

97-005

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Cleveland Heights-University Heights Board of Education,

Respondent.

CASE NUMBERS: 95-ULP-09-0547
95-ULP-11-0636

OPINION

MCGEE, Vice Chairman:

These unfair labor practice cases come before the State Employment Relations Board ("SERB" or "Complainant") on exceptions to the Hearing Officer's Proposed Order issued on September 19, 1996. For the reasons below, we find the unfair labor practice charge in Case No. 95-ULP-09-0547 was filed untimely, and the charge in Case No. 95-ULP-11-0636 was filed timely. Further, we find that the Cleveland Heights-University Heights Board of Education made no material change to wages, hours, or terms and other conditions of employment by requiring high school guidance counselors, middle school guidance counselors, and elementary school child service specialists to submit Medicaid reimbursement forms. Hence, Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5) were not violated, and the charges and the complaint are dismissed.

I. BACKGROUND¹

The Cleveland Heights-University Heights Board of Education ("School Board") and the Cleveland Heights Teachers Union, Local 795 AFT ("Local 795") are parties to a collective bargaining agreement effective August 2, 1994

¹Finding of Fact ("F.F.") Nos. 3-5, 8-9, 12-13, 19, 21, 24, and 33-34; Transcript ("T.") pages 39-40 and 571-594.

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to August 1, 1997. Local 795 represents all classroom teachers, guidance counselors, child service specialists and other employees referred to in the recognition clause of the collective bargaining agreement. Thomas Schmida is employed by the School Board as a social studies teacher and is Local 795's president. Daniel MacDonald is employed by the School Board as a high school guidance counselor and is Local 795's first vice president. Mr. Schmida and Mr. MacDonald are Local 795's two designated representatives under the contract.

In 1990, as a result of legislative amendments to the Social Security Act, the State of Ohio adopted a Community Alternative Funding System ("CAFS"). Under regulations promulgated by the Ohio Department of Human Services and the Ohio Department of Mental Retardation and Developmental Disabilities, CAFS provides a vehicle for public school districts to bill Medicaid for services provided to eligible children within their districts. In 1993, the School Board hired a consultant to review and analyze the Habilitation Center program. The consultant's report provided a historical perspective of the program, identified the current status of program implementation already existing within Pupil Services, presented an analysis of the findings, and presented recommendations for the next phase to set up the Medicaid billing program.

As a result of the consultant's report, the School Board set up its Medicaid billing program. This billing program required certain school personnel to fill out and submit claims forms for Medicaid reimbursement. The information requested by Medicaid on the forms included the kind of activity, the students involved, whether an individual student or a group was treated, the initials and signatures of certain personnel, and the dates the service was provided. Since most of the authorized billable services were assigned code numbers, filling out a claim form involved mainly circling the appropriate pre-printed codes. CAFS billing was "phased-in" in the district, with the first actual billing done in 1992 or 1993.

Classes for multi-handicapped ("MH") children are small, typically 6-8 children, because the severe physical and/or mental handicaps and functional impairments of the children necessitate a "hands-on" approach. An average of 2 aides are assigned to each MH class. Aides are permitted to assist MH teachers with record-keeping duties, including the completion of the Medicaid billing forms. In January 1994, the supervisor of the MH teachers introduced them to the Medicaid billing program.

Elementary school guidance counselors, also known as Child Service Specialists, provide counselling services at the elementary school level. They work under a 190-day contract and have regular teacher's hours. Middle and high school counselors work under a 200-day contract and extended hours.

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The School Board's consultant met with and distributed materials to the elementary and middle school guidance counselors in early 1994. The elementary school guidance counselors billed from April 1994 through June 1994; middle school counselors billed from May 1994 to November 1994.

Mr. Schmida first became aware of the CAFS program in approximately April 1994 when the elementary school guidance counselors asked for an extended school day to perform the added duties. Mr. Schmida discussed the elementary school guidance counselors' concerns with Local 795 Vice President MacDonald. High school counselors had been told of the CAFS program during an April 1994 meeting, but had not begun billing. Mr. Schmida's understanding was that only the elementary and middle school guidance counselors were affected by the new billing requirement.

In September 1994, the elementary and middle school counselors were given the CAFS manual. Both groups already maintained logs on students that recorded information similar to that needed to complete the Medicaid billing forms. Once the elementary and the middle school counselors started completing the Medicaid billing forms, the logging was suspended.

On October 25, 1994, the School Board issued a Memorandum to the elementary and middle school counselors stating that Medicaid billing for counselor services was not cost effective and would no longer be required. Logging was re-instituted, and Mr. Schmida was informed about this change. High school guidance counselors did not do any billing for the 1994-1995 school year, but maintained logs.

On June 13, 1995, the Executive Director of Pupil Services, Dr. Richard Weber, issued a written warning to two MH teachers that their failure to complete the Medicaid billing forms would be considered insubordination and would result in discipline. Each teacher contacted Mr. Schmida after receiving this notice. On June 27, 1995, Mr. Schmida sent a letter to the Superintendent demanding to bargain over the subject of Medicaid billing requirements. As of September 1995, the School Board had not responded to this request.

