

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Dover,

Respondent.

Case No. 98-ULP-02-0061

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
April 22, 1999.

On February 5, 1998, the Fraternal Order of Police Lodge No. 4 - Dover Division ("FOP" or "Intervenor") filed an unfair labor practice charge against the City of Dover ("City" or "Respondent"). On April 30, 1998, the State Employment Relations Board ("Board" or "Complainant") determined that probable cause existed to believe that the City had committed an unfair labor practice, authorized the issuance of a complaint, referred the matter to hearing, and directed the parties to the unfair labor practice mediation process.

On August 25, 1998, a hearing was conducted during which testimonial and documentary evidence was presented by the parties. The parties filed posthearing briefs on September 25, 1998. On October 2, 1998, the Hearing Officer's Proposed Order was issued. On October 22, 1998, the City filed exceptions to the proposed order. On November 2, 1998, the Complainant filed a response to the exceptions. On November 3, 1998, the Intervenor filed a response to the exceptions. On November 3, 1998, the City filed a motion for oral hearing. Neither the Intervenor nor the Complainant filed a response. On February 25, 1999, the Board granted the motion. An oral hearing was conducted on April 15, 1999.

After reviewing the record and all filings, the Board finds that the City of Dover violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5) by unilaterally changing the schedule and hours of work for bargaining-unit members when it altered the conciliator's award pertaining to scheduling. Attached is an Opinion, incorporated by reference, that contains supporting Findings of Fact and Conclusions of Law.

The City of Dover is ordered to:

- A. Cease and desist from:
 1. Interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 in violation of Ohio Revised Code Section 4117.11(A)(1) by unilaterally changing the schedule and hours of work for bargaining-unit members when it altered the conciliator's award pertaining to scheduling; and
 2. Refusing to implement the entire conciliation award and otherwise refusing to bargain collectively with the exclusive representative of its employees in violation of Ohio Revised Code Section 4117.11(A)(5).
- B. Take the following affirmative action:
 1. Post the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board, which states that the City of Dover shall cease and desist from the actions set forth in paragraph A and shall take the affirmative action set forth in paragraph B, for sixty days in all of the usual and normal posting locations where employees represented by the Fraternal Order of Police Lodge No. 4 - Dover Division work;
 2. To immediately reinstate the scheduling system that had been in place, specifically the rotating shifts system, and make all bargaining-unit members whole for wages and benefits lost as a result of the City's unilateral implementation of the revised scheduling system on December 22, 1997; and

3. Within twenty calendar days from the issuance of the Order, notify the State Employment Relations Board in writing of the steps that have been taken to comply therewith.

It is so directed.

POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, 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 State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county 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 after the mailing of the State Employment Relations Board's order.

I certify that this document was filed and a copy served upon each party on this

16th day of June, 1999.



LINDA S. HARDESTY, CERTIFIED 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 State Employment Relations Board and abide by the following:

The City of Dover is hereby ordered to:

- A. Cease and desist from:
 - 1. Interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 in violation of Ohio Revised Code Section 4117.11(A)(1) by unilaterally changing the schedule and hours of work for bargaining-unit members when it altered the conciliator's award pertaining to scheduling; and
 - 2. Refusing to implement the entire conciliation award and otherwise refusing to bargain collectively with the exclusive representative of its employees in violation of Ohio Revised Code Section 4117.11(A)(5).
- B. Take the following affirmative action:
 - 1. Post the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board, which states that the City of Dover shall cease and desist from the actions set forth in paragraph A and shall take the affirmative action set forth in paragraph B, for sixty days in all of the usual and normal posting locations where employees represented by the Fraternal Order of Police Lodge No. 4 - Dover Division work;
 - 2. To immediately reinstate the scheduling system that had been in place, specifically the rotating shifts system, and make all bargaining-unit members whole for wages and benefits lost as a result of the City's unilateral implementation of the revised scheduling system on December 22, 1997; and
 - 3. Within twenty calendar days from the issuance of the Order, notify the State Employment Relations Board in writing of the steps that have been taken to comply therewith.

