97-006

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Akron,

Respondent.

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

OPINION

MASON, Board Member:

I. INTRODUCTION

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") upon a remand by the Summit County Court of Common Pleas and the subsequent filing of briefs by the parties. The issue to be decided is whether the unilateral implementation of revisions to civil service commission rules by the City of Akron ("City") constitutes an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5). For the reasons below, we find that the City violated O.R.C. §§ 4117.11(A)(1) and (A)(5) by unilaterally implementing certain changes to the civil service rules governing promotions and demotions.

II. STIPULATIONS[1]

1. The City of Akron is a "public employer" as defined by O.R.C. § 4117.01(B).

2. The Civil Service Personnel Association, Inc. ("CSPA"); the Akron Nurses Association ("ANA"); Local 1360, American Federation of State, County and Municipal Employees ("AFSCME"); the Akron Firefighters Association ("AFA"); the Fraternal Order of Police, Lodge No. 7 ("FOP") are "employee organizations" as defined by O.R.C. § 4117.01(D).

3. The CSPA, ANA, AFSCME, AFA, and FOP (hereinafter collectively called "Unions") filed charges with SERB on May 29, 1992, pursuant to, and in accordance with, O.R.C. § 4117.12(B) and O.A.C. 4117-7-01, in Case Nos. 92-ULP-05-0313, 92-ULP-05-0314, 92-ULP-05-0315, 92-ULP-05-0316, 92-ULP-05-0317, respectively.

4. SERB determined on October 8, 1992, that there was probable cause for believing the City had committed, or was committing, an unfair labor practice, consolidated the cases, and directed that a complaint be issued. The City disputed the validity of SERB's determination.

5. The CSPA is the deemed-certified exclusive representative of a bargaining unit of the City's employees that includes account clerks and building inspectors. The CSPA and the City are parties to a collective bargaining agreement for

[1]The parties entered into the following Stipulations of Fact. Since the unfair labor practice charge filed by the Foremen and Supervisors Association (Case No. 92-ULP-05-0318) is not a part of this case, the references to that charge have been deleted from these stipulations.

the period April 22, 1991 to December 31, 1993. Joint Exhibit 1 is a copy of their collective bargaining agreement.

6. The ANA is the deemed-certified exclusive representative of a bargaining unit of the City's employees that includes professional nurses. The ANA and the City are parties to a collective bargaining agreement for the period April 1, 1991 to December 31, 1993. Joint Exhibit 2 is a copy of their collective bargaining agreement.

7. AFSCME is the deemed-certified exclusive representative of a bargaining unit of the City's employees that includes custodial workers and machinists. AFSCME and the City are parties to a collective bargaining agreement for the period April 23, 1991 to December 31, 1993. Joint Exhibit 3 is a copy of their collective bargaining agreement.

8. The AFA is the deemed-certified exclusive representative of a bargaining unit of employees that includes all uniformed officers of the Akron Fire Department, excluding the Chief and Deputy Chiefs. The AFA and the City are parties to a collective bargaining agreement for the period December 9, 1991, to December 31, 1994. Joint Exhibit 4 is a copy of their collective bargaining agreement.

9. The FOP is the deemed-certified exclusive representative of a bargaining unit of the City's employees that includes all sworn police officers, excluding the Chief and Deputy Chiefs. The FOP and the City are parties to a collective bargaining agreement for the period December 9, 1991 to December 31, 1994. Joint Exhibit 5 is a copy of their collective bargaining agreement.

10. On January 21, 1992, the City's Personnel Director, Richard F. Pamley,

sent a memorandum to the presidents of the Unions and all department and division managers notifying them that the City's Civil Service Commission ("Commission") had considered revising some of its rules as provided for under Civil Service Rule 16 at its January 16, 1992 meeting and that the revisions would be considered for final approval on February 27, 1992. Mr. Pamley included a copy of the proposed revisions to the rules with his memorandum and invited the presidents of the Unions and the managers to submit written comments or objections by February 19, 1992. Joint Exhibit 10 is a copy of Mr. Pamley's memorandum dated January 21, 1992, and a copy of the proposed revisions to the rules sent along with the memorandum.

