

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

State of Ohio, Department of Youth Services,

Respondent.

CASE NUMBER: 94-ULP-11-0659

ORDER
(OPINION ATTACHED)

Before Chairman Pohler, Vice Chairman Pottenger, and Board Member Mason:
February 22, 1996.

On November 23, 1994, District 1199, Health Care and Social Service Union, SEIU, AFL-CIO ("District 1199") filed an unfair labor practice charge against the State of Ohio, Department of Youth Services ("Respondent"). Pursuant to Ohio Revised Code ("O.R.C.") § 4117.12, the Board conducted an investigation and found probable cause to believe that an unfair labor practice had been committed. Subsequently, a complaint was issued alleging that Respondent had violated O.R.C. §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the hours of certain bargaining unit employees. The Board directed the matter to hearing, and the case was heard by a Board hearing officer on October 27, 1995.

On December 18, 1995, the Hearing Officer's Proposed Order was issued. On January 8, 1996, the Respondent filed its exceptions to the proposed order. On January 18, 1996, the Complainant filed its response to the Respondent's exceptions.

The Board has reviewed the record, the Hearing Officer's Proposed Order, the exceptions and the response. For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the Findings of Fact and Conclusions of Law in the Hearing Officer's Proposed Order and issues a cease and desist order with a Notice to Employees to be posted for sixty (60) days.

The Respondent is ordered to:

A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Ohio Revised Code Chapter 4117; refusing to bargain collectively with the representative of its employees certified pursuant to Ohio Revised Code Chapter 4117 by unilaterally changing the scheduled hours of work of Social Worker IIs; and otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty (60) days in all State of Ohio, Department of Youth Services facilities where Social Worker IIs work, the NOTICE TO EMPLOYEES furnished by the Board stating that the State of Ohio, Department of Youth Services shall cease and desist from the actions set forth in Paragraph A and shall take the affirmative action set forth in Paragraph B.
- (2) Return all Social Worker IIs to the *status quo ante* with respect to their schedules.
- (3) Immediately offer to bargain with the District 1199, Health Care and Social Service Union, SEIU, AFL-CIO, regarding any desired changes in the schedules of Social Worker IIs.
- (4) 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.

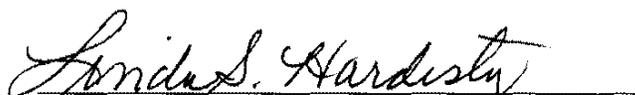
It is so ordered.

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


SUE POHLER, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the common pleas court where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days (15) after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party by certified mail, return receipt requested, on this 26th day of April, 1996.


LINDA S. HARDESTY, LEGAL ASSISTANT



NOTICE TO EMPLOYEES

FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE
STATE EMPLOYMENT RELATIONS BOARD,
AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and abide by the following:

A. WE WILL CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Ohio Revised Code Chapter 4117; refusing to bargain collectively with the representative of its employees certified pursuant to Ohio Revised Code Chapter 4117 by unilaterally changing the scheduled hours of work of Social Worker IIs; and otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

B. WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty (60) days in all State of Ohio, Department of Youth Services facilities where Social Worker IIs work, the NOTICE TO EMPLOYEES furnished by the Board stating that the State of Ohio, Department of Youth Services shall cease and desist from the actions set forth in Paragraph A and shall take the affirmative action set forth in Paragraph B.
- (2) Return all Social Worker IIs to the *status quo ante* with respect to their schedules.
- (3) Immediately offer to bargain with the District 1199, Health Care and Social Service Union, SEIU, AFL-CIO, regarding any desired changes in the schedules of Social Worker IIs.
- (4) 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.

STATE OF OHIO, DEPARTMENT OF YOUTH SERVICES
CASE NUMBER: 94-ULP-11-0659

DATE

BY

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

ERR 2012

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the Board.

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

State of Ohio, Department of Youth Services,

Respondent.

CASE NUMBER: 94-ULP-11-0659

OPINION

POTTENGER, Vice Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Board") on exceptions filed to the Hearing Officer's Proposed Order issued on December 18, 1995. For the reasons below, we find that the State of Ohio, Department of Youth Services ("ODYS" or "Respondent") violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the scheduled work hours of Social Worker IIs at the Northwest Regional Office and the Mohican Youth Center without bargaining with the employee organization certified as the exclusive representative of the Respondent's employees.

