

**STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Fraternal Order of Police, Ohio Valley Lodge No. 112,

Respondent.

**Case No. 99-UJP-10-0597**

**ORDER  
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:  
November 9, 2000.

On October 26, 1999, the Union Township Board of Trustees, Clermont County ("Intervenor") filed an unfair labor practice charge against the Fraternal Order of Police, Ohio Valley Lodge No. 112 ("Respondent"). On February 17, 2000, the State Employment Relations Board ("Board" or "Complainant") found probable cause to believe that the Respondent had violated Ohio Revised Code Section 4117.11(B)(3) when it amended its wage proposal fewer than five days before the conciliation hearing.

On May 1, 2000, a hearing was conducted by the Administrative Law Judge. On June 29, 2000, the Proposed Order was issued. On July 18, 2000, the Respondent and the Intervenor filed exceptions to the Proposed Order. On July 25, 2000, the Intervenor filed a response to the Respondent's exceptions. On July 26, 2000, the Respondent filed its response to the Intervenor's exceptions. On July 31, 2000, the Complainant filed its responses to the Respondent's and Intervenor's exceptions.

On September 7, 2000, the Board directed the parties' representatives to appear for an oral argument; the oral argument was held on October 4, 2000. After reviewing the record and the arguments presented, the Findings of Fact and Conclusions of Law in the Proposed Order are adopted, and for reasons set forth in the attached Opinion, incorporated by reference, the Board finds that the Respondent committed an unfair labor practice in violation of Ohio Revised Code Section 4117.11(B)(3) when it submitted an amendment to its wage proposal to the conciliator and the employer fewer than five days before the conciliation hearing.

The Fraternal Order of Police, Ohio Valley Lodge No. 112 is ordered to:

A. CEASE AND DESIST FROM:

Refusing to bargain collectively with the public employer by amending its wage proposal fewer than five days before a conciliation hearing and from otherwise violating Ohio Revised Code Section 4117.11(B)(3).

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 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 by certified mail, return receipt requested, on this 22<sup>nd</sup> day of November, 2000.



SALLY L. BARAILLOUX, EXECUTIVE SECRETARY

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**Case No. 99-UPL-10-0597**

**OPINION**

VERICH, Board Member:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") upon the filing of exceptions and responses to the exceptions to the Administrative Law Judge's Proposed Order issued on June 29, 2000. On September 7, 2000, SERB directed the parties' representatives to appear for an oral argument. The oral argument was held on October 4, 2000. For the reasons below, we find that the Fraternal Order of Police, Ohio Valley Lodge No. 112 violated Ohio Revised Code ("O.R.C.") § 4117.11(B)(3) when it submitted an amendment to its wage proposal to the conciliator and the employer fewer than five days before the conciliation hearing.

**I. SUMMARY OF FACTS**

The Union Township Board of Trustees, Clermont County ("Township") and the Fraternal Order of Police, Ohio Valley Lodge No. 112 ("Union") were parties to a collective bargaining agreement effective June 11, 1996 to March 31, 1999, containing a grievance procedure that culminated in final and binding arbitration. The Township and the Union

engaged in contract negotiations for a successor agreement. After going through fact-finding proceedings, the parties still had not reached an agreement. A conciliator was then appointed by SERB to hear the matter. A conciliation hearing was set for September 24, 1999.

The Union filed its position statement with the conciliator, the Township, and SERB at least five days before the commencement of the conciliation hearing. The Union's initial wage proposal contained a proposed "sign-in bonus" that provided for bonuses dependent upon an employee's job classification and step level under the collective bargaining agreement. The initial sign-in bonus proposal gave the employees the equivalent of a five-percent raise commencing after March 31, 1999, the date of the conclusion of the prior collective bargaining agreement. The initial sign-in bonus proposal also included overtime pay, and it provided for a compounding of the five-percent raise through the three-year term of the collective bargaining agreement. The Union received the Township's wage proposal at least five days before the commencement of the conciliation hearing; the Township did not include any sign-in bonus in its wage proposal.

