. Bargaining the Decision to Implement the ERIP Was Required

SERB previously held that a retirement incentive plan was a mandatory subject of bargaining. In *re Montgomery County Joint Vocational School Dist Bd of Ed*, SERB 89-017 (7-14-89). Since that decision was reached before the announcement of the balancing test herein, it no longer has precedential value. Furthermore, different facts may lead to different results under this balancing test. See, e.g., *In re City of Canton*, SERB 94-011 (6-29-94). In the present case, the Employer asserts the 1993 ERIP was developed primarily to reduce administrative staff and, subsequently, was applied to this bargaining unit by operation of law, not by design. Thus, given the Employer's assertion, analysis under the three-part balancing test is necessary.

Under the first part of the test set forth above, it was clearly established that retirement or pension benefits are logically and reasonably related to wages, hours, terms and other conditions of employment. This is

⁹ O.R.C. § 3307.35 provides in part:

An employer may establish a retirement incentive plan for its employees who are members of the state teachers retirement system. ... An employeewho is a member of the state teachers retirement system shall be eligible to participate in a retirement incentive plan ... Participation in the plan shall be available to all eligible employees except that the employer may limit the number of persons for whom it purchases credit in any calendar year to a specified percentage of its employees who are members of the state teachers retirement system on the first day of January of that year. (emphasis added).

a position held in the private sector¹⁰ and a substantial number of public sector¹¹ labor jurisdictions that have considered the matter. ERIPs directly affect the wages, hours, terms and conditions of employment of those individuals potentially participating in the plan.

Analysis of the facts under the second part of the balancing test is problematic. While the Respondent could argue that an ERIP is a necessary element to assist it in implementing its determination of 'the adequacy of the work force' pursuant to O.R.C. § 4117.08(C)(6), or that an ERIP affects its right to 'layoff, transfer, assign, schedule, promote, or retain employees' pursuant to O.R.C. § 4117.08(C)(5), an ERIP basically just speeds up the natural process of staff reductions through attrition. Accordingly, while the weight of the YEA's interest in the first part is relatively strong, the weight to be given the Employer's concern under the second part is relatively weak in this instance. The Employer has failed to establish an overriding management objective that would justify the unilateral action under the second part.

Finally, the third part of the balancing test requires an examination of the extent to which the collective bargaining process is an appropriate method to resolve the conflict over the instant subject matter. We conclude that it is to a great extent. The parties do not assert that the bargaining process is an inappropriate or cumbersome means for developing and negotiating an ERIP. The bargaining history of these parties has demonstrated that bargaining over an ERIP has not significantly abridged the Employer's freedom to manage the School District using the inherent discretion to make the decisions essential to its mission and its obligations to the general public. This is evidenced by the several previous collective bargaining agreements between the parties that contained negotiated ERIPs. A compelling reason for a union to cooperate in negotiations over an ERIP is that the alternative is often layoffs of the least senior employees. Theoretically, by inducing the highest paid employees to retire early, fewer employees are lost overall from the bargaining unit to achieve a set fiscal savings, and less personal economic hardships and workload increases are experienced by the union's membership. Again, the parties' history with respect to bargaining over ERIPs demonstrates that addressing the subject through these channels has proven successful in resolving their conflicts.

Thus, analysis under the three-part balancing test clearly indicates that the 1993 ERIP constituted a mandatory subject of bargaining. Therefore, the Board of Education's unilateral implementation, without bargaining the decision to implement an ERIP with the YEA, was in violation of O.R.C. § 4117.11(A)(1) and (5).

G. Whether the Employee Organization Waived Its Right to Bargain

The next issue to be resolved is whether the YEA waived its right to bargain over the ERIP. It is well-settled that the waiver of a statutory right to bargain over a mandatory subject must be established by clear and unmistakable action by the waiving party. Additionally, SERB has historically required that as a 'threshold requirement,' precise terminology must be contained in a collective bargaining agreement before contract language can be held to override the statutory right to bargain. Lakewood, supra.

