

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Broadview Heights,

Respondent.

Case Nos. 98-ULP-03-0095 & 98-ULP-03-0096

CORRECTED ORDER
(OPINION ATTACHED)

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
February 25, 1999.

On March 2, 1998, the Broadview Heights Fireman-s Association (ABHFA@) filed two unfair labor practice charges against the City of Broadview Heights (ARespondent@). On July 9, 1998, the State Employment Relations Board (ABoard@) determined there was probable cause for believing the Respondent had committed or was committing unfair labor practices by unilaterally changing unit employees-wages and hours and by excluding a unit employee from negotiated collective bargaining benefits in violation of Ohio Revised Code (A.O.R.C.@) Sections 4117.11(A)(1) and (A)(5), consolidated the cases, authorized the issuance of a complaint, referred the matter to hearing, and directed the parties to the unfair labor practice mediation process. On September 17, 1998, the parties submitted Joint Stipulations of Fact with exhibits and briefs in lieu of an evidentiary hearing in this case. On November 2, 1998, the case was transferred from the Hearings Section to the Board for a determination on the merits.

After reviewing the record and all filings, including the Joint Stipulations of Fact, exhibits, and the briefs filed by the parties, the Board finds that the City of Broadview Heights violated Ohio Revised Code Section 4117.11(A)(1) and (A)(5) when it unilaterally excluded a bargaining-unit member from a collectively bargained benefit and when it unilaterally changed a bargaining-unit employee-s wages. Attached is an Opinion, incorporated by reference, that contains supporting Findings of Fact and Conclusions of Law.

The City of Broadview Heights is ordered to:

A. Cease and desist from:

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 Sections 4117.11(A)(1) and (A)(5) by unilaterally excluding a bargaining-unit member from a collectively bargained benefit and by unilaterally changing a bargaining-unit employees wages.

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 Broadview Heights 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 Broadview Heights Fireman-s Association work; and
2. 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.

/s/ 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 5th day of March, 1999.

/s/ SALLY L. BARAILLOUX
EXECUTIVE SECRETARY

**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:

A. CEASE AND DESIST FROM:

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 Sections 4117.11(A)(1) and (A)(5) by unilaterally excluding a bargaining-unit member from a collectively bargained benefit and by unilaterally changing a bargaining-unit employee's wages.;

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 Broadview Heights 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 Broadview Heights Fireman's Association work; and
2. 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.

**CITY OF BROADVIEW HEIGHTS
CASE NOS. 98-UPL-03-0095 & 98-UPL-03-0096**

BY

DATE

TITLE

This Notice must remain posted for sixty 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 State Employment Relations Board.

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

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v.

City of Broadview Heights,

Respondent.

Case Nos. 98-ULP-03-0095 & 98-ULP-03-0096

OPINION

GILLMOR, Vice Chairman:

On March 2, 1998, the Broadview Heights Fireman-s Association (ABHFA@) filed two unfair labor practice charges, Case Nos. 98-ULP-03-0095 and 98-ULP-03-0096, against the City of Broadview Heights (ACity@). On July 9, 1998, the State Employment Relations Board (ASERB@ or ABoard@) determined that probable cause existed for believing that the City had committed or was committing unfair labor practices in violation of Ohio Revised Code (AO.R.C.@) ' ' 4117.11(A)(1) and (A)(5), consolidated the cases, authorized the issuance of a complaint, directed the matter to hearing, and also directed the parties to the unfair labor practice mediation process. On September 17, 1998, the parties submitted Joint Stipulations of Fact with exhibits and briefs in lieu of an evidentiary hearing in this case. On November 2, 1998, the case was transferred from the Hearings Section to the Board for a determination on the merits. For the reasons below, we find that the City violated O.R.C. ' ' 4117.11(A)(1) and (A)(5) when it unilaterally excluded a bargaining-unit member from a collectively bargained benefit and when it unilaterally changed a bargaining-unit employee-s wages.