11. On February 18, 1992, Susannah Muskovitz, an attorney who at that time was representing the CSPA, AFSCME, AFA, and FOP, sent a letter to Mr. Pamley on behalf of the foregoing employee organizations protesting the unilateral implementation of the revisions to the Commission's rules. Also on February 18, 1992, Ms. Muskovitz sent a letter to Mathew L. Contessa, the City's Deputy Mayor of Labor Relations, requesting that the City bargain over the proposed revisions with the aforementioned employee organizations. Joint Exhibit 11(a) is a copy of Ms. Muskovitz's letter to Mr. Pamley dated February 18, 1992 and Joint Exhibit 11(b) is a copy of Ms. Muskovitz's letter to Mr. Contessa dated February 18, 1992.

12. On February 27, 1992, the Commission held a second reading of the proposed rule revisions. Joint Exhibit 12(a) is a copy of the second reading of the Proposed Rule Changes. Also on February 27, 1992, Mr. Contessa and Charles Victor, president of CSPA, addressed the Commission. Joint Exhibit 12(b) is a copy of the minutes of the February 27, 1992 Commission meeting.

13. Joint Exhibit 13 is a copy of a letter sent by Mr. Contessa to Ms. Muskovitz

dated February 27, 1992.

14. On March 6, 1992, Mr. Pamley sent Ms. Muskovitz a letter stating that the Commission was desirous of receiving written comments from her and her clients by March 20, 1992, indicating which revisions they objected to. Joint Exhibit 14 is a copy of Mr. Pamley's letter dated March 6, 1992.

15. On March 19, 1992, Mr. Pamley, Mr. Contessa, Ms. Muskovitz, and representatives for the CSPA, AFSCME, AFA, FOP, and ANA held a meeting. Ms. Muskovitz was representing the ANA as well as the other employee organizations. The parties discussed the proposed revisions.

16. On March 20, 1992, the CSPA, AFSCME, ANA, AFA, and FOP submitted a memorandum to the Commission outlining their objections to the proposed revisions and making recommendations. . Joint Exhibit 15 is a copy of the FAX cover sheet, letter from Ms. Muskovitz to Mr. Pamley, and the memorandum dated March 20, 1992.

17. On March 26, 1992, Mr. Pamley sent a memo with attached exhibits to the Commission providing background information. Joint Exhibit 16 is a copy of the memo and attached exhibits. Copies of Joint Exhibit 16 were not served on the CSPA, AFSCME, ANA, AFA, or FOP.

18. On April 2, 1992, the Commission met. At the meeting, Mr. Pamley read a copy of his March 26, 1992 memo to the Commission. Ms. Muskovitz stated her objections to the proposed rule revisions, but no negotiations between the City and the Unions took place at that time. Joint Exhibit 17(a) is a copy of the minutes of the April

2, 1992 Commission meeting. Joint Exhibit 17(b) is a copy of the transcript of the portions of the April 2, 1992 Commission meeting dealing with the proposed rule revisions.

19. Joint Exhibit 18 is a copy of a letter dated April 14, 1992 from Mr. Pamley to Ms. Muskovitz.

20. On or about May 1, 1992, Mr. Pamley submitted the final rules revisions proposal to the Commission, which included the existing rules, the proposed changes, the testimony and written comments of the Unions, and the Personnel Department's response to the Unions' comments. Joint Exhibit 19 is a copy of the final rules revisions proposal. A copy of Joint Exhibit 19 was not served on the Unions.

21. On May 7, 1992, the Commission voted to adopt the proposed revisions to its rules that are fully set forth in Joint Exhibit 20.

22. Joint Exhibit 21 is a copy of a letter dated May 8, 1992 from Mr. Pamley to Ms. Muskovitz.

23. On January 16, 1986, Mr. Pamley proposed an amendment to Civil Service Commission Rule 2(5) in a first reading. The proposal was circulated to all managers, department heads, and Union presidents. The Commission, at its meeting of February 13, 1986, adopted the proposed revision in accordance with its rules and established procedure. Joint Exhibit 22(a) is a copy of the minutes of the January 16, 1986 Commission meeting. Joint Exhibit 22(b) is a copy of a memo dated January 21, 1986 from Mr. Pamley, with attachments, including the proposed revision to Civil Service Rule 2(5) and a background report. Joint Exhibit 22(c) is a copy of the relevant portion of the minutes of the February 13, 1986 Commission meeting.