In September 1995, due to rule changes in the CAFS program and a five-fold increase in the amount reimbursed for counselling services, the requirement that the elementary and middle school guidance counselors complete Medicaid billing forms was re-instituted and the requirement to maintain logs was again suspended. The elementary and middle school guidance counselors were given "refresher" training in September 1995. In October 1995, a meeting was held with the high school guidance counselors informing them of the benefits of Medicaid billing and instructing them how to do the billing.

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Faith Foster and Marianne Brennan are elementary school guidance counselors. During the 1995-96 school year (38-week contract), Ms. Foster completed 46 Medicaid billing forms; Ms. Brennan completed between 70-75 forms. After the initial form, which took 15-20 minutes to complete, each form took 5-8 minutes to complete.

During the 1995-96 school year, middle school counselors completed an average of 12 claims for the year. During the 1995-1996 school year, Mr. MacDonald, a high school guidance counselor, submitted approximately 9 Medicaid claims, which was about the average number for a high school counselor. Each form took approximately 5 minutes to complete.

II. DISCUSSION

A. Timeliness of the Unfair Labor Practice Charges

O.R.C. § 4117.12(B) states in pertinent part: "The board may not issue a notice of hearing based upon any unfair labor practice occurring more than ninety days prior to the filing of the charge with the board[.]" In *In re City of Barberton*, SERB 88-008 (7-5-88), ("*Barberton*"), SERB laid out two conditions that must be present to begin the ninety-day period: first, the acquired knowledge, or constructive knowledge, by the charging party of the alleged unfair labor practice that is the subject of the charge; and second, the occurrence of actual damage to the charging party resulting from the alleged unfair labor practice.² "Actual damage" occurs when the job duties change.³ While the basis of both charges in the present case is the allegation that the School Board imposed, without bargaining, an additional duty of completing forms for Medicaid reimbursement, the charges differ in the billing periods and, to some extent, in the group of employees involved. As a result, the analysis of the charges as to timeliness will also differ.

The first charge, Case No. 95-ULP-09-0547, was filed on September 15, 1995, and referred to MH teachers, elementary school guidance counselors, and middle school guidance counselors. The alleged violation involved a June 15, 1995 disciplinary threat against two MH teachers for not completing the Medicaid billing forms, and the School Board's imposition of additional duties (filling out the Medicaid billing forms) on the elementary and middle school guidance counselors. It is undisputed that these three groups of employees began completing Medicaid billing forms in

²See also *SERB v. City of Cincinnati*, SERB 91-003 (6-7-91).

³*In re Columbus Bd of Health, City of Columbus*, SERB 96-003 (3-26-96).

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the spring of 1994.⁴ It is also undisputed that in June 1994, Local 795's president had actual knowledge that at least the elementary and middle school counselors were being asked to fill out the Medicaid billing forms.⁵

Regarding the elementary and middle school counselors, the two *Barberton* conditions, actual knowledge and actual damage, were present in the spring of 1994, well over 90 days before the first charge was filed. As far as the MH teachers are concerned, it is undisputed that they were required to carry out additional billing duties in 1994. The only issue in dispute regarding the MH teachers is when Local 795 had actual or constructive knowledge about the event. Construing the facts most favorably to Local 795, it did not have notice that completing the Medicaid billing forms was part of the job requirements until June 13, 1995, the date the memoranda were sent to the two MH teachers threatening possible future discipline. The ninety-day period to file a timely charge on the MH teachers' issue would have then elapsed on September 11, 1995. Thus, Case No. 95-ULP-09-0547, filed on September 15, 1995, is untimely regarding all three designated classifications of employees in it and is hereby dismissed.

The second charge, Case No. 95-ULP-11-0636, was filed November 9, 1995, and like the first charge, referred to the elementary and the middle school guidance counselors; unlike the first charge, it did not refer to the MH teachers but, instead, referred to the high school guidance counselors. The second charge is timely as it concerns the elementary and the middle school guidance counsellors because it refers to the renewed billing requirement set up by the School Board in October 1995.

The record further shows that the Medicaid billing program for elementary school guidance counselors and middle school counselors ended in September 1994. A new cause of action arose in September 1995 when the elementary and middle school counselors were asked to resume billing. The renewal of the billing requirement is a new cause of action and not a continuation of the first implementation for at least two reasons. First, a year passed between the end of the first implementation and the beginning of the renewed program; this was a substantial break in continuity.

Second, the circumstances upon which the School Board ended the billing program in 1994 and started it again in 1995 are different. The billing program did not end in 1994 because the School Board needed to create a different strategy, needed more studies done, or needed more time for research. Instead, the School Board realized that under the law at that time it was not economical and prudent to continue with the program. Only after the law changed did the School Board decide to renew the billing program. Thus, establishing the Medicaid billing program for the elementary

⁴F.F. Nos. 7 and 8.

⁵F.F. No. 9; T. 61.

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and middle school guidance counsellors in the second attempt was conducted under a different set of circumstances than before where objective forces, beyond the School Board's control, caused the difference.

This second charge is also timely as to the high school counselors. The record shows that while the School Board apparently intended to have high school counselors begin billing in April 1994, no billing actually took place until at least October 1995.⁶ Hence, the charge, as it relates to the high school counselors was filed within the ninety-day period and is also timely.

In summary, we find that the unfair labor practice charge in Case No. 95-ULP-09-0547 is untimely filed. We further find that the charge in Case No. 95-ULP-11-0636 is timely filed as to all three groups mentioned in the charge.

⁶F.F. Nos. 9, 13, and 24.

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B. The School Board Did Not Violate O.R.C. §§ 4117.11(A)(1) and (A)(5) When It Required Bargaining Unit Employees To Fill Out and Submit Medicaid Reimbursement Forms

O.R.C. §§ 4117.11(A)(1) and (A)(5) state in pertinent part:

- (A) It is an unfair labor practice for a public employer, its agents, or representatives to:
 - (1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117[.];
 - (5) Refuse to bargain collectively with the representative of his employees[.]

The Complainant has the burden of demonstrating by a preponderance of the evidence that an unfair labor practice has been committed.⁷ The Complainant and Intervenor argued that the School Board's unilateral imposition of the additional duties and the use of discipline for a failure to comply with the additional duties constitute a refusal to bargain in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5). The Complainant has not met that burden.

In *In re SERB v. Youngstown City School Dist Bd of Ed*, SERB 95-010 (6-30-95), SERB adopted a three-part balancing test to determine whether certain subjects are mandatory or permissive subjects of bargaining and standards when such test applies:

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. (emphasis added).⁸

The decision to utilize CAFS is an inherently managerial prerogative under O.R.C. § 4117.08(C) because the Medicaid billing is merely another record-keeping and reporting duty. This activity falls within the School Board's responsibility to efficiently conduct its operations, including budgetary and revenue areas. Thus, the only issue is to what extent, if at all, terms and conditions of employment are affected.

⁷O.R.C. § 4117.12(B)(3).

⁸*Id.* at 3-78.

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After a review of the facts, we find that the Medicaid billing program had no material influence upon wages, hours, or terms and other conditions of employment. The average high school guidance counselor, even considering the "expanded" range of services that were billed for during the 1995-96 school year, completed approximately nine claim forms. Each form took approximately 5 minutes to complete. Given a 200-day contract, the time spent by high school guidance counselors on these claim forms totaled 45 minutes for the entire school year which is an average of .225 minutes per day. Middle school guidance counselors averaged 12 claim forms for the year. Again, each form took approximately 5 minutes, which adds up to an average of 60 minutes for the entire year. For the middle school guidance counselors, this new billing program replaced logging, which took approximately 45 minutes for the year. The change from logging to Medicaid billing added an average of 15 minutes per counselor for the entire year. Calculating for a 200-day contract the additional time spent on the new billing results in an average of .08 minutes per day. In regard to the elementary school guidance counselors, the record shows that Ms. Foster completed 46 claim forms during the year and Ms. Brennan completed 70-75 forms, an average of 60 per year. After adding 5 minutes per form and deducting the logging period, the change added 255 minutes per year; this was an average of less than 1.5 minutes per day for the 190-day contract.

If wages, hours, or terms and conditions of employment were affected at all, it was *de minimis*. Importantly, there is nothing in the record to show that the few minutes devoted to the extra billing requirement actually added any extra amount of time to the normal working hours of the guidance counselors. There was absolutely no evidence in the record that counselors could not fit this minimal amount of time into their normal workday. Since there was no material change to the bargaining unit employees' wages, hours, or terms and other conditions of employment, there was no obligation to bargain the billing duties under these facts. Therefore, there was no refusal to bargain and no violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).⁹

III. CONCLUSION

For the above reasons, we find that the unfair labor practice charge in Case No. 95-ULP-09-0547 was untimely filed. We also find that the unfair labor practice charge in Case No. 95-ULP-11-0636 is timely filed and that the

⁹The private sector and other public sector jurisdictions have found that not every unilateral change in working conditions constitutes a breach of the bargaining obligation. Initially, the change must be material, substantial, and significant. See *Peerless Food Products*, 236 N.L.R.B. 161, 98 L.R.R.M. 1183 (1978); *La Mousse, Inc.*, 259 N.L.R.B. 37, 108 L.R.R.M. 1356 (1981), *enforced without opinion*, 703 F.2d 576 (9th Cir. 1983); *Hillsboro County School Board*, 7 FPER ¶ 12411, *recon. denied* 8 FPER ¶ 13074 (FL PERC 10/01/81), *aff'd*, 423 S.2d 969 (Fla. 1st Dist. Ct. App. 1983); *Lee County Port Authority*, 18 FPER ¶ 23241 (FL General Counsel, 08/20/92).

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Cleveland Heights-University Heights Board of Education did not violate O.R.C. §§ 4117.11(A)(1) and (A)(5) because it made no material change to wages, hours, or terms and other conditions of employment when it required high school guidance counselors, middle school guidance counselors, and elementary school guidance counselors to fill out and submit Medicaid reimbursement forms.

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