I. BACKGROUND

A collective bargaining agreement, effective June 1, 1994 through May 31, 1997 (1994-97 Agreement"), governs the terms and conditions of employment of public employees of the State of Ohio in bargaining units represented by District 1199, Health Care and Social Service Union, SEIU, AFL-CIO ["District 1199"], including Social Worker IIs at the Northwest Regional Office and the Mohican Youth Center. Pursuant to the 1994-97 Agreement,

employee-initiated flex-time is available with the employer's approval. The employer could mandate flex-time for Social Worker IIs only for the accommodation of training.¹

ODYS is responsible for the care, treatment, training, supervision and rehabilitation of delinquent youth. ODYS operates several institutions, including the Northwest Regional Office ["Northwest Office"], which provides aftercare services to delinquent youth in Lucas County, Ohio, and custodial treatment of delinquent youth at the Mohican Youth Center ["Mohican"] in Loudonville, Ohio. ODYS is required to develop treatment programs necessary to meet the needs of its youth, but has no obligation to provide substance abuse treatment exclusively through Alcoholics Anonymous ["AA"] and may develop its own programs in this area.²

Following certain incidents of disruptive behavior of ODYS youths in AA meetings, the AA Association asked ODYS for help. An agreement was reached to treat the ODYS youth at separate AA meetings to be conducted at ODYS' Northwest Office. The AA meetings were moved "in-house" in approximately May 1994. ODYS determined, based upon the number of youths who needed treatment, that two Social Worker IIs, one Substance Abuse Specialist,³ and one supervisor were necessary at each meeting. Initially, ODYS management solicited Social Worker IIs to volunteer to staff the AA meetings, which were conducted from 5:30 p.m. - 6:30 p.m. on Wednesdays. Interest in volunteering eventually waned, and Social Worker IIs did not volunteer in sufficient numbers to staff the AA meetings.⁴

On or about September 27, 1994, ODYS, through a supervisor of the Social Worker IIs employed at the Northwest Office, issued a memorandum with a new schedule attached,

¹Findings of Fact ("F.F.") Nos. 5, 10, and 18.

²F.F. Nos. 1, 2, 3, and 12.

³Substance Abuse Specialist is a working title; however, the classification is also Social Worker II. (Transcript, pp. 152, 166-167).

⁴F.F. No. 6.

mandating that Social Worker IIs flex their schedules to cover the Wednesday evening AA meetings on a rotating basis. For many years, the Social Worker IIs at the Northwest Office worked a straight 8:00 a.m. - 5:00 p.m. schedule. The 1994-97 Agreement allowed employees to initiate flex-time in their schedules. However, the September 27, 1994 memorandum was the first time that ODYS changed employees' schedules by flexing their schedules.⁵

At Mohican, ODYS also changed the work schedules of Social Worker II's for greater accessibility to youth. On or about September 15, 1994, a schedule was issued, effective October 2, 1994, requiring the Social Worker IIs at Mohican to extend evening hours on certain weekdays to 8:00 p.m. After this change, Social Worker IIs worked a swing-shift, with two eight-hour weekdays, two nine-hour weekdays, and a six-hour weekend day. The change in scheduling at Mohican was first announced to bargaining unit employees at a meeting called by the unit administrator sometime during the beginning of September 1994. There was no bargaining with District 1199 either before or after the change.⁶

On November 23, 1994, District 1199 filed an unfair labor practice charge alleging that ODYS had unilaterally changed the working hours of Social Worker II's, thereby refusing to bargain collectively in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5). On July 13, 1995, the Board found probable cause on the alleged violations of O.R.C. §§ 4117.11(A)(1) and (A)(5), authorized the issuance of a complaint, and directed the matter to hearing.

II. DISCUSSION

At the Northwest Office, Social Worker IIs, who historically worked a straight 8:00 a.m. - 5:00 p.m. schedule, were required on a rotating basis to flex their schedules to work 5:30 p.m. - 6:30 p.m. on Wednesdays. Before October 5, 1994, certain Social

⁵F.F. Nos. 5, 8, and 10.

⁶F.F. Nos. 15 and 16.

OPINION

Case No. 94-ULP-11-0659

Page 4 of 12

Worker IIs flexed their schedules occasionally on their own initiative but never at ODYS' directive. At Mohican, the hours of Social Worker IIs were changed so that they had to work some evenings until 8:00 p.m. While the record at Mohican indicates some flexibility in scheduling and the required flex-time to cover mandatory training sessions (specifically allowed under the 1994-97 Agreement), employees' hours were never extended until 8:00 p.m.

The issue before the Board is whether bargaining was required on the change in schedule implemented by the Respondent. A preliminary question is whether the balancing test in *In re SERB v. Youngstown City School District Bd of Ed*, SERB 95-010 (6-30-95) (hereinafter "*Youngstown*") should be utilized.