24. On August 21, 1986, Mr. Pamley proposed an amendment to Civil Service Rule 4(3) in a first reading. The proposal was circulated in a memo dated August 22, 1986. Comments were received. The Commission at its meeting of October 9, 1986 adopted a revision incorporating one of the suggestions in accordance with its rules and its established procedure. Joint Exhibit 23(a) is a copy of the minutes of the August 21, 1986 Commission meeting. Joint Exhibit 23(b) is a copy of a memo dated August 22, 1986 from Mr. Pamley, with attachments, including the background report dated August 14, 1986. Joint Exhibit 23(c)(1) is a letter dated September 19, 1986 to Mr. Pamley from Patricia Ambrose. Joint Exhibit 23(c)(2) is a letter dated September 16, 1986 to Mr. Pamley from the National Association for the Advancement of Colored People (NAACP), Akron branch. Joint Exhibit 23(d) is a copy of the minutes from the October 9, 1986 Commission meeting.

III. DISCUSSION

This case originally had two issues to be determined. The first issue concerned whether the Foremen and Supervisors Association ("FSA") was a deemed-certified exclusive representative. SERB held that the FSA was not a deemed-certified representative and that the City had no duty to bargain collectively with the FSA under O.R.C. Chapter 4117.[2] That issue was not appealed to the Summit County Court of Common Pleas and, as a result, was not part of the remand to SERB. The second issue, which is back before SERB, is whether the City's implementation of revisions to its civil service commission rules without bargaining as to the bargaining-unit employees constitutes an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).

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[2] *In re City of Akron*, SERB 94-012 (7-7-94), SERB Docket No. 92-ULP-05-0318.

A. *The City's Unilateral Implementation of Civil Service Rule Revisions Violated O.R.C. §§ 4117.11(A)(1) and (A)(5)*

O.R.C. §§ 4117.11(A)(1) and (A)(5) provide as follows:

> (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. of the Revised Code * * * ;
> * * *
> (5) Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117. of the Revised Code[.]

Unless otherwise provided, public employers maintain the authority to determine matters of inherent managerial policy as outlined in O.R.C. § 4117.08(C). They are required, however, to bargain with an exclusive representative on all matters relating to wages, hours, or terms and other conditions of employment under O.R.C. § 4117.08(A). Thus, if a given subject involves the exercise of inherent managerial discretion and also materially affects any of these factors, a balancing test must be applied to determine whether the subject is a mandatory or permissive subject of bargaining. *In re SERB v. Youngstown City School Dist Bd of Ed*, SERB 95-010 (6-30-95) (hereinafter "*Youngstown*"). Those management decisions which are found, on balance, to be mandatory subjects must be bargained before implementation, upon notice by the employer and a timely request by the employee organization, except where emergency situations render prior bargaining impossible.[3]

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[3] *Id.*

In *Youngstown*, SERB adopted a balancing test for determining whether subjects of bargaining are mandatory or permissive when the tension between O.R.C. § 4117.08(A) and O.R.C. § 4117.08(C) exists, as mentioned above. Under this test, the following factors must be balanced:

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.[4]

SERB cannot prohibit a city or its civil service commission from *enacting* legislation, including civil service rules, because such a remedy exceeds SERB's jurisdiction; SERB must focus on the public employer's *implementation* of those legislative enactments. *See, e.g., SERB v. City of St. Bernard*, 1995 SERB 4-45 (1st Dist. Ct. App., Hamilton, 10-18-95).

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[4] *Id.* at 3-76 - 3-77.

On May 7, 1992, the Commission adopted revisions to civil service commission rules that primarily addressed promotions and demotions.[5] Any civil service commission rule enacted under the authority of the city charter may not abridge the bargaining unit's right to negotiate promotional criteria.[6] The revision to Rule 3, Section 6 expands the City Personnel Director's authority to set psychological standards and to conduct psychological and physical examinations for applicants. The changes to Rule 3, Section 12(2) would prohibit recording, not just note-taking, of examination content and would allow examinees to anonymously protest examination questions. The revisions to Rule 4, Sections 4(4) and (6) concerned reasons for removing eligible candidates from an eligibility list and conditions under which reinstatement requests may be granted. The change to Rule 6, Section 5 called for the City's Personnel Director, instead of the Commission, to investigate an appointing authority's objections to certifications of any candidates on the eligibility list and to approve objections for cause. The revisions to Rule 8, Section 4 include diminishing the weight given for efficiency ratings when grading promotional exams and authorizing the City's Personnel Director to determine the weights to be given to the various factors in computing the final grades and the methods for calculation. (Revisions for three other rules - Rule 10, Section 3(2); Rule 12, Section 2; and Rule 15, Section 2 - were not opposed or were never implemented.)