It is proper to consider contract language, bargaining history, and extrinsic evidence in determining whether a statutory right has been waived. Contrary to any suggestion otherwise in Lakewood, supra, we do not hold that contract language must specifically waive the right to bargain over a particular issue before the conduct of the parties can be considered. A party's intent can best be determined by examining all the foregoing factors together. This concept of waiver is consistent with that espoused by the NLRB and the federal courts. See, e.g., Indianapolis Power & Light Co., 133 L.R.R.M. 2921 (7th Cir. 1990). Thus, the previous SERB

¹⁰ Inland Steel Co., (1948) 77 N.L.R.B. No. 1, 21 L.R.R.M. 1310, enforced 170 F.2d 247, 22 L.R.R.M. 2506 (7th Cir. 1948); Hearst Corp., Baltimore News American Division, 230 N.L.R.B. No. 29, 95 L.R.R.M. 1274 (1977), enforced 590 F.2d 554, 100 L.R.R.M. 2320 (4th Cir. 1979).

¹¹ Birmingham Board of Education, 8 NPER MI-16151 (MI--MERC, 8-9-85); Alhambra City and High School Districts, 10 PERC p 17046 (CA--PERB, 1-08-86); and Jefferson School District, 4 PERC p 11117 (CA--PERB, 6-19-80).

decision in Lakewood, supra, regarding waiver, which conflicts with this Opinion and Order, is expressly overruled.

Where a permissive subject of bargaining involving the exercise of management discretion is at issue, the employer, before implementation, must bargain collectively about wages, hours, or terms and other conditions of employment affected by its decision.¹² Where an employer's decision is implemented mid-term in a collective bargaining agreement, the employer should give the employee organization reasonable advance notice both of the decision to be implemented and the projected date of implementation. Once notice has been given and mid-term bargaining requested, the parties must bargain in good faith to a legal impasse on the wages, hours, or terms and other conditions of employment affected by the implementation of the employer's decision. The statutory impasse procedures do not apply to mid-term contract disputes. In re Franklin County Sheriff, SERB 90-012 (7-18-90). In mid-term bargaining, the employer may implement its last best offer when the parties have reached an ultimate impasse in bargaining or when the employer has made good faith attempts to bargain the matter before time constraints necessitated the implementation of its last best offer.

If the exclusive representative states that it does not wish to bargain collectively or does not request to bargain collectively within a reasonable period of time, then it will be found to have waived its rights. The waiver of a statutory right to bargain over mandatory subjects of bargaining must be established by clear and unmistakable action by the waiving party. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 103 SCt 1467, 75 LEd(2d) 387, 112 L.R.R.M. 3265 (1983). What constitutes reasonable conduct by the employer and a reasonable time to request to bargain collectively by the exclusive representative will depend upon the facts and circumstances in each case, with consideration both for the urgency with which the employer must act and the amount of time that good faith bargaining would likely consume. If an employer offers no reasonable basis for giving little or no advance notice and when bargainable subjects are affected by the management decision, the intended implementation may be found to be a *fait accompli* for which a bargaining request would have been futile and, therefore, would not be required.

In the present matter, the YEA did not waive its right to bargain. The Board of Education adopted and implemented the 1993 ERIP without notifying or offering to bargain with the YEA over this mandatory subject of bargaining even though the Employer knew, by operation of law, employees in the YEA-represented bargaining unit would be directly affected by this decision.¹³ Further, even though the Employer later offered to bargain the 'effects' of its decision, the YEA was under no duty to limit its bargaining rights to this alone and, therefore, did not waive its right to bargain by refusing to negotiate at this stage. As a result, the Employer handled a mandatory subject of bargaining as though it were a permissive one and, thereafter, presented the YEA with a *fait accompli*. The YEA was well within its rights to reject any limited bargaining thereafter.