Where the subject matter falls exclusively within O.R.C. § 4117.08(C), no duty to bargain exists, and the case is characterized as a permissive subject of bargaining. Where the subject matter falls exclusively within O.R.C. § 4117.08(A), a duty to bargain exists, and this subject is a mandatory subject of bargaining. Under either situation, an application of the balancing test is not needed. However, where a subject matter both materially affects wages, hours, or other terms and conditions of employment and is an inherent managerial prerogative, the balancing test shall be applied to determine whether the subject is a mandatory or permissive subject of bargaining. *Id.*

O.R.C. § 4117.08 provides in pertinent part:

(A) All matters pertaining to wages, *hours*, or terms and other conditions of employment * * * are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section.

* * *

(C) *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:

* * *

OPINION

Case No. 94-ULP-11-0659

Page 5 of 12

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, *schedule*, promote, or retain employees[.] (emphasis added).

The term "schedule" means an employer's planning of its operations, including *when* employees will perform their assigned duties. A change in schedule may change the time of an event but also other components, e.g., location. Such change may or may not affect terms and conditions of employment. For example, rescheduling a meeting from 9:00 a.m. to 9:30 a.m. for employees working 8:30 a.m. - 5:00 p.m. probably does not affect wages, hours or other terms and conditions of employment, unlike rescheduling that meeting to 9:30 p.m. Rescheduling a meeting place from one office to another in the same building does not involve a change in terms and conditions of employment, while rescheduling it to another city or another state may. Thus, while scheduling is a management prerogative, there are situations where the right to schedule will involve hours, terms or conditions of employment.

The term "hours" in O.R.C. § 4117.08(A) does not equate only the *number* of hours. The term "hours" refers to more than merely the quantity of hours worked. *See, e.g., American Oil Co. v. NLRB*, 602 F.2d 184, 101 L.R.R.M. 2981 (8th Cir. 1979), citing *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea*, 381 U.S. 676, 59 L.R.R.M. 2369 (1965). For example, hours during which automobile showrooms will be open by employer dealers are subject to bargaining between the employers and their employees. *In re Detroit Auto Dealers Assn.*, 955 F.2d 457, 139 L.R.R.M. 2401 (6th Cir. 1992). Similarly, the time during the day in which the Social Workers II's have to be at work falls within the term "hours" under O.R.C. § 4117.08(A). Hence, we find that "scheduling" in the case at issue is a subject that involves both inherent managerial rights as well as terms and conditions of employment. Being a "mixed" subject, the *Youngstown* balancing test must be utilized to determine whether "scheduling" is a mandatory or a permissive subject of bargaining.

Under *Youngstown, supra* at 3-76 - 3-77, the following factors must be balanced to determine whether the subject is a mandatory or permissive subject of bargaining:

OPINION

Case No. 94-ULP-11-0659

Page 6 of 12

- 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.

Under the first prong of the balancing test, these changes in schedule fall within the statutory phrase "wages, hours, terms and conditions of employment." At the Northwest Office, ODYS required employees to work hours on Wednesdays that they were not normally required to work and required the employees to otherwise modify their own work hours in order to remain within their regular weekly number of hours. At Mohican, the number of hours worked each day was changed. ODYS' actions logically and reasonably relate to the "hours" worked by bargaining unit members at both the Northwest Office and Mohican.

Under the second prong of the test, a finding that ODYS must bargain these types of scheduling changes will neither *significantly abridge* ODYS' freedom to exercise those managerial prerogatives set forth in O.R.C. § 4117.08, nor prevent ODYS from achieving its essential missions and obligations to the public. ODYS contends that changing the Social Worker II's schedules at the Northwest Office to cover the AA meetings is within its managerial discretion, since it is necessary for ODYS to have such discretion regarding its "essential" (i.e., core) functions. Therefore, ODYS alleges that the second prong of the balancing test outweighs the first prong. The Respondent justifies its actions at the Northwest Office by essentially arguing that it has no control over when AA schedules its meetings. While this may be true, maintaining AA meetings in-house is not an "essential"

OPINION

Case No. 94-ULP-11-0659

Page 7 of 12

function of ODYS. The record is clear that a part of ODYS' mission is to provide substance abuse treatment, but equally clear is that this treatment does not have to come from AA.⁷

At Mohican, there is even less evidence that compelling bargaining would significantly abridge managerial freedom or impede ODYS' essential mission. The only justification offered for the change was that it would make it easier for Social Worker IIs to spend more time with the youth.

