

97-012

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,
v.
City of Akron,
Respondent.

CASE NUMBER: 96-ULP-09-0520

OPINION

MCGEE, Vice Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB") on the exceptions and response to exceptions to the Hearing Officer's Proposed Order issued March 21, 1997. For the reasons below, we find that the City of Akron ("City") violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5) by reallocating, without bargaining, the pay ranges for the classifications of Graphic Artist I and Graphic Artist II.

I. BACKGROUND¹

The Civil Service Personnel Association, Inc. ("CSPA") is the deemed-certified representative for a bargaining unit of the City's employees including Graphic Artist

¹Stipulations of Fact Nos. 1-2, 4, 6-7, 9, 11-14, and 16-18.

I and Graphic Artist II. The City and the CSPA were parties to a collective bargaining agreement from December 15, 1993 until December 31, 1996. The City is a home-rule municipality operating under a city charter. The City's charter creates a Civil Service Commission and empowers it to promulgate lawful rules for the administration of the civil service system.

On or about May 2, 1996, the Deputy Director of the Department of Planning and Urban Development for the City of Akron spoke to CSPA President Dale Sroka and notified him of the City's intention to reallocate downward the pay ranges for the bargaining-unit classifications of Graphic Artist I and Graphic Artist II and asked the CSPA to waive the required thirty-day notification period contained in Article II, Section 2(a) of the parties' 1993-1996 collective bargaining agreement.² The CSPA did not agree to the requested waiver. On May 3, 1996, one of the City's Personnel Analysts prepared a report to the Civil Service Commission ("CSC") recommending the revision, reallocation, and reclassification of the positions. Mr. Sroka expressed the CSPA's opposition to the proposed reallocation to the City's Personnel Director.

On May 9, 1996, the CSC, at the request of the City's Personnel Department, deferred action on the proposed reallocation until June 13, 1996. Four days later, the City promoted the Graphic Artist I employees to Graphic Artist II positions. Mr. Sroka sent a letter to the City's Personnel Director expressing opposition to the proposed reallocation and suggesting that the CSPA and the City could discuss the issue or make it a subject of contract negotiations for the new collective bargaining agreement in the fall of 1996. On June 13, 1996, Mr. Sroka and another officer of the CSPA met with representatives of the City's Personnel Department to discuss the proposed reallocation, but no negotiations took place.

²Article II, Section 2(a) states: "The Union shall be notified of any proposal to establish a new job classification or to change duties and responsibilities of any existing job classification thirty (30) days before the Civil Service Commission acts upon the proposal. This time limit may be waived by the mutual agreement of the parties."

On June 13, 1996, the CSC reallocated the classification of Graphic Artist I from pay range 23 to pay range 21 and Graphic Artist II from pay range 25 to pay range 24 and adopted revised job descriptions for each. The current employees in Graphic Artist II positions were not affected by the reallocation in the pay ranges and their pay or pay potential was not affected. There were no employees in Graphic Artist I positions at that time.

II. DISCUSSION

A. *The CSPA Has Standing To Bring This Unfair Labor Practice Charge*

The City has asserted that the CSPA lacks standing to bring this unfair labor practice charge because the reallocation of pay ranges and the reclassification of the Graphic Artist I and Graphic Artist II positions will affect no incumbent members of the bargaining unit. Standing is a concept utilized to ensure that a live dispute exists so that a given case will not present a hypothetical or abstract question of law.³ SERB, like the courts, seeks assurances that "there is an active dispute to be resolved rather than a hypothetical issue" and that "the charging party possess[es] a direct interest, relevant knowledge of alleged harm, and a right to be protected."⁴

The CSPA possesses all three of the interests outlined above for standing. First, the CSPA has a direct interest since it is the employee organization recognized as the exclusive representative for all of the employees in a bargaining unit that includes

³*Flast v. Cohen*, 392 U.S. 83, 101 (1968).

⁴*In re City of Canton*, SERB 90-006, p. 3-45 (2-16-90).

OPINION

Case No. 96-ULP-09-0520

Page 4 of 7

Graphic Artist I and Graphic Artist II classifications. As the exclusive representative, the CSPA has a duty to protect the interests of the bargaining unit's employees and to preserve the terms of the contract. Second, the CSPA has knowledge of the alleged harm to the bargaining-unit Employees' rights as evidenced by the correspondence between it and the City. Third, pursuant to O.R.C. § 4117.03(A)(4), public employees have the right to representation by an employee organization such as the CSPA, and pursuant to O.R.C. § 4117.11(A)(5), an employer cannot refuse to bargain collectively with the exclusive representative over a mandatory subject of bargaining. As a result, if the reallocation of pay ranges is a mandatory subject of bargaining, the bargaining-unit employees represented by the CSPA have a right to be protected from a unilateral change in wages by the City even if the change will only affect employees hired in the future.

The City argues that the wage reallocation affects no current bargaining-unit members, and that the CSPA has no right to bargain on behalf of future members of the bargaining unit. Established case law belies the City's proposition. "The duty to bargain is a continuing one, and a union may legitimately bargain over wages and conditions of employment which will affect employees who are to be hired in the future."⁵ Moreover, the fact that the Graphic Artist I positions are now vacant does not vitiate the CSPA's representation duties to those positions.⁶ Thus, the CSPA has standing to bring this unfair labor practice charge.