SERB v. City of Dover
Case No. 98-UJP-02-0061

BY
DATE

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Dover,

Respondent.

Case No. 98-UPL-02-0061

OPINION

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("Board" or "Complainant") upon the filing of exceptions and responses to exceptions to the Hearing Officer's Proposed Order issued on October 2, 1998. For the reasons below, we find that the City of Dover committed an unfair labor practice in violation of Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the schedule and hours of work for bargaining-unit employees when it altered the conciliator's award pertaining to scheduling.

I. PROCEDURAL BACKGROUND

On February 5, 1998, the Fraternal Order of Police Lodge No. 4 - Dover Division ("FOP" or "Intervenor") filed an unfair labor practice charge against the City of Dover ("City" or "Respondent"). On April 30, 1998, we determined that probable cause existed to believe that the City had committed an unfair labor practice, authorized the issuance of a complaint, referred the matter to hearing, and directed the parties to the unfair labor practice mediation process. On May 21, 1998, the complaint was issued. On June 15,

1998, the City filed a motion to dismiss; on July 23, 1998, the motion was denied. On August 25, 1998, a hearing was conducted during which testimonial and documentary evidence was presented by the parties. The parties filed posthearing briefs on September 25, 1998. On October 2, 1998, the Hearing Officer's Proposed Order was issued. On October 22, 1998, the City filed exceptions to the proposed order. On November 2, 1998, the Complainant filed a response to the exceptions. On November 3, 1998, the Intervenor filed a response to the exceptions.

On November 3, 1998, the City filed a motion for oral hearing, asserting two grounds. First, the City contended that the former hearing officer who initially decided this case, and who was interviewing for a position with the Ohio Education Association ("OEA") at the time of the hearing, had an "obvious conflict of interest" in this case because of those interviews. This alleged conflict existed because the representative for the Intervenor was Ronald G. Macala, who is also a contract attorney for the Ohio Education Association. Second, the City contended "the findings of fact are so inconsistent and contrary to [the Board's] process of final offer arbitration that a thorough review of the process is required." The Complainant and the Intervenor did not file responses to the motion for oral hearing.

On February 25, 1999, we recognized that the unusual factual circumstances in this matter supported granting the motion for oral hearing in order to protect the integrity of the hearings process from any suggestion of an appearance of impropriety. As a result, the motion for oral hearing was granted, and the parties' representatives were directed to appear for such hearing before the Board at a time and under procedures established by the Board's General Counsel in consultation with the parties.

On April 15, 1999, the oral hearing was held. During the oral hearing, the City's representative, Robert J. Tscholl, contended that the hearing officer had a duty to disclose to the parties that he was considering a position with the OEA since the FOP's representative also represents the OEA. Mr. Tscholl indicated that he had no knowledge

of any direct involvement by the FOP's representative in the hiring of the hearing officer by the OEA; but the City's representative argued that the hearing officer had a duty to disclose his "indirect link" with the FOP's representative and that the timing of the events created an "impression of impropriety."¹ The City's representative also confirmed that the City had presented testimony from all of the witnesses it wanted to call, that its witnesses were not precluded from giving additional evidence the City felt it needed to be part of the record, that the City did not have any exhibits it was unable to introduce into evidence, and that the record was complete for the Board to evaluate independently and make a judgment.²

Since a complete record is before us, we will act upon it and all of the parties' filings in this matter. We will not rely in any part upon the Hearing Officer's Proposed Order issued on October 2, 1998. Consequently, we will issue new Findings of Fact and Conclusions of Law in this matter.

II. FINDINGS OF FACT³

1. The City of Dover is a "public employer" within the meaning of O.R.C. § 4117.01(B). (Answer ["A."], ¶ 1).

2. The Fraternal Order of Police Lodge No. 4 - Dover Division is an "employee organization" within the meaning of O.R.C. § 4117.01(D). The FOP is the exclusive representative for a bargaining unit of the City's safety force employees. (A., ¶ 2).

¹Oral Hearing Transcript ("OHT."), pp. 10-11, 29-30, 32-34.

²OHT., pp.12-14.