I. FINDINGS OF FACT

1. The City of Broadview Heights is a public employer as defined by O.R.C. ' 4117.01(B). (Joint Stipulations of Fact [AStip.] No. 2).

2. The Broadview Heights Fireman-s Association is an employee organization as defined by O.R.C. ' 4117.01(D). The BHFA has been the Board-certified exclusive representative for a bargaining unit of part-time firefighters employed by the City since February 7, 1997. (Stip. Nos. 1 and 10).

3. Richard ARick@ Neiden has served the City as a part-time Lieutenant for 4-5 years. Lieutenant Neiden was an active member of the BHFA-s negotiating team. (Stip. Nos. 9 and 11).

4. After five bargaining sessions for the initial collective bargaining agreement, the parties entered into the statutory fact-finding process. The fact-finding hearing was held on June 24, 1997. Compensation was one of the issues presented to the fact finder. On July 8, 1997, the fact finder ruled that the part-time Lieutenant position is included in the unit until clarified otherwise by SERB and also recommended 3% increases for the existing pay system for 1997 and 1998. (Stip. Nos. 13 - 17; Respondent-s Answer [AAnswer@ & 7).

5. In October 1997, the BHFA filed an unfair labor practice charge in Case No. 97-ULP-10-0557, alleging that the City had refused to implement the fact finder-s recommendations. (Answer & 8).

6. The second pay increase was scheduled for January 1998. On January 12, 1998, the City notified the bargaining-unit employees that the increase had been implemented that week. When the City implemented the pay increase, it did not implement

the entire pay program because the City would not include the part-time Lieutenant position in the pay program. On January 13, 1998, the City affirmatively excluded Lieutenant Neiden from the scheduled wage increase as provided for in the Agreement's compensation schedule. (Stip. No. 25; Joint Exhibit [AJt. Exh.@ No. 4; Answer && 10 and 11).

7. On June 25, 1998, SERB ruled in Case No. 97-ULP-10-0557 that the part-time Lieutenant position was included in the bargaining unit and that the City failed to implement in 1997 the entire pay system as negotiated. (Answer & 9).

8. On or about September 3, 1998, the City and the BHFA filed an executed collective bargaining agreement, effective June 1, 1997 through December 31, 1998, that incorporated the fact finder's report, included a compensation schedule, and also contained a declaration that Mr. Richard ARick@ Neiden, a part-time Lieutenant, was a member of the BHFA. (Stip. No. 32; Jt. Exh. No. 3).

II. DISCUSSION

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

(A) It is 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[.]

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).

In re Ottawa County Riverview Nursing Home, SERB 96-006 (5-31-96). Thus, if a given subject materially influences any of these matters and also involves the exercise of inherent managerial discretion, 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) (*A Youngstown*). Those management decisions 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, absent emergency situations that render prior bargaining impossible. *Id.* The balancing test is not necessary when the subject matter at issue pertains only to wages, hours, or terms and conditions of employment. *Id.*

The balancing test is not necessary in this case because the central issue pertains only to wages, i.e., the wage scale awarded by the fact finder for the bargaining unit.¹ The City has implemented the scheduled wage increase for all of the bargaining-unit members except Lieutenant Neiden. In the January 13, 1998 memorandum from Captain Fleming to all part-time employees concerning the wage increase, the Captain by order of the Chief stated that the wage increase was in effect for all part-time employees with the exception of Rick Neiden who is to remain at the old system of pay and the old pay rates. Captain Fleming's memorandum demonstrates the City's exclusion of Lieutenant Neiden from the January 1998 wage increase mandated by the Agreement for members of the bargaining unit. Such a unilateral act violates the duty to bargain because of its inherent nature of being inapposite to the collective bargaining process. *In re Mayfield City School Dist. Bd. of Ed.*, SERB 89-033 (12-20-89) *citing with approval Int'l. Ladies Garment Workers Union v. NLRB*, 463 F.2d 907,917-919 (D.C. Cir. NLRB 1972), 80 L.R.R.M. 2716. This unilateral act violated the City's duty to bargain collectively with the BHFA on a matter of wages pursuant to O.R.C. ' 4117.11(A)(5).

