

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of North Ridgeville,

Respondent.

Case No. 99-ULP-09-0506

**ORDER
(OPINION ATTACHED)**

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

On September 2, 1999, the North Ridgeville Fire Fighters, Local 2129, IAFF ("Charging Party") filed an unfair labor practice charge against the City of North Ridgeville ("Respondent"). On December 9, 1999, the State Employment Relations Board ("Board" or "Complainant") found probable cause to believe that the Respondent had violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5) and directed the matter to hearing.

The parties agreed to submit the case on stipulations and briefs in lieu of a hearing. On February 11, 2000, the "Joint Stipulations of Fact" were filed. On March 27, 2000, the parties filed their briefs. On April 6, 2000, the Board transferred the case from the Hearings Section for a decision on the merits.

After reviewing the stipulations of fact, the parties' briefs, and all filings, the Board finds for the reasons stated in the attached Opinion, incorporated by reference, that the City of North Ridgeville committed an unfair labor practice in violation of O.R.C. Sections 4117.11(A)(1) and (A)(5) when it unilaterally implemented physical fitness standards for fire fighters hired after June 9, 1999, since the City failed to show that the minimum physical fitness abilities or qualifications it established are valid measures of a fire fighters's ability to perform one or more essential functions of his or her job.

We hereby order the City of North Ridgeville to:

A. Cease and desist from:

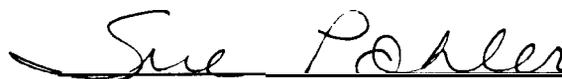
Interfering with, restraining, or coercing its bargaining-unit employees in the exercise of rights guaranteed in Ohio Revised Code Chapter 4117, or refusing to bargain collectively with the exclusive representative of its employees, and from otherwise violating Ohio Revised Code Sections 4117.11 (A)(1) and 4117.11 (A)(5).

B. Take the following affirmative action:

- (1) Reinstatement of the physical fitness policy as it existed before the unilateral changes on June 9, 1999;
- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the North Ridgeville Fire Fighters, Local 2129, IAFF work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the City of North Ridgeville shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- (3) Notify the State Employment Relations Board in writing within twenty calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

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 432154213, 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. Barailoux
SALLY L. BARAILLOUX, EXECUTIVE SECRETARY



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 North Ridgeville is hereby ordered to:

A. Cease and desist from:

Interfering with, restraining, or coercing its bargaining-unit employees in the exercise of rights guaranteed in Ohio Revised Code Chapter 4117, or refusing to bargain collectively with the exclusive representative of its employees, and from otherwise violating Ohio Revised Code Sections 4117.1 I(A)(I) and 4117.1 1(A)(5).

B. Take the following affirmative action:

- (1) Reinstate the physical fitness policy as it existed before the unilateral changes on June 9, 1999;
- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the North Ridgeville Fire Fighters, Local 2129, IAFF work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the City of North Ridgeville shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- (3) Notify the State Employment Relations Board in writing within twenty calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

SERB v. City of North Ridgeville
Case No. 99-ULP-09-0506

BY

DATE

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

ERB 2012 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,

Complainant,

v.

City of North Ridgeville,

Respondent.

Case No. 99-ULP-09-0506

OPINION

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") upon joint stipulations of fact and briefs filed by the parties. The issue to be decided is whether the unilateral implementation of physical fitness standards for fire fighters hired after June 9, 1999, by the City of North Ridgeville ("City") constitutes an unfair labor practice in violation of Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5). For the reasons below, we find that the city violated O.R.C. §§ 4117.11(A)(1) and (A)(5) by unilaterally implementing physical fitness standards for fire fighters hired after June 9, 1999, since the City failed to show that the minimum physical fitness abilities or qualifications it established are valid measures of a fire fighter's ability to perform one or more essential functions of his or her job.

I. FINDINGS OF FACT

1. The City of North Ridgeville ("City") is a public employer as defined by O.R.C. § 4117.01(B). (Stipulation ["S."] 1)
2. The North Ridgeville Professional Fire Fighters, Local 2129, IAFF ("Union") is an "employee organization" as defined by R.C. § 4117.01(D). The Union is the