H. Remedial Relief

O.R.C. § 4117.12 authorizes SERB to remedy unfair labor practices and grants broad discretion to do so. O.R.C. § 4117.12(B)(3) states in part:

If upon the preponderance of the evidence taken, the board believes that any person named in the complaint has engaged in an unfair labor practice, the board shall state its findings of fact and issue and cause to be served on the person an order requiring that he cease and desist from these unfair labor practices, and take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of Chapter 4117. of the Revised Code.

¹² Where the employer's decision itself is a mandatory subject of bargaining, these procedures must be applied to the decision as well as the employment terms affected by the decision.

¹³ FN13. F.F. No. 4.

SERB's exclusive jurisdiction to determine unfair labor practices does not foreclose parties to a collective bargaining agreement from settling differences in interpreting provisions of their agreement through binding arbitration. *City of East Cleveland v. East Cleveland Firefighters Local 500* (1994), 70 Ohio St.3d 125, 1994 SERB 4-57, 637 NE(2d) 878. Similarly, SERB is not compelled to give deference to an arbitrator's award and is free to devise a remedy it deems appropriate to remedy an unfair labor practice. *SERB v. East Palestine City School Dist Bd of Ed*, supra. In this instance, except for the omission of a cease and desist order and the posting of a notice to employees by the Employer, the relief provided by the arbitration award was both adequate and appropriate and the Board of Education has complied with the award through the negotiation of the 1995 ERIP.

The arbitrator's award provides in part:

The Board [of Education] is directed to bargain with the YEA on the subject of an ERIP that shall include provisions no less than those in the plan adopted by the Board on January 28, 1993.¹⁴

After the award was issued, the parties negotiated the 1995 ERIP under which the Board of Education would purchase one-fifth of each eligible employee's total Ohio service or two years of service, whichever is less, for a maximum of five percent of the eligible employees who could retire early.¹⁵ Since the record does not show the YEA took any action to enforce the arbitration award, we can only assume the ERIP provisions provided for and implemented through that award were 'no less than those in the [1993 ERIP],' thereby obviating any need by SERB to second-guess the parties with a remedy we might find more appropriate.¹⁶

Since there was a violation of O.R.C. § 4117.11(A)(1) and (5) by the Employer, the appropriate remedy must still be determined. The YEA has received substantial relief from the arbitrator's award. One remedy an arbitrator is not empowered to award is the issuance of a cease and desist order, pursuant to O.R.C. § 4117.12(B)(3), with the requisite posting. The posting of a notice is an important remedial element, serving three critical functions: (1) Notifying employer, employees, and employee organizations that a particular action has been found to be unlawful and that such action will cease; (2) Acknowledging the aggrieved party's effort to protect the integrity of the process; and (3) Stating publicly a commitment by the Respondent that it will abide by the law in the future. In re *Findlay City School Dist Bd of Ed*, SERB 88-011 (7-15-88). The issuance of a cease and desist order is an appropriate part of the remedy in this matter and the Employer is ordered to post a notice to employees for sixty days in all of its buildings where the YEA-represented employees work.

III. CONCLUSION

For the reasons above, we find that the Youngstown City School District Board of Education committed an unfair labor practice in violation of O.R.C. § 4117.11(A)(1) and (5) by unilaterally implementing its 1993 Early Retirement Incentive Plan because the ERIP was a mandatory subject of bargaining based upon the facts of this case under the three-part balancing test announced herein. We also find the Youngstown Education Association did not waive its right to bargain over the 1993 ERIP. With respect to the appropriate remedy in this matter, we find that full relief was obtained through the grievance process, except the issuance of a cease and desist order with the posting of a notice to employees by the Employer for sixty days in all of its buildings where the YEA-represented employees work must also be included as part of this remedy. Finally, the previous SERB decision in *Lakewood*, supra, is expressly overruled by this decision.

¹⁴ FN14. Jt. Exh. J, pg. 20.

¹⁵ FN15. F.F. No. 8.

¹⁶ Since we have found that remedial relief has already been provided to the charging party, we will not address the question of whether SERB has authority to re-open the 1993 ERIP without the State Teacher's Retirement System being a party to this action.

POTTENGER, Vice Chairman and MASON, Board Member concur.