³References to the transcript and exhibits in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for the related Findings of Fact.

3. Ronald R. Johnson is the City's Chief of Police. He has acted as an agent or representative of the City at all relevant times. (A., ¶ 3; Transcript ["T."] 96).

4. The FOP and the City are parties to a collective bargaining agreement that expired on November 1, 1996 ("Agreement"). During late 1996, the parties commenced successor contract negotiations. (A., ¶ 6; Complainant's Exhibit ["Comp. Exh."] 1).

5. Since at least January 7, 1985, bargaining-unit personnel have been on a rotating-shift schedule. Subsequent collective bargaining agreements have dealt with compensatory and vacation time. (T. 20; Comp. Exhs. 2 and 10, p. 125).

6. On or about November 1, 1996, and through negotiations for the previous collective bargaining agreement, the City initiated discussions to change the work schedule to permanent shift assignments. (T. 21).

7. Section 34.01 of the Agreement was necessary because of the rotating-shift schedule. (T. 28-29).

8. Before the fact-finding hearing, the Union took a vote regarding whether the membership preferred rotating shifts. From the voting results, the Union concluded that the membership wanted to maintain rotating shifts. (Comp. Exh. 10, p. 124; Comp. Exh. 11, p. 2).

9. The Union's position at fact finding was to maintain the present rotating-shift schedule, compensatory and vacation time provisions, and the language in the 1995 Memorandum of Understanding. The City asked the fact finder to award it the right to schedule permanent shifts. (Comp. Exh. 3, pp. 3-4; Comp. Exh. 10, pp. 77 and 127; Respondent's Exhibit ["Resp. Exh."] 1, pp. 3-6; T. 72-74).

10. The fact-finding hearing was held on November 27, 1996. On or about December 16, 1996, the fact-finding report was issued. The Union accepted the fact-finder's report, but the City rejected the report. (Stipulation ["Stip."] No. 1; Comp. Exhs. 3, 4, and 10, p. 62; T. 110).

11. The parties submitted to conciliation their disputed matters, to wit: (1) Article VIII scheduling, including rotating shifts, compensatory time, vacation schedules, and long weekends; (2) wages; (3) call-in call-back pay; (4) holiday pay; (5) life insurance; and (6) injury leave and light duty. (Stip. No. 2; Comp. Exhs. 3, 4, and 10, p. 62; Resp. Exh. 2).

12. The Union's position at conciliation was to maintain the present rotating-shift schedule, compensatory and vacation time provisions, and the language in the 1995 Memorandum of Understanding. (Comp. Exh. 10, p. 127).

13. In its prehearing statement to the conciliator, the City acknowledged that the fact finder did not award the City's proposal on scheduling, stating: "The fact-finder in his decision dated December 13, 1996 attempts to give the City the right to schedule its employees. However, what the fact-finder gave with the right hand, he took away with the left." (Resp. Exh. 3, p. 2).

14. The City did not have the right to schedule permanent shifts and was asking the conciliator for that right. (Comp. Exh. 10, pp. 135-139).

15. The City's Public Safety Director testified at the conciliation hearing that "the City would like to have the option to schedule permanent shifts, not that they were necessarily going to do it. They would like to have that management right to have control of these schedules." The City's Public Safety Director later admitted that what the City was

asking the conciliator to award was plenary authority to schedule as it wished. (Comp. Exh. 10, pp. 77-78).

16. The conciliator's report and award were issued on October 15, 1997. The conciliator found that the status quo would be maintained regarding rotating shifts and scheduling, awarding the issue to the Union. The report and award provided in relevant part:

ANALYSIS AND AWARD

1. Article VIII A., Rotating Shifts;

The City's demand is for a consistent schedule of twenty-one (21) eight (8) hour paid time off shifts per week. This would be annualized and thus afford all bargaining unit members their long weekends and planned vacations due to the advance scheduling of off days. Overtime would be reduced; down from what the Memorandum Agreement created.