¹Finding of Fact No. 4.

In the present case, the City implemented the collectively bargained wage increase for all members of the bargaining unit represented by the BHFA except Lieutenant Neiden. Lieutenant Neiden was a member of the BHFA from the outset. On April 1, 1998, we issued a *Clarification of Bargaining Unit* in *In re Broadview Heights Fireman's Association and City of Broadview Heights*, Case No. 98-REP-02-0022, stating that Richard Neiden, a part-time Lieutenant, was a member of the bargaining unit represented by the BHFA. The determination was based upon Conclusion of Law No. 3 adopted by the Board in *In re SERB v City of Broadview Hts*, SERB HO 1998-NE-017 (7-1-98) [Case No. 97-ULP-10-0557], where we held that *the position of part-time Lieutenant is included within the BHFA's bargaining unit of part-time firefighters.*² In that unfair labor practice case, we denied the City's motion to dismiss the complaint, stating that the City's actions in the first representation case, *In re Broadview Heights Fireman's Association and City of Broadview Heights*, Case No. 96-REP-10-0215, *plainly manifest its understanding that the part-time lieutenant's position was included in the unit.*² The City had included Lieutenant Neiden in its January 3, 1997 list of employees eligible to vote in the certification action for the BHFA and had made no objections to his inclusion or participation in the election. Thus, any claim by the City that it had no duty to collectively bargain because Lieutenant Neiden was not a member of the BHFA is baseless and contrary to the evidence.

Notwithstanding the City's own actions in January 1997, recognizing Lieutenant Neiden as an eligible employee for the bargaining unit, the City unilaterally excluded him from the collectively bargained wage increase one year later in January 1998. The City's conduct interfered with a bargaining-unit member's compensation structure. Therefore, we find that the City violated O.R.C. ' ' 4117.11(A)(1) and (A)(5)³ when it unlawfully excluded a bargaining-unit employee from a collectively bargained wage increase, which is a protected right guaranteed in O.R.C. Chapter 4117, and when it unilaterally changed a bargaining-unit employee's wages.

²See *Directive Denying Motion to Dismiss* issued February 20, 1998.

³O.R.C. ' 4117.11(A)(1) represents an alleged derivative violations of O.R.C. ' 4117.11(A)(5) in this instance. *In re Amalgamated Transit Union, Local 268*, SERB 93-013 (6-25-93) at n.14.

III. CONCLUSIONS OF LAW

1. The City of Broadview Heights is a public employer as defined by O.R.C. ' 4117.01(B).
2. The Broadview Heights Fireman-s Association is an employee organization as defined by O.R.C. ' 4117.01(D).
3. The City of Broadview Heights committed an unfair labor practice in violation of O.R.C. ' ' 4117.11(A)(1) and (A)(5) when it unilaterally excluded Lieutenant Richard Neiden, a bargaining-unit employee, from the wage increase contained in the effective collective bargaining agreement.

IV. DETERMINATION

For the reasons stated above, we find that the City of Broadview Heights violated Ohio Revised Code ' ' 4117.11(A)(1) and (A)(5) when it unilaterally excluded a bargaining-unit employee from the scheduled wage increase mandated by the effective collective bargaining agreement. Therefore, we issue an Order, pursuant to O.R.C. ' 4117.12(B)(3), requiring the City of Broadview Heights to cease and desist from interfering with, restraining, or coercing the employee, Lieutenant Richard Neiden, in the exercise of his rights guaranteed in the O.R.C. Chapter 4117, and from otherwise violating O.R.C. ' ' 4117.11(A)(1) and (A)(5). We also order the City of Broadview Heights to post the Notice to Employees for sixty days in all of the usual and normal posting locations where employees represented by the Broadview Heights Fireman-s Association work.

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