

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

State of Ohio, Department of Health,

Respondent.

CASE NO. 98-ULP-02-0070

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich: May 6, 1999.

On February 11, 1998, District 1199, Service Employees International Union ("Intervenor") filed an unfair labor practice charge against the State of Ohio, Department of Health ("Respondent") alleging that the Respondent had violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5). On July 9, 1998, the State Employment Relations Board ("SERB" or "Complainant") determined that probable cause was present to believe that the Respondent had committed an unfair labor practice, authorized the issuance of a complaint, and referred the matter to hearing. On August 5, 1998, a complaint was issued alleging that the Respondent had violated O.R.C. § 4117.11(B)(6) by refusing to honor a negotiated travel policy.

A hearing was conducted on September 29, 1998. On December 2, 1998, the Administrative Law Judge's Proposed Order was issued. On January 5, 1999, the Respondent filed its amended exceptions to the proposed order. On January 15, 1999, the Intervenor and the Complainant filed their responses to the Respondent's exceptions.

After a review of the Hearing Officer's Proposed Order, the exceptions, responses to exceptions, and the record before us, the Board, pursuant to the attached Opinion, incorporated by reference, amends Conclusion of Law No. 3 to read: "The Respondent did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it refused to enter into a memorandum of understanding for a substitute travel policy."; adopts the Findings of Fact and Conclusions of Law, as amended, in the Administrative Law Judge's Proposed Order; dismisses the complaint; and dismisses with prejudice the unfair labor practice charge.

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It is so ordered.

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 (15) days after the mailing of the Board's order.

I certify that this document was filed and a copy served upon each party by certified U.S. Mail, return receipt requested, on this 21st day of May, 1999.



LINDA S. HARDESTY, CERTIFIED LEGAL ASSISTANT

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OPINION

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Board") on the exceptions and response to exceptions to the Administrative Law Judge's Proposed Order issued on December 2, 1998. For the reasons below, we find that the State of Ohio, Department of Health did not violate Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5) when it refused to enter into a memorandum of understanding for a midterm travel policy amendment to the collective bargaining agreement.

I. BACKGROUND

District 1199, Service Employees International Union, The Health Care and Social Service Union, AFL-CIO ("District 1199" or "Union") is the exclusive representative for a bargaining unit of certain State employees, including employees of the State of Ohio, Department of Health ("ODH"). District 1199 and the State of Ohio are parties to a

collective bargaining agreement effective from August 3, 1997 to May 31, 2000 ("Agreement"). Article 1 of the Agreement provides that midterm contractual changes must be in writing and executed by the President of the Union, or designee, and the Director of the State of Ohio, Department of Administrative Services ("DAS"), or designee. Article 21 of the Agreement contains an employee travel time policy that does not compensate employees for time spent traveling the first twenty miles to and from an off-site work location. Article 31 of the Agreement provides for agency professional committees that address agency-wide issues deemed appropriate by the parties. The agency professional committee may not "reach an agreement on any matter that would alter in any way the terms" of the Agreement.¹

The travel policy in the Agreement was different from the "portal-to-portal" travel policy in place from 1987 to 1997 for the State. The "portal-to portal" travel policy compensated the employee from the moment that travel began until the employee arrived home. The travel policy in the Agreement was also different from the "30/30" travel policy implemented unilaterally by ODH for District 1199 members in August 1997. The "30/30" travel policy compensated an employee for travel time after the first thirty minutes of travel going to a job site and coming from a job site. The "30/30" travel policy was in effect until February 10, 1998, when it was stopped by DAS.

In August 1997, ODH did not implement the State of Ohio's travel policy; instead, ODH issued the "30/30" travel policy. In late August or early September 1997, before the Agreement was ratified, ODH Labor Relations Administrator Dave White contacted Lee Evans, an ODH employee who was also on the District 1199 Executive Board, to open discussions with the Union about the travel policy. Mr. White was concerned that the

¹See Joint Exhibit ("Jt. Exh.") 1 (District 1199/SEIU 1997-2000 Collective Bargaining Agreement).

travel policy contained in the Agreement was not “workable” for ODH. He told Ms. Evans that ODH wanted to form a committee to discuss an agency-wide travel policy without initially involving the State of Ohio, Department of Administrative Services, Office of Collective Bargaining (“OCB”).

In September 1997, after ratification of the Agreement, Ms. Lisa Hetrick, the Ohio State Coordinator for District 1199, met with Mr. White. They agreed to form an agency professional committee to discuss the travel policy issues. The travel policy committee could then arrive at a substitute travel policy acceptable to both ODH and the Union. Ms. Hetrick explained to Mr. White that any committee proposal would require a vote for approval by District 1199 members. Likewise, Mr. White informed Ms. Hetrick that any substitute travel policy would have to be approved by OCB.

The travel policy committee met three times: October 8, 1997; October 20, 1997; and November 17, 1997. During the first two meetings, the parties established their positions for a travel policy and discussed alternative travel policies. The Union stressed that its membership had traditionally relied upon the “portal-to-portal” travel policy for additional compensation. Mr. White indicated during these first two meetings that he believed OCB would agree to the proposal arrived at by the committee. At the final meeting on November 17, 1997, Mr. White presented three travel policy options: the “portal-to-portal” policy; the “30/30” policy; or the policy in the Agreement.