ODYS offered no evidence that inherent discretion in scheduling employees after regular working hours at either the Northwest Office or Mohican was "necessary" to achieve its "essential" mission, nor was it "necessary" for its discretion to mandate flex-time to fulfill this function. ODYS did not establish the "overriding management objective" required by *Youngstown. Id.* at 3-80. The flex-time language that the Respondent has already negotiated in the 1994-97 Agreement shows that the Respondent's essential mission allows for some freedom in the scheduling of training; as to flex-time, the contract language obligates the Respondent, where possible, to flex an employee's schedule only at an employee's request. The Respondent failed to establish that substance-abuse treatment of youth required it to mandate flex-time scheduling of its employees' work hours.

Under the third prong of the test, the mediatory influence of collective bargaining is the appropriate means of resolving conflicts over scheduling and hours when the two issues overlap, as in the instant case. Again, in this case, the parties have previously bargained certain flex-time provisions without any apparent harm to the Respondent's managerial rights. The negotiated flex-time provisions undoubtedly impact upon scheduling, but there is no evidence that the bargaining that took place significantly abridged the Respondent's freedom

⁷The Northwest Office's regional director testified that ODYS is not tied in any way to AA, that it has the prerogative to devise its own treatment program, and that such a program could be established within the hours of 8:00 a.m - 5:00 p.m. Even if the Respondent wants to continue to exercise its managerial prerogative to utilize AA rather than to develop in-house programs, ODYS has options, other than mandating flex-time, for covering the Wednesday evening sessions.

OPINION

Case No. 94-ULP-11-0659

Page 8 of 12

to manage using its inherent discretion to make the decisions essential to ODYS' missions and to its obligations to the general public. The Respondent's argument is not that the collective bargaining process is an inappropriate or cumbersome means for resolving these types of disputes, but that the collective bargaining process has already been fully utilized in this instance.

Balancing the three prongs, we find that the employee organization's interest under the first prong is relatively strong, the employer's interest under the second prong is relatively weak, and that mediatory influence of collective bargaining under the third prong is appropriate for this subject matter. Thus, this matter of scheduling, in this case, involves a mandatory subject of bargaining.

This finding is in line with other jurisdictions although their statutes do not specifically include "schedule" within the list of management rights. The U.S. Supreme Court ruled: "We think that the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain." *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 59 L.R.R.M. 2376, 2381 (1965). Similarly, the National Labor Relations Board ("NLRB") found that a change in hours which involved moving back the starting and quitting times to later in the day was a unilateral revision in conditions of employment. *Massey Gin & Machine Works, Inc.*, 78 N.L.R.B. 189, 22 L.R.R.M. 1191 (1948).⁸

In the public sector, the approach is similar. The California Public Employment Relations Board applied a three-prong balancing test nearly identical to the test adopted in *Youngstown* and found that an employer had unlawfully refused to bargain when it unilaterally eliminated a night shift and reassigned custodians working that shift to a day shift. *Los*

⁸The Fifth Circuit Court of Appeals ultimately denied a petition for enforcement of the NLRB's Order, which involved numerous other issues. *Massey Gin and Machine Works*, 173 F.2d 758, 23 L.R.R.M. 2619 (5th Cir. 1949).

OPINION

Case No. 94-ULP-11-0659

Page 9 of 12

Angeles Community College District, 6 PERC ¶ 13241 (CA PERB, 1982). Finally, in Illinois, another public sector jurisdiction applying a balancing test similar to the test in *Youngstown*, the Illinois State Labor Relations Board noted the "general proposition" that "matters involving time off, including scheduling, are mandatory subjects of bargaining." *Village of Oak Park*, 9 PERI ¶ 2019 (IL LRB, 1993).

Having found that this case involves a mandatory subject of bargaining, the next issue to be addressed is whether District 1199 waived its right to bargain the subject. The Respondent claims that it has, arguing: (1) at the Northwest Office, a union delegate, knew of the schedule change before it went into effect, but that the employee organization did nothing to demand bargaining until mid-December, and (2) at Mohican, the employees did nothing to oppose the schedule change.

The waiver of a statutory right to bargain collectively over a mandatory subject of bargaining must be established by clear and unmistakable action by the waiving party. *Youngstown, supra*. The *Youngstown* decision also provides SERB's latest pronouncement on waiver:

Where an employer's decision is implemented mid-term in a collective bargaining agreement, the employer should give the employee organization reasonable advance notice. * * * Once notice has been given and mid-term bargaining requested, the parties must bargain in good faith to a *legal* impasse. * * *

If the exclusive representative * * * 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 a clear and unmistakable action by the waiving party. (citation omitted). 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 * * *, 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.

Id. at 3-81.