Cost efficiency cannot be overstated according to the Employer. It would stop the disparity in off time usage between the younger officers and the veteran ones. Capt. Moran's scheduling efforts would usurp less of his time as well, freeing him up to serve as a detective and benefitting the citizenry.

The current methods of scheduling have yielded a part-time police force in Dover. Since crime is not a part-time occurrence, this is a situation to be avoided. Working on average some 205 days per year is akin to being a part-time officer; this shortchanges the citizens depending upon its police. Also, by equalizing long weekends the officers cease to dictate to the City when they will be off. Special details and the narcotics unit approaches for example would not be feasible because of minimum manning structures.

The bottom line is better service to the public would result under the Employer's proposed Art. 8.07.

In favoring the status quo the Union points out that under the City's proposal a unilateral imposition of the Employer's determination is without any limitations unlike what the Fact-Finder recommended. The main thrust

of the Employer's objectives are to lessen Capt. Moran's scheduling time and eradicate extended-hour shifts for the less senior officers. Yet there is no evidence that the costs under the current system have eroded the police department's budget. Also, the manning has never fallen below the minimum levels set by the Memorandum.

The testimony of record shows only 20% of the Captain's time is spent on scheduling; hardly reason enough to eschew a negotiated settlement agreement. Budgetary concerns would compel adding additional officers instead of paying overtime. Finally the Union suggests a computer-aided approach for the scheduling function as an answer to the claimed onerous task. These demands are a "power play" by the Chief of Police, seeking absolute control over these areas of administration subject to collective bargaining. The FOP is willing to accept the Fact-Finder's recommendation on all these issues.

AWARD

The current shifts' scheduling shall be retained as recommended by Mr. Van Pelt. I concur with the Union's view that the Chief's desire to obtain absolute control in this area is the motivating force behind this demand. There is a dearth of corroborative evidence as to the adverse impact of the current system in this record. The City posits that the public interest is of paramount concern where actually it is one of the six statutorily required criteria neutral's have to work with. Since Mr. Vorhees testified that the City was going to add two full-time officers to this safety force the need to extend shifts by overtime will be lessened and result in lower overtime costs and enhanced police service to the public.

Also due to the history of negotiations creating this system (one of statutory criteria) I do not herein attempt to "tinker" with the scheduling policy; "my" system would not possess greater utility than the current one bargained for by the parties.

(Comp. Exh. 4, pp.4-5; Resp. Exh. 2, pp. 4-5).

17. At a meeting on December 22, 1997, Chief Ronald R. Johnson announced a schedule change from rotating shifts to fixed shifts for bargaining-unit members represented by the FOP. At that meeting, he distributed an assignment sheet. The City's

unilateral changes affected scheduled time off, compensatory time, vacation scheduling, overtime, and other working conditions. (A., ¶ 10; Comp. Exhs. 6, 7, and 8).

18. On December 24, 1997, the Union sent Chief Johnson a letter expressing its opposition to the schedule change. (Comp. Exh. 8).

III. DISCUSSION

The issue in this case is whether the City's unilateral change of the schedule and hours of work for bargaining-unit employees altered the conciliator's award in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5), which provide in relevant 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 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[.]

It is the Complainant's burden to demonstrate by a preponderance of the evidence that an unfair labor practice has been committed. O.R.C. § 4117.12(B)(3). Based upon the testimony and evidence presented, we find that the Complainant has met its burden and that the City committed an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).

Since at least January 7, 1985, bargaining-unit personnel have been on a rotating-shift schedule. Beginning November 1, 1996, the City began discussions to change the work schedule to permanent shifts. The parties were unable to reach an agreement on this issue during negotiations. The issue was presented at fact-finding, but the parties were

not able to resolve the matter through the statutory, fact-finding process. Because the fact-finder's report was not accepted by both parties, what the fact finder recommended, or even meant to recommend, is irrelevant to our inquiry.