On September 23, 1999, the Union's chief negotiator called the conciliator and requested permission to file an amended wage proposal. The conciliator told the Union that it could submit a revised wage proposal as long as the Township was notified. The Union's chief negotiator then faxed a copy of the revised position statement to the Township's chief negotiator, who objected to the modification.

The Union's revised wage proposal eliminated both overtime pay and the bonus distinctions between the various steps of each job classification. The sign-in bonus in the revised wage proposal provided a five-percent increase for only the period from April 1, 1999 through December 31, 1999, thereby eliminating the compounding element from the sign-in bonus in the initial wage proposal.

At the conciliation hearing on September 24, 1999, the conciliator attempted to engage the Township in mediation. After this attempt, the same outstanding issues remained pending. During the opening remarks at the conciliation hearing, the Union again submitted the revised wage proposal. On September 27, 1999, the conciliator issued the Final Offer Settlement Award, which awarded the Union's modified wage proposal.

On December 13, 1999, the Township filed a Motion to Vacate Conciliator's Arbitration Award in the case of *Board of Trustees, Union Township, Clermont County v. FOP Ohio Valley Lodge No. 112*, Case No. 99-CVF-1055, Court of Common Pleas, Clermont County, Ohio. This matter was pending at the time of hearing and oral argument in the present case.

## II. DISCUSSION

### A. The Union Violated O.R.C. Section 4117.11(B)(3)

O.R.C. § 4117.11 provides in relevant part as follows:

(B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

\* \* \*

(3) Refuse to bargain collectively with a public employer if the employee organization is recognized as the exclusive representative or certified as the exclusive representative of public employees in a bargaining unit[.]

The Township and the Union engaged in negotiations for a successor collective bargaining agreement. After going through fact-finding proceedings, the parties still had not reached an agreement. SERB appointed a conciliator, and a conciliation hearing was set for September 24, 1999.

O.R.C. § 4117.14(G) sets forth the conciliation process and provides in relevant part as follows:

(3) The conciliator shall conduct the hearing pursuant to rules developed by the board. He shall establish the hearing time and place, but it shall be, where feasible, within the jurisdiction of the state. *Not later than five calendar days before the hearing, each of the parties shall submit* to the conciliator, to the opposing party, and to the board, a written report summarizing the unresolved issues, the party's final offer as to the issues, and rationale for that position. (emphasis added).

The statutory requirement that position statements be filed no later than five days before a conciliation hearing is clear and unambiguous; therefore, the failure to timely file a position statement constitutes a violation of O.R.C. § 4117.11(A)(5) by a public employer or a violation of O.R.C. § 4117.11(B)(3) by an employee organization. *In re Greenville Patrol Officers Assn*, SERB 2000-005 (6-13-2000). In the present case, both parties timely filed their final offers with the conciliator. The Union, however, took the additional step of amending its final offer within five days of the conciliation hearing. As a result of the Union's action, the pending question is whether a party engages in bad-faith bargaining when it submits an amendment to one of its final positions to the conciliator and the other party fewer than five days before the conciliation hearing.

Ohio Administrative Code Rule 4117-9-06(E) establishes a limited exception in which a party could amend its final offer after the position statements have been submitted for the conciliation hearing. The rule provides in pertinent part as follows:

(E) Upon notice of the conciliator's appointment, each party shall submit to the conciliator and serve on the other party a written statement. A failure to submit such a written statement to the conciliator and the other party prior to the day of the hearing shall require the conciliator to take evidence only in support of matters raised in the written statement that was submitted prior to the hearing. The statement shall include:

\* \* \*

(4) A report defining all unresolved issues, stating the party's final offer as to each unresolved issue, and summarizing the position of the party with regard to each unresolved issue. *If, after submission of the parties' reports, mediation efforts result in a change in a final offer, a party may, with the permission of the conciliator, submit a revised final offer to the conciliator.* (emphasis added).

The filing of the position statements is a critical step in the conciliation process. *In re Greenville Patrol Officers Assn, supra.* O.R.C. § 4117.14(G) requires nearly simultaneous filings by the parties. The conciliator must choose from either the employer's proposal or the employee organization's proposal on each of the outstanding issues. By the very design of this process, each party has an incentive to issue a final proposal that it believes the conciliator will select as the more reasonable position. If a party amends its position after receiving the other party's statement, the amending party might gain an unfair advantage over the other party: the amending party could modify its position based upon its knowledge of the other party's final position. Such an amendment creates a potential for abuse. We conclude that an amendment of a final offer violates O.R.C. § 4117.11(B)(3) when the amendment occurs outside the limited exception permitted by O.A.C. Rule 4117-9-06(E)(4).

In this case, the Union submitted its revised final offer the day before the conciliation hearing. The conciliator did not attempt mediation until the day of the hearing. Thus, the Union did not submit its revised proposal in accordance with O.A.C. Rule 4117-9-06(E)(4) because mediation efforts did not lead to the change in the final offer as required by the rule. If mediation efforts had occurred after the submission of the position statements, resulting in a party changing its final offer, and the conciliator had approved the request to submit a revised final offer, then a different result could be reached. The conclusion reached under *these* facts is that the Union committed an unfair labor practice in violation of O.R.C. § 4117.11(B)(3) when it submitted its revised final offer fewer than five days before the conciliation hearing.

This result is consistent with the recent holding of the Ohio Supreme Court. In *Fairborn Professional Fire Fighters' Assn., IAFF Local 1235 v. Fairborn* (2000), 90 Ohio St.3d 170, the negotiations between the employee organization and the employer had reached the conciliation process. One week before the employer was to file its position statement for the conciliation hearing, the employee organization sent a proposal regarding the employee evaluation procedure. When the employee organization submitted its position statement, its final offer regarding performance appraisals was nearly identical to its first proposal. The Ohio Supreme Court held that the employee organization's proposal "was not a surprise thrown in by the union in its final-offer statement." *Id.* at 175. Although the Court warned that "arbitration by ambush" should not be used in collective bargaining, the Court found that the "one-week gap between proposal and final-offer statement, whether planned or not, is about as close to a surprise attack as we would be comfortable allowing." *Id.*

In this case, the Union's revised wage proposal eliminated both overtime pay and the bonus distinctions between the various steps of each job classification. It also eliminated the compounding element from the sign-in bonus in the initial wage proposal. The amendment presented substantive changes to the Union's final offer. The Union did not request to submit its revised final offer until *the day before* the conciliation hearing. The timing of the amendment is exactly the "surprise attack" about which the Ohio Supreme Court warned.

## **B. Remedy**

To determine the appropriate remedy, we must look at all of the circumstances. The Union's amendment to its final offer occurred only after it requested and received permission from the conciliator. O.A.C. Rule 4117-9-06(E)(4) authorizes a conciliator to permit an amendment to a final offer fewer than five days before the conciliation hearing *only if* the amendment is the result of mediation efforts. This rule vests the conciliator with

great discretion in determining whether “mediation efforts result in a change in a final offer.” In this case, however, the conciliator permitted the Union to file an amendment to its wage offer *before* the parties engaged in mediation efforts. Thus, the conciliator’s granting of permission to the Union, while not the cause of the unfair labor practice in this case, contributed to the facts that resulted in the Union’s unfair labor practice.

The remedy for this violation is the issuance of a cease-and-desist order to the violating party along with the posting of a notice to employees. However, given the Union’s reliance upon the conciliator’s erroneous permission, we are waiving the posting of the notice to employees.

### **III. CONCLUSION**

For the reasons above, we find that the Fraternal Order of Police, Ohio Valley Lodge No. 112 committed an unfair labor practice in violation of Ohio Revised Code § 4117.11(B)(3) when it submitted an amendment to its wage proposal to the conciliator and the Union Township Board of Trustees, Clermont County fewer than five days before the conciliation hearing. A cease-and-desist order will be issued to the Union.

Pohler, Chairman, and Gillmor, Vice Chairman, concur.