Ms. Hetrick sent a memorandum to the District 1199 membership outlining the proposals on November 17, 1997. She recommended that the members vote for the “30/30” travel policy. On December 1, 1997, the members voted for the “portal-to-portal” travel policy.

On January 8, 1998, the parties held a meeting to draft language for a written memorandum of understanding for the "portal-to-portal" travel policy. Shortly thereafter, Ms. Hetrick was informed by Mr. White that OCB had disapproved the "portal-to-portal" travel policy and that ODH would not be able to enter into a memorandum of understanding with District 1199 on this issue. On February 4, 1998, DAS Director Sandra Drabik sent a letter directing ODH to adhere to the Agreement's travel policy. On February 10, 1998, ODH implemented the Agreement's travel policy.

II. DISCUSSION

O.R.C. §§ 4117.11(A)(1) and (A)(5) provide 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 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[.]

District 1199 claims that ODH's conduct constituted an unfair labor practice because ODH failed to implement a travel policy proposed by a committee consisting of representatives from the Union and ODH. The issue is whether ODH's conduct during the travel policy committee discussions and ODH's subsequent failure to implement the committee's proposed travel policy was bad-faith bargaining. Based upon the relevant facts and the applicable law, we find that ODH bargained in good faith and did not violate O.R.C. §§ 4117.11(A)(1) and (A)(5).

Whether a party has engaged in good-faith bargaining is determined by the totality of the circumstances. *In re Dist 1199/HCSSU/SEIU, AFL-CIO, SERB 96-004 (4-8-96)*.

Although an employer may be willing to meet at length with the union and discuss substantive issues, the employer has refused to bargain in good faith if it offers a proposal that the employer knows it does not have the authority to implement. *In re Springfield Local School Dist Bd of Ed*, SERB 97-007 (5-1-97). This principle holds true unless the party to whom the offer is made knows or has reason to know that the party lacks the capacity to make such an offer.

OCB's express authority as the statutory designee for the State of Ohio is set forth in O.R.C. § 4117.10(D), which provides:

There is hereby established an office of collective bargaining in the department of administrative services for the purpose of negotiating with and entering into written agreements between state agencies, departments, boards, and commissions and the exclusive representative on matters of wages, hours, terms and conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement.

It is well established in Ohio that all persons are charged with knowledge of the law. In this case, the Union is charged with having at least constructive notice of OCB's statutory authority. The heart of the travel policy is the method of calculating compensation for bargaining-unit members who travel in the course of their employment. As an issue directly impacting wages, the capacity to negotiate a substitute travel policy is strictly within OCB's express authority.

Article 31 of the Agreement provided for the formation of agency professional committees to discuss and resolve agency-wide issues of mutual concern. The travel policy negotiations were conducted in a joint Union/ODH committee. In form and function, the travel policy committee met the Agreement's description of a professional committee. The authority of the professional committee was expressly limited by the Agreement: a

professional committee may not “reach an agreement on any matter that would alter in any way the terms” of the Agreement.² By virtue of the Agreement’s language, the professional committee formed between District 1199 and ODH could do no more than reach a *proposed* resolution of the travel policy issue that still required the approval by the District 1199 members and by OCB.

To substitute the committee’s proposed solution to the travel policy issue for the existing policy, the parties were bound by the midterm negotiation provision set forth in the Agreement. Article 1 of the Agreement required a proposed change to be in writing, signed by the Union President, or designee, and the DAS Director, or designee, before it could supersede an existing provision in the Agreement.³ The Agreement did not designate ODH as the representative with that authority. District 1199 had merely reached a proposed midterm change with ODH concerning the travel policy.

District 1199 had bargained collectively the provision in the Agreement requiring OCB’s approval for midterm changes. In addition, ODH did not mislead Union representatives of the committee into believing that it could gain OCB’s approval for the proposal. The ODH representative had informed the Union representative that any substitute travel policy must be approved by OCB.⁴

Under the totality of the circumstances, we find as a matter of law that District 1199 knew that statutorily and contractually ODH lacked the capacity to enter into a binding agreement for a new travel policy without OCB’s approval. The Union cannot claim that

²See Jt. Exh. 1.

³See Jt. Exh. 1.

⁴Finding of Fact No. 19.

ODH failed to implement a negotiated midterm change in the travel policy because the Union knew or should have known from the beginning of the negotiations that ODH was not authorized to agree to a midterm change in the Agreement. Based upon the foregoing analysis, we find that ODH did not engage in bad-faith bargaining in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).

III. CONCLUSION

For the reasons above, we find that the State of Ohio, Department of Health did not commit an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) when it refused to enter into a memorandum of understanding for a midterm travel policy amendment to the collective bargaining agreement. Consequently, we dismiss the complaint and dismiss with prejudice the unfair labor practice charge.

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