- exclusive bargaining representative for the full-time fire fighters, lieutenants, and captains employed within the City's fire department. (S. 2)
3. The City and the Union are parties to a collective bargaining agreement effective January 1, 1999 to December 31, 2000 ("Agreement") containing a grievance procedure that culminates in final and binding arbitration. (S. 3; Jt. Exh. ["Jt. Exh."] 1.
 4. On June 9, 1999, the City's Division of Fire issued its "Guidelines for Physical Fitness Standards." The directive stated: "[I]t is the policy of this Department that all Firefighters hired after June 9, 1999 and all members who choose to voluntarily participate, will achieve and maintain established minimum physical fitness standards while employed by this Department." The individuals required to participate in the program will be tested at least twice per year. The directive further stated that failure to meet the minimum physical standards required reevaluation, counseling, a letter of reprimand, and more severe discipline. (S. 4; Jt. Exh. 2)
 5. The City did not negotiate with the Union concerning the establishment of the minimum physical standards nor was this subject ever discussed during contract negotiations. It was the City's position that it was not obligated to bargain with the Union under these circumstances. A request to bargain was not filed by the Union. (S. 5)
 6. After the June 9, 1999 directive, but prior to being hired as fire fighters for the City, Tony Carrozzino and Mark Cominsky were both required to sign a document acknowledging and agreeing to the directive and to have it notarized before starting work. (S. 6; Jt. Exhs. 6 and 8)
 7. The Union filed an unfair labor practice charge with SERB on September 2, 1999, pursuant to and in accordance with O.R.C. § 4117.12(B) and O.A.C. Rule 4117-7-01. On December 9, 1999, SERB determined that probable cause existed for believing the City had committed or was committing unfair labor practices, authorized the issuance of a complaint, referred the matter to hearing, and directed the parties to the unfair labor practice mediation process. (S. 7 and 8)
 8. The Union filed a grievance in this matter on August 23, 1999. Pursuant to the Agreement, the grievance was pursued through the third and final step of the grievance process, but was not pursued to arbitration. (S. 9; Jt. Exh. 3)
 9. Pursuant to a directive issued in April 1995, candidates for a fire fighter's position in the City of North Ridgeville were required to be licensed paramedics. Before that date, a paramedic license was not a requirement. (S. 11)

II. DISCUSSION

A. The City's Unilateral Implementation of Physical Fitness Standards for Fire Fighters hired after June 9, 1999, violated O.R.C. §§ 4117.11 (A)(1) and (A)(5).

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

(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 the 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). Thus, if a given subject involves the exercise of inherent managerial discretion and also materially affects any of these factors, 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 95010 (6-30-95) (hereinafter "Youngstown"). Those management decisions that are found, on balance, to be mandatory subjects must be bargained before implementation, upon notice by the employer and a timely request by the employees' organization, except where emergency situations render prior bargaining impossible.

In *Youngstown*, SERB adopted a balancing test for determining whether subjects of bargaining are mandatory or permissive when tension between O.R.C. § 4117.08(A) and O.R.C. § 4117.08(C) exists, as mentioned above. Under this test, the following factors must be balanced:

- 1) The extent to which the subject is logically and reasonably related to wages, hours, terms and conditions of employment;
- 2) The extent to which the employer's obligation to negotiate may significantly abridge its freedom to exercise those managerial prerogatives set forth in and anticipated by O.R.C. 4117.08(C), including an examination of the type of employer involved and whether inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and its obligations to the general public; and
- 3) The extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties are the appropriate means of resolving conflicts over the subject matter. *Id.* at 3-76 - 3-77.

In *Cuyahoga County Sheriff's Department*, SERB 99-018 (6-30-99), the employer unilaterally issued a dress code providing that if a Corrections Officer failed to report to duty in compliance with the policy, the officer would not be allowed to work, would be declared A.W.O.L., and would be subject to further disciplinary action. We noted that the dress code would have been a management prerogative if it had been properly formulated and implemented. We held that where an employer introduces a disciplinary component to a work rule or policy and the potential discipline affects wages, hours, or terms and other conditions of employment, the work rule or policy, whether new or revised, is a mandatory subject of bargaining. *Id.* at 3-17. Our focus in that case was on the disciplinary component, especially when the employer could declare a Corrections Officer A.W.O.L., which can result in the loss of income and other adverse employment consequences. We found that the disciplinary component directly affected wages. Employees can anticipate receiving discipline for insubordination or neglect of duty if they break a work rule or policy. The *Cuyahoga County Sheriff's Department* case is distinguishable from the present case because it introduced a new disciplinary component, the A.W.O.L. declaration and its subsequent effects, in addition to any discipline for breaking a work rule. We will apply its holding to cases with similar facts.