The situations at the Northwest Office and Mohican are slightly different and must be examined separately. At the Northwest Office, the only advance notice was the distribution of a memorandum and schedule, two weeks before the schedule became effective, to bargaining unit members, including an employee who is also a Union delegate. Again, the Respondent has made no showing that it gave notice to the District 1199 designated representative, any District 1199 officer, any member of a bargaining team, or anyone else with bargaining authority.⁹ At Mohican, there was no advance notice of the change in scheduling. District 1199's somewhat belated bargaining request, viewed on a case-by-case basis as dictated by *Youngstown*, does not constitute a waiver because District 1199 did not have reasonable advance notice.

More important, a request to bargain was not necessary because the scheduling changes were presented as a *fait accompli*. The Respondent's argument that there was no *fait accompli* because certain individuals were open to alternatives *after the fact* does nothing to change the Respondent's obligation to give notice and to bargain, upon request, *before the fact*. In the Northwest Office, the memo announcing the scheduling change states: "[W]e have found it necessary to schedule each of you * * * plan your schedule in advance so that it may include flex-schedules." This directory language is not the communication of an idea in the planning stages; it conveys a decision already made. The Respondent's basis for giving little or no advance notice is alleged urgency: "[T]he employer was forced, by the employees' having become 'tired' of volunteering, to choose between requiring social workers to cover the meetings or simply eliminating them, and running the risk of regression[.]"¹⁰ The

⁹Article 3 of the 1994-97 Agreement contemplates no more than twenty (20) bargaining team members. The Union may appoint "a reasonable number" of delegates, whose duties are "limited to the investigation and presentation of bargaining unit employees' grievances and representing said employees in meetings with the agency." Thus, unless a delegate has also been appointed to a bargaining team, it appears that a delegate has no authority to bargain.

¹⁰Respondent's Post-hearing Brief, p. 13.

OPINION

Case No. 94-ULP-11-0659

Page 11 of 12

Respondent "forced" this situation upon itself; it knew that it had a problem getting sufficient volunteers and it devoted a number of months and staff meetings to "coaxing" more volunteers. The Respondent had the time to bargain collectively with the employees' exclusive representative.

With respect to Mohican, the Respondent does not even attempt to argue, and there is no evidence to show, that any advance notice of a scheduling change was given to the employee organization. There is also no evidence of any urgent circumstances that would nullify the notice requirement. The uncontested evidence shows that the scheduling change was first announced to unit employees at a meeting devoid of union representation. *Youngstown* requires advance notice *to the employee organization*, not to just any bargaining unit employee. Even if we found notice had been given, it is clear that the tone of the meeting, which merely conveyed a decision that had already been made, and the almost immediate issuance of the schedule thereafter, rendered the scheduling change a *fait accompli* for which a bargaining request was not required. As a result, adequate notice was not given, and no waiver by District 1199 can be found at Mohican.

The last issue is where the Respondent places its focus: whether bargaining over the mandatory subject occurred. While essentially conceding that there was no bargaining at the time these schedule changes were made, the Respondent's position is that there can be no "failure to bargain" because its duty to bargain had already been satisfied through the formation of a collective bargaining agreement covering the subject. The Respondent argues that the "extensive contract provisions covering scheduling and the arbitration decisions rendered thereunder" are proof that the duty to bargain has been satisfied.¹¹

The Respondent's argument is not persuasive. Flex-time is discussed in Section 24.11 of the 1994-97 Agreement. However, Section 24.11 merely gives the employer the right to turn down an employee's flex-time request. It is silent to the employer's right to mandate

¹¹Respondent's Post-hearing Brief, pp. 10 and 11.

OPINION

Case No. 94-ULP-11-0659

Page 12 of 12

flex-time. Consequently, it appears the parties have only bargained one side of the flex-time issue, the employee's right to seek it, but not the other side of the issue, the employer's right to require employees to use flex-time. Thus, Section 24.11 cannot reasonably be read to confer upon the employer a previously bargained-for, unfettered right to unilaterally alter work schedules.

III. CONCLUSION

For the reasons above, the Board finds that the State of Ohio, Department of Youth Services made a material change in hours of employment; that such a change involves a mandatory subject of bargaining; that the Respondent did not give notice of the proposed change and offer to bargain the change before implementation; that the employee organization, under these circumstances, did not waive its right to bargain the change; and that the parties' previous bargaining and current contract language do not demonstrate that the parties have previously bargained to allow the employer to make such a unilateral change. Accordingly, we find that the Respondent, by making the unilateral change in hours herein, committed an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).

Pohler, Chairman, and Mason, Board Member, concur.