⁵*N. L. R. B. v. Laney and Duke Storage Warehouse Co.*, 369 F.2d 859, 866, 63 L.R.R.M. 2553, 2556 (5th Cir. 1966), *cited with approval* in *In re City of St. Bernard*, SERB 89-007, p. 3-38 (3-15-89).

⁶*See, e.g., In re City of Union City*, 15 NJPER ¶ 20, 262 (10-30-89), in which the New Jersey Public Employment Relations Commission specifically rejected an argument that the union did not represent a job title because it was vacant at the time and held that the union represented all employees except those excluded by the contractual recognition clause.

B. The City Violated O. R. C. §§ 4117.11(A)(1) And (A)(5)

The issue in this case is whether the City's reallocation, without bargaining, of the pay ranges for the classifications of Graphic Artist I and Graphic Artist II violated O. R. C. §§ 4117.11(A)(1) and (A)(5):

(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[.]

The City asserts that the reallocation of pay ranges does not affect wages and that the pay range assignments to job classifications are not a term of its collective bargaining agreement with CSPA. It argues that the assignment of pay ranges to job classes is a managerial right falling squarely within O. R. C. § 4117.08(C) as a permissive subject of bargaining.

In support of its argument that reallocation of pay ranges is a managerial right, the City relies primarily on two cases. In the first case, *Civil Service Personnel Association v. The Civil Service Commission*, Case No. CV 86-10-3490 (CP, Summit, 1986) (unreported) ("*Civil Service Commission*"), the court ruled that the City retained a management prerogative to reallocate job classes. The court in that case relied upon the court of appeals' decision in *Lorain City School District Board of Education v. SERB*, App. No. 96891-96, (CA, Lorain, 9-9-87) (unreported), which was later reversed by the

OPINION

Case No. 96-ULP-09-0520

Page 6 of 7

Ohio Supreme Court in *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 1989 SERB 4-2 (1988). The Ohio Supreme Court held that a public employer must bargain to the extent that its management decision affects wages, hours, terms, and conditions of employment, as opposed to the court of appeals' holding, on which *Civil Service Commission* relied, that it was a management prerogative. Hence, the continued viability of *Civil Service Commission* is certainly in doubt, and the City's reliance upon that case is misplaced.

In the second case, *Alaska Public Employees Assoc. v. State of Alaska*, 831 P.2d 1245, 1251 (1992), a merit provision concerning State employment in the Alaska Constitution led the Alaska Supreme Court to hold that assignment of job classes to salary ranges "cannot be a mandatory subject of bargaining[.]" This constitutional obligation in Alaska mandated that the court weigh the governmental interest in merit employment over the employees to find that the assignment of job classes to salary ranges was a permissive subject of bargaining. By contrast, the Ohio Constitution does not include any provision similar to the Alaskan constitutional provision. The City asserts that since the State of Ohio is not the employer, but rather the City of Akron, then the Akron City Charter should control. The Ohio Supreme Court has already held that the home-rule provision of the Ohio Constitution, Section 3, Article XVIII, may not be used to impair, limit, or negate O.R.C. Chapter 4117. *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, Syllabus 2, 1989 SERB 4-41 (1989). In *City of Cincinnati v. Ohio Council 8, AFSCME*, 61 Ohio St.3d 658, 662, 1991 SERB 4-87, 4-89 (1991), the Court held: "[W]here the agreement conflicts with any local law, including the charter itself, the agreement prevails unless the conflicting local law falls into one of the specific exceptions listed in the statute." The Court reiterated this view in *State ex rel. Parsons v. Fleming* (1994), Ohio St.3d 509, 513, when it stated: "Except for laws specifically exempted, the provisions of a collective bargaining agreement entered into pursuant to R.C. Chapter

4117 prevail over conflicting laws."

The collective bargaining agreement includes placements and wages of the Graphic Artist I and Graphic Artist II positions in Appendix A and Ordinance 861-1993. Article V of the agreement stipulates that nothing in the agreement should be amended during its term without mutual agreement. The City Charter is conflicting with the collective bargaining agreement and therefore is not controlling.

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*").

But in *Youngstown* we stressed that this balancing test 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.

The reallocation of pay ranges directly affects the wages for the Graphic Artist I and Graphic Artist II positions. Both positions are expressly allocated in Appendix A of the collective bargaining agreement, which corresponds to the pay ranges in Ordinance 861-1993. The reallocation of pay ranges is nothing more than a simple decrease in wages falling squarely within O.R.C. § 4117.08(A) as a mandatory subject of bargaining. Since wages fall exclusively within O.R.C. § 4117.08(A), the balancing test need not be applied.

OPINION

Case No. 96-ULP-09-0520

Page 8 of 7

The City and the CSPA had already bargained over the pay ranges for these classifications. The 1993-1996 collective bargaining agreement contained a schedule of compensation ranges for the bargaining-unit members. Therefore, the City's unilateral change of these pay ranges violates O.R.C. §§ 4117.11(A)(1) and (A)(5).

III. CONCLUSION

For the reasons above, we find that the City of Akron violated O.R.C. §§ 4117.11(A)(1) and (A)(5) when it reallocated, without bargaining, the pay ranges for the classifications of Graphic Artist I and Graphic Artist II. Accordingly, the City of Akron must restore these classifications to the negotiated pay ranges, and it must bargain with the Civil Service Personnel Association, Inc., pursuant to O.R.C. Chapter 4117 and any applicable collective bargaining agreement provisions, before implementing these Civil Service Commission rule changes.

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