Under the first prong of the balancing test, the rule revisions fall within the statutory phrase "wages, hours, or terms and other conditions of employment." "[A]ll matters concerning promotional eligibility pertain to and directly affect wages, hours, or

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[5] Stipulation Nos. 14, 15, and 20; Joint Exhibit ("Jt. Exh.") No. 15.

[6] *City of Columbus v. SERB*, 1990 SERB 4-60 (10th Dist Ct App, Franklin, 9-4-90).

terms and other conditions of employment and are, therefore, bargainable issues."[7] Since demotions involve the same issues as promotions, *e.g.*, changes in wages, responsibilities, and work schedules, all matters concerning demotions are also bargainable issues.

Under the second prong of the test, the City offered no evidence that bargaining over the implementation of the rule revisions as to the bargaining-unit employees would either *significantly abridge* the City's freedom to exercise those managerial prerogatives set forth in O.R.C. § 4117.08 or that inherent discretion on such subjects is necessary for the City to achieve its essential mission and obligations to the public.

Under the third prong of the test, there is no evidence in the record demonstrating that the implementation of these particular rule revisions does not lend itself to the mediatory influence of collective bargaining. None of the rule revisions on their face involve public health or liability concerns.

Balancing the three prongs, we find that the Unions' interest under the first prong is strong, the City's interest under the second prong is relatively weak, and that the mediatory influence of collective bargaining under the third prong is appropriate for this subject matter. As a result, these civil service rule revisions are mandatory subjects of bargaining. The City did not have a duty to bargain the *adoption* by the Commission of the proposed rules primarily addressing promotions and demotions. Once the rule revisions were adopted and became effective, they immediately applied to all non-bargaining-unit employees and to bargaining-unit employees whose exclusive representative did not request bargaining. If the collective bargaining agreements had contained provisions relating to promotions and demotions the duty to bargain may

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[7] *DeVennish v. City of Columbus*, 57 Ohio St.3d 163, 166, 1991 SERB 4-7, 4-8. *See also City of Columbus v. SERB, supra.*

have been fulfilled already since the contract terms would be given primacy under O.R.C. § 4117.10(A).

In the present case, the Unions had requested to bargain over the rule revisions as to these bargaining-unit employees. Once notice was given and mid-term bargaining was requested, the City had an obligation to bargain in good faith with the Unions over the *implementation* of these rule revisions as to these bargaining-unit employees; the City was required to bargain and, if the parties reached ultimate impasse, the City could implement the rule revisions.[8] Thus, the City committed an unfair labor practice when it refused to bargain with the exclusive bargaining representatives of its employees over the implementation of these rule revisions as they apply to the bargaining-unit employees.

Of the eight rules contested by the various employee organizations, we find that the implementation of only five are the product of unlawful conduct, *i.e.*, Rule 3, Section 6; Rule 3, Section 12(2); Rule 4, Sections 4(4) and (6); Rule 6, Section 5; and Rule 8, Section 4. The Unions are on record as not objecting to the revision to Rule 10, Section 3(2). No violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) can be found due to an employer's unilateral implementation where the employee organization has acquiesced in the implementation. Because Rule 12, Section 2 and Rule 15, Section 2 were not implemented, no violation has been proven as to these rules.

B. <u>The Right To Bargain Has Not Been Waived</u>

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[8] *Youngstown*, *supra* at 3-81.

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.[9] It is proper to consider contract language, bargaining history, and extrinsic evidence in determining whether a statutory right has been waived.[10] In the instant case, the record is devoid of bargaining history between the City and CSPA, ANA, AFSCME, AFA, and the FOP. Thus, any waiver would have to be derived solely from contract language and extrinsic evidence.

The City asserts that provisions contained within the collective bargaining agreements between the City and the Unions are evidence of waiver on the part of the Unions; as a result, the City is relieved from any bargaining obligations regarding the rules revisions. Specifically, the Unions have a "Legal Conflict" provision in their respective collective bargaining agreements that (unless otherwise noted) reads:

> If any provision of this Agreement be found by a tribunal of competent jurisdiction to be invalid, inoperative or in conflict with federal or state law, Civil Service Rules and Regulations, or municipal ordinances of the City of Akron, such finding shall supersede the conflicting provision or provisions. All other provisions shall remain in full force and effect for the duration of this Agreement.

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[9] *Youngstown, supra.* *See also Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 112 L.R.R.M. 3265 (1983).

[10] *Youngstown, supra.*

> In the event any Article of this Agreement or any part thereof is made invalid pursuant to the above paragraph, the Administration and the Union shall meet within thirty (30) working days to negotiate a legal alternative unless subject invalidation is appealed by either party to a higher tribunal, in which case the time period mentioned above will be stayed pending the outcome of said appeal.[11]

There is nothing in the "Legal Conflict" language that could be construed as a clear and unmistakable waiver of the public employees' right to bargain over the implementation of changes in the civil service commission rules. As pointed out by the Unions' attorney, the language is merely a "severability clause" providing that if one section of the agreement is found invalid, the other sections remain in effect. Moreover, a condition precedent to the application of the "Legal Conflict" language is that a court of competent jurisdiction must find a section of the agreement to be invalid. There is no allegation in this case that this mandatory condition precedent has been met.

The AFSCME contract contains an "Effect of Agreement" provision not found in the other contracts:

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[11]Jt. Exh. No. 1, pp. 11-12; Jt. Exh. No. 2, p. 4 [first paragraph only]; Jt. Exh. No. 3, p. 34 [both paragraphs slightly modified]; Jt. Exh. No. 4, p. 3 [first paragraph only]; Jt. Exh. No. 5, p. 2 [second paragraph slightly modified].

> B. It is understood that this Agreement is subject to all applicable provisions of statutes, City Charter, ordinances (except those ordinances previously referred to in this contract) and Civil Service Commission Rules and Regulations, all of which govern and control most topics which are normally included in labor-management agreements in private industry. It is agreed that the parties hereto shall be bound by such provisions both as they now exist and as the same may be amended and supplemented from time to time.[12]

The additional language found in the AFSCME contract also does not constitute a clear and unmistakable waiver of the right to bargain over terms and conditions of employment affected by the implementation of changes in the civil service commission rules. The above language is much too general and lacks any specificity to create a clear and unmistakable waiver of statutory rights. Nowhere does this language mention even one term or condition of employment in regard to which a waiver of statutory bargaining rights can be applied. In fact, the right of the City to implement civil service rule changes on bargaining-unit members without bargaining first with the Unions is nowhere stated in any of the collective bargaining agreements. Contract language does not have to specifically waive the right to bargain over a particular issue for us to find a waiver,[13] but in the absence of any reference to any term or condition of employment, as is the case with the language at issue, and where the record is silent on relevant bargaining history or extrinsic evidence, an argument for waiver cannot prevail.

The "Legal Conflict" and the "Effect of Agreement" clauses of the parties' collective bargaining agreements are not waivers. Neither clause specifically mentions

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[12] Jt. Exh. No. 3, p. 34.

[13] *Youngstown, supra* at 3-81.

unilateral changes in civil service rules, and the record evidence does not demonstrate that implementation of such changes without bargaining was contemplated by the parties when these clauses were negotiated. Thus, those provisions lack the required specificity to constitute a clear and unmistakable waiver of the right to bargain.

IV. CONCLUSIONS OF LAW

1. The City of Akron is a "public employer" within the meaning of O.R.C. § 4117.01(B).

2. The Civil Service Personnel Association, Inc.; the Akron Nurses Association; Local 1360, American Federation of State, County and Municipal Employees; the Akron Firefighters Association; and the Fraternal Order of Police, Lodge No. 7, are "employee organizations" within the meaning of O.R.C. § 4117.01(D).

3. The City of Akron's implementation of revisions to its civil service commission rules without bargaining as to bargaining-unit employees constitutes an unfair labor practice in violation of O.R.C.§§ 4117.11(A)(1) and (A)(5).

V. DETERMINATION

For the reasons above, we find that the City of Akron made a material change in wages, hours, or terms and other conditions of employment for its public employees; that such a change involves a mandatory subject of bargaining; that the City refused to bargain the implementation of the changes; and that the employee organizations, under these circumstances, did not waive the bargaining-unit members' right to bargain the

change. Accordingly, we find that the City committed an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).

Pohler, Chairman, and McGee, Vice Chairman, concur.