Since the employees in the bargaining unit are safety force employees, the negotiations proceeded to the statutory, final-offer settlement procedure to be resolved by conciliation. O.R.C. § 4117.14(D)(1). At conciliation, the parties submitted all issues that were subject to collective bargaining under O.R.C. § 4117.08 and upon which the parties had not yet reached agreement. O.R.C. § 4117.14(G)(1). The conciliator was required to make written findings of fact and to promulgate a written opinion and order upon the issues presented and the record made at the conciliation hearing. O.R.C. § 4117.14(G)(10). Once issued, the conciliator's award constituted "a binding mandate to the public employer and the exclusive representative to take whatever actions are necessary to implement the award." O.R.C. § 4117.14(I). Thus, at the end of the conciliation process, the parties' collective bargaining agreement was composed of the conciliator's award and the subjects of bargaining that were agreed upon before conciliation. With a new collective bargaining agreement in place, the employer is required to bargain over the continuation, modification, or deletion of an existing provision pursuant to O.R.C. § 4117.08(C).⁴ An employer's unilateral change of an existing provision in a collective bargaining agreement violates O.R.C. §§ 4117.11(A)(1) and (A)(5).

⁴O.R.C. § 4117.08(C) provides in relevant part:

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*. A public employee or exclusive representative may raise a legitimate complaint or file a grievance based on the collective bargaining agreement. (emphasis added).

Our focus in this case is on what the conciliator awarded regarding the type of schedules for the bargaining-unit members. The conciliator went to considerable length in the report and award discussing the parties' positions and in making his award concerning rotating shifts. In his analysis, the conciliator explained the City's reasons for going to permanent shifts, including cost efficiencies achieved through reduced overtime and eliminating disparities in off-time usage. The conciliator also put forth the Union's arguments in favor of the status quo, including the absence of any evidence showing that costs have eroded the police department's budget and that manning has never fallen below the minimum levels set by the parties' 1995 Memorandum of Understanding. In his award, the conciliator stated: "I do not herein attempt to 'tinker' with the scheduling policy; 'my' system would not possess greater utility than the current one bargained for by the parties."⁵

The City contends that the language in the conciliator's award gave it the right to change scheduling. It points to the conciliator's references to what the fact finder recommended and to the first sentence in the award: "The current shifts' scheduling shall be retained as recommended by Mr. Van Pelt." This argument contradicts the City's own witness who testified at the conciliation hearing that "what the fact-finder gave with the right hand, he took away with the left,"⁶ a statement with which we agree.

A conciliator's written opinion and order must stand independently. The award in the present case, when read in its entirety, maintains the rotating-shift schedule that was in place before negotiations began on November 1, 1996. The City's unilateral change from rotating to permanent shifts altered the conciliator's award and, consequently, modified an existing provision of the collective bargaining agreement. Therefore, the City's unilateral change violates O.R.C. §§ 4117.11(A)(1) and (A)(5).

⁵Finding of Fact ("F.F.") No. 16.

⁶F.F. No. 13.

IV. CONCLUSIONS OF LAW

1. The City of Dover is a "public employer" under O.R.C. § 4117.01(B).
2. The Fraternal Order of Police Lodge No. 4 - Dover Division is an "employee organization" under O.R.C. § 4117.01(D).
3. When the City of Dover unilaterally changed the schedule and hours of work for bargaining-unit employees, it altered the conciliator's award and committed 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 Dover committed an unfair labor practice in violation of Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by unilaterally changing the schedule and hours of work for bargaining-unit employees when it altered the conciliator's award pertaining to scheduling. The City of Dover is ordered to cease and desist from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in O.R.C. Chapter 4117, from otherwise violating O.R.C. § 4117.11(A)(1), and from refusing to implement the entire conciliation award and otherwise refusing to bargain collectively with the exclusive representative of its employees in violation of O.R.C. § 4117.11(A)(5). The City of Dover is also ordered to immediately reinstate the scheduling system that had been in place, specifically, the rotating-shifts system; to make all bargaining-unit members whole for wages and benefits lost as a result of the City of Dover's unilateral implementation of the revised scheduling system on December 22, 1997; and to post the Notice to Employees for sixty days in all of the usual and normal posting locations where employees represented by Fraternal Order of Police Lodge No. 4 - Dover Division work.

Gillmor, Vice Chairman, and Verich, Board Member, concur.