In *Youngstown*, we found that the aim of O.R.C. Chapter 4117 is not realized by requiring bargaining over every management decision that affects employee working conditions. Similarly, we find that the aim of O.R.C. Chapter 4117 is better realized by not requiring bargaining over *every* work rule or policy where a violation could result in some type of disciplinary action. Just as almost any managerial policy will have some effect on conditions of employment, so too will the violation of a work rule or policy always present the potential for disciplinary action affecting the terms and conditions of the violator's employment. Therefore, we incorporate disciplinary components of any challenged work rule or policy into prong one of the *Youngstown* balancing test. Thus, if the subject of the work rule or the type and degree of discipline specified for an infraction of any work rule or policy is alleged to affect and is determined to have a material influence upon wages, hours, or terms and other conditions of employment and the underlying work rule or policy involves the exercise of inherent management discretion, implementation of the work rule or policy must be bargained unless, on balance, it is determined to be a permissive subject of bargaining.

By a directive dated June 9, 1999, the City unilaterally established minimum physical fitness standards for all fire fighters hired after June 9, 1999. The directive required all new fire fighters to adhere to the established standards and required that they be tested twice a year to determine compliance. Moreover, the directive stated that failure to meet the minimum physical standards would require counseling, a letter of reprimand, and increasingly more severe discipline. The City did not negotiate with the exclusive representative of its full-time fire fighters, lieutenants, and captains, regarding the implementation of the minimum physical standards or the effects of a failure to meet said standards. The Union did not request to bargain over the standards; because of the policy's immediate implementation date, a request to bargain was not necessary since the matter was a *fait accompli* under *Youngstown*.

Under the first prong of the balancing test, the standards fall within the statutory phrase “wages, hours, and terms and conditions of employment.” Failure to meet the standards established by the City will result in disciplinary action against an employee. Continued failure will result in “increasingly more stringent disciplinary measures.” Presumably, continued failure ultimately could result in an employee’s removal. Therefore, it is clear that the minimum physical fitness standards established by the City have a material influence upon wages, hours, or other terms and conditions of employment.

Under the second prong of the test, the record is simply devoid of evidence showing any connection between an employee’s failure to perform satisfactorily on the prescribed physical fitness test and his or her inability to perform one or more essential functions of the job of fire fighter. We note that the physical fitness test requirements applied *only* to fire fighters hired after June 9, 1999, instead of all fire fighters. By not applying these standards to the current fire fighters, the City itself is saying that the standards are not essential for performance of the fire fighters’ duties. If an employer establishes minimum abilities or qualifications necessary to perform the work for which the employees were hired and it can be shown through validated tests, or other reliable evidence, that any employee not possessing the established abilities or qualifications simply cannot perform one or more essential functions of the job, then the employer could very effectively argue that inherent discretion in the area of physical fitness standards is necessary to achieve the employer’s essential mission and its obligations to the general public. Further, an employer could argue that any obligation to negotiate such standards would significantly abridge its freedom to exercise those management prerogatives set forth in and anticipated by O.R.C. § 4117.08(C) — especially its ability to maintain and improve the efficiency and effectiveness of governmental operations and to suspend, discipline, demote or discharge for just cause or layoff, transfer, assign, schedule, promote, or retain employees. O.R.C. § 4117.08(C)(3) and (C)(5). For public safety and policy considerations, no employer should be required to bargain over the implementation of a policy or work rule requiring

employees to possess the abilities and qualifications necessary to do their jobs or face discipline.

Under the third prong of the test, the City has not shown a nexus between the physical fitness standards and ability to do the job of a fire fighter. Absent such evidence, we cannot find that the work rule or policy does or does not lend itself to the mediatory influence of collective bargaining. Because no such evidence was presented, we cannot reach this conclusion in this case.

Balancing the three prongs, we find that the Union's interest under the first prong is strong. The City's interest under the second prong is weak because it failed to establish that its physical fitness standards were valid indicators of the ability to perform the duties of a fire fighter. As a result of such failure, the City's physical fitness standards are not demonstrably job related. Under the third prong, the mediatory influence of collective bargaining is appropriate for this subject matter. Therefore, we find that the physical fitness standards for fire fighters are a mandatory subject of bargaining under these facts. Thus, the City violated O.R.C. §§ 4117.1 I(A)(I) and (A)(5) when it implemented the standards without bargaining with the Union.

B. Waiver

Having concluded that physical fitness standards under the specific facts of this case are a mandatory subject of bargaining, it remains to be determined whether the Union has waived its right to bargain based on the Agreement's bargaining history and other extensive evidence. The City contends that several provisions of the parties' Agreement show that the Union has waived its right to bargain over physical fitness standards. Specifically, the City cites the language of Articles IV ("Management Rights"), IX ("Rules and Regulations"), XXX ("Obligation to Negotiate"), and XXXVI ("Total Agreement") of the Agreement.

It is well-settled that the waiver of a statutory right to bargain over a mandatory subject of bargaining must be established by clear and unmistakable action by the waiving party. *Youngstown, supra* at 3-81. