

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Wright State University Chapter of the American Association of University Professors,

Respondent.

Case No. 99-ULP-07-0425

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
June 22, 2000.

On May 13, 1999, Wright State University ("Charging Party") filed an unfair labor practice charge against the Wright State University Chapter of the American Association of University Professors ("Respondent"). On November 18, 1999, 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) and directed the matter to hearing.

On February 7, 2000, a hearing was conducted. On March 23, 2000, the Administrative Law Judge issued a Proposed Order recommending that the Board find that the Respondent violated Ohio Revised Code Sections 4117.11(B)(3) when it attempted to negotiate the prohibited subject of faculty workload. On April 12, 2000, the Respondent filed exceptions to the Proposed Order. On April 24, 2000, the Complainant filed its response to the exceptions. On April 26, 2000, the Charging Party filed a notice of its adoption of the Complainant's response to the exceptions.

After reviewing the record, including the transcript, exceptions, cross-exceptions, and responses, the Board renumbers the conclusions of law in the Proposed Order; amends new Conclusion of Law No. 3 to read: "The Respondent did not violate O.R.C. § 4117.11(B)(3) when it attempted to bargain over faculty workload because, during the relevant time period, the Ohio Supreme Court had found O.R.C. § 3345.45 to be unconstitutional under the Ohio Constitution."; adopts the Findings of Fact and Conclusions

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of Law, as amended, in the Administrative Law Judge's Proposed Order; dismisses the complaint; and dismisses with prejudice the unfair labor practice charge.

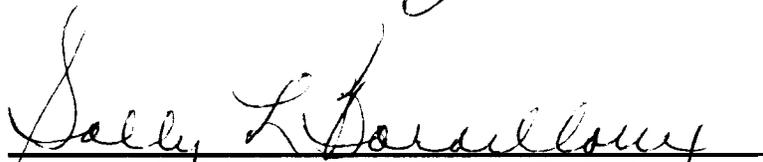
It is so ordered.

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 22nd day of June 2000.


SALLY L. BARAILLOUX, EXECUTIVE SECRETARY

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OPINION

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") upon the filing of exceptions and responses to exceptions to an Administrative Law Judge's Proposed Order issued on March 23, 2000. The issue in this case is whether the Wright State University Chapter of the American Association of University Professors ("Union") attempted to negotiate a prohibited subject of bargaining. For the reasons below, we find that the Union did not violate O.R.C. § 4117.11(B)(3) because, during the relevant time period of this case, the statute making faculty workload a prohibited subject of bargaining, O.R.C. § 3345.45, had been found by the Ohio Supreme Court to be unconstitutional under the Ohio Constitution.

I. BACKGROUND

The Union is the exclusive representative for a bargaining unit of full-time, tenure-track faculty employed by Wright State University ("University"). The University and the Union began negotiations for a successor collective bargaining agreement on or about January 25, 1999. From February 1, 1999 through October 6, 1999, the parties had a

continuing dialogue about what discussions relating to workload would be prohibited and what discussions might be allowed pursuant to O.R.C. § 3345.45, which makes faculty workload a prohibited subject of bargaining.

On March 18, 1999, the Union provided a copy of a proposal entitled “12 Workload” to the University’s chief negotiator. This proposal discussed workload distribution, maximum workload, and what activities were included in teaching, scholarship, and service. On June 7, 1999, the Employer told the Union that workload was a prohibited subject of bargaining and that the Employer would not bargain workload.

Section 12.7 of the Union’s “12 Workload” proposal addressed overload compensation. Before September 29, 1999, the Union revised and moved this language to a different article, entitled “Compensation.” Believing it was not a workload issue, the Employer agreed to bargain the rate of pay for overload courses.

Section 12.6.7 of the Union’s “12 Workload” proposal addressed release time. This language was moved to Article 30. Believing it was not a workload issue, the Employer agreed to bargain the 32 credit hours release time.

On September 29, 1999, the Union submitted a proposal to replace, in part, the “12 Workload” proposal. The new proposal provided:

In the event that O.R.C. Section 3345.45 is declared unconstitutional, or if SERB and/or a court issues a final decision that the issue of workload remains a mandatory subject of bargaining, in spite of the constitutionality of O.R.C. Section 3345.45, then either side may request a reopener of negotiations to address the issues of workload. In that event, a notice to negotiate will be filed with SERB and the normal dispute resolution process contained in Section 4117.14 will apply.

The Employer did not object to bargaining on the above-quoted language.

Also on September 29, 1999, the Union withdrew the “12 Workload” proposal and replaced it, in part, with a proposal titled “Article 19, Workload,” which provided:

19.1 During the term of this Agreement, if ORC 3345.45 is declared unconstitutional, or if SERB and/or a court issues a final decision that the issue of workload is a mandatory subject of bargaining, in spite of the constitutionality of ORC 3345.45, the University, upon request, shall bargain with the WSU-AAUP [Union] regarding any proposed changes to the University’s faculty workload policy or its college faculty workload policies using the normal dispute resolution process contained in ORC Section 4117.14.

On October 8, 1999, the parties agreed to this proposal, which is now contained in Article 19 of the collective bargaining agreement.

II. HISTORY OF O.R.C. § 3345.45

The Ohio General Assembly enacted Am.Sub.H.B. No. 152, which included O.R.C. § 3345.45. This provision, which was effective July 1, 1993, provided as follows:

On or before January 1, 1994, the Ohio board of regents jointly with all state universities, as defined in section 3345.011 of the Revised Code, shall develop standards for instructional workloads for full-time and part-time faculty in keeping with the universities’ missions and with special emphasis on the undergraduate learning experience. The standards shall contain clear guidelines for institutions to determine a range of acceptable undergraduate teaching by faculty.

On or before June 30, 1994, the board of trustees of each state university shall take formal action to adopt a faculty workload policy consistent with the standards developed under this section. ***Notwithstanding section 4117.08 of the Revised Code, the policies adopted under this section are not appropriate subjects for collective bargaining.*** Notwithstanding division (A) of section 4117.10 of the Revised Code, any policy adopted under this section by a board of trustees prevails over any conflicting provisions of any collective bargaining agreement between an employees (sic) organization and that board of trustees. (emphasis added).

The constitutionality of O.R.C. § 3345.45 plays a significant role in this case. Acts of the General Assembly are presumed to comply with the Ohio and United States Constitutions. O.R.C. § 1.47. As the Ohio Supreme Court stated in *State ex rel. Dickman v. Defenbacher, Dir.* (1955), 164 Ohio St. 142, 147: “A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. This court has held enactments of the General Assembly to be constitutional unless such enactments are clearly unconstitutional beyond a reasonable doubt.”

On May 17, 1995, the American Association of the University Professors, Central State University Chapter (“CSU-AAUP”) filed a complaint for declaratory judgment and injunctive relief and a motion for a preliminary injunction pursuant to Ohio Civil Rule 65(B), alleging that O.R.C. § 3345.45 violated the Equal Protection Clauses of the Ohio and United States Constitutions, and Section 1, Article I of the Ohio Constitution. The Court of Common Pleas of Greene County denied the requested injunctive relief and held that O.R.C. § 3345.45 was constitutional in its entirety. The CSU-AAUP appealed that decision to the Second District Court of Appeals. On January 1, 1997, the Court of Appeals reversed the trial courts judgment and concluded that the statute was unconstitutional.

Upon appeal and cross-appeal, the Ohio Supreme Court was asked to determine the constitutionality of O.R.C. § 3345.45 under the Equal Protection Clauses of both the United States and Ohio Constitutions, in addition to Section 34, Article II of the Ohio Constitution. On September 30, 1998, the Ohio Supreme Court held that O.R.C. § 3345.45 violated the Equal Protection Clause under the Ohio and U.S. Constitutions; the Court did not reach the issue of constitutionality under Section 34, Article II of the Ohio Constitution. *Am. Assoc. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.* (1998), 83 Ohio St.3d 229, 1998 SERB 4-51 (“AAUP I”).

Upon appeal by Central State University, the U.S. Supreme Court reversed *AAUP I* to the extent that it held the statute unconstitutional under the federal Equal Protection Clause. *Cent. Sfafe Univ. v. Am. Assn. of Univ. Professors, Cent Sfafe Univ. Chapter* (1999), 526 U.S. 124, 1999 SERB 4-I. The U.S. Supreme Court emphasized that *AAUP I* had misapplied the federal rational-basis review by requiring the state to provide evidence of a rational relationship between the statute and its goal. The U.S. Supreme Court held that O.R.C. § 3345.45 rationally relates to the statute's legitimate goal and therefore survived the federal equal protection challenge. The U.S. Supreme Court then remanded this case to the Ohio Supreme Court for further proceedings consistent with its opinion.

On October 20, 1999, the Ohio Supreme Court held that the classification contained in O.R.C. § 3345.45 does not violate the Equal Protection Clause of the Ohio Constitution. *Am. Assoc. of Univ. Professors, Cenf. Sfafe Univ. Chapter v. Cenf. Sfafe Univ.* (1999), 87 Ohio St.3d 55, 1999 SERB 4-21 ("*AAUP II*"). The Court also held that O.R.C. § 3345.45 is a valid exercise of legislative authority under Section 34, Article II of the Ohio Constitution. *Id.*

In summary, from July 1, 1993 to September 30, 1998, O.R.C. § 3345.45 was presumed constitutional because a binding court decision had not yet been issued to the contrary. Then, on September 30, 1998, the Ohio Supreme Court held in its syllabus in *AAUP I* that O.R.C. § 3345.45 violated the Equal Protection Clause under the Ohio and U.S. Constitutions because it did not rationally relate to a legitimate government interest. The constitutionality of the statute under the U.S. Constitution was subject to further appeal to the U.S. Supreme Court. But the Ohio Supreme Court- as the highest court in Ohio — is the ultimate interpreter of the Ohio Constitution. Its declaration that O.R.C. § 3345.45 was unconstitutional under the Ohio Constitution established the rights of the parties until

a subsequent decision from the same court varied or departed from that declaration.’ On October 20, 1999, the Ohio Supreme Court held in *AAUP II* that O.R.C. § 3345.45 was constitutional under the Ohio Constitution. Thus, from September 30, 1998 to October 20, 1999, O.R.C. § 3345.45 was unconstitutional under the Ohio Constitution as determined by the Ohio Supreme Court in *AAUP I*.

III. DISCUSSION

The issue before the Board is whether the Union attempted to negotiate a prohibited subject of bargaining, faculty workload. We find that the Union did attempt to bargain over faculty workload when it presented its “12 Workload” proposals. We also find that during the relevant time period of this case, O.R.C. § 3345.45 had been found by the Ohio Supreme Court to be unconstitutional under the Ohio Constitution.

“Prohibited” subjects of bargaining are certain provisions that, by law, cannot be included in a collective bargaining contract.² These provisions are described in O.R.C. § 4117.08(B), which states: “The conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists *are not appropriate subjects for collective bargaining.*” (emphasis added). This list of prohibited subjects is not exclusive. For example, under O.R.C. § 4117.09(C), a collective bargaining agreement cannot require membership in an employee organization as a condition of employment. The General Assembly created an additional prohibited subject of bargaining when it passed O.R.C. § 3345.45, which provides in pertinent part: “Notwithstanding section 4117.08 of the Revised Code, the policies adopted under this section *are not appropriate subjects for*

¹See, e.g., *Lewis v. Taylor*, 10 Ohio C.D. 205, 18 Ohio C.C. 443, 1899 WL 658 (Ohio Cir. 1899); *Green Co. v. Conness*, 109 U.S. 104 (1883); *Anderson v. Santa Anna*, 116 U.S. 356 (1886).

²*City of Cincinnati v Ohio Council 8, AFSCME* (1991), 61 Ohio St.3d 658, 1991 SERB 4-87.

collective bargaining." (emphasis added). The plain language of these statutes indicates that a prohibited subject of bargaining is a subject over which no bargaining is to take place.³ A violation would occur when the proposal concerning a prohibited subject is first presented.

The complaint alleges that the Union violated O.R.C. § 4117.11 (B)(3) by attempting to negotiate the prohibited subject of faculty workload, pursuant to O.R.C. § 3345.45, during contract negotiations. O.R.C. § 4117.11 provides in relevant part:

(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[.]

In this case, the content and timing of the Union's actions are critical to determining whether O.R.C. § 4117.11 (B)(3) has been violated. The Union's initial proposal entitled "1 2 Workload" discussed workload distribution, maximum workload, and what activities were included in teaching, scholarship, and service. In addition, its proposal also addressed overload compensation and release time before these items were moved to different articles of the collective bargaining agreement. Thus, the content of these proposals fell within the parameters of faculty workload addressed in O.R.C. § 3345.45.

The timing of the various court decisions is pivotal because the present case concerns the Union's actions when it was bargaining with the University from March 18, 1999 to October 8, 1999. On September 30, 1998, the Ohio Supreme Court decided in *AAUP I* that O.R.C. § 3345.45 was unconstitutional under the Ohio Constitution. It did not

³See, e.g., *National Maritime Union (Texas Co.)*, 78 NLRB 971, 22 L.R.R.M. 1289 (1948).

subsequently rule in *AAUP II* that this statute was constitutional under the Ohio Constitution until October 20, 1999. Thus, during the relevant time period when the parties were bargaining and the Union presented its “12 Workload” proposals, the Union was attempting to bargain over a subject that was not a prohibited subject at that time due to the *AAUP* /decision. Therefore, when we apply O.R.C. § 4117.11 (B)(3) to these facts, we find that the Union did not commit an unfair labor practice under the facts and law in effect at that time.

IV. CONCLUSION

For the reasons above, we find that the Wright State University Chapter of the American Association of University Professors did not violate O.R.C. § 4117.11 (B)(3) when it attempted to bargain over faculty workload because, during the relevant time period of this case, O.R.C. § 3345.45 had been found to be unconstitutional by the Ohio Supreme Court under the Ohio Constitution. As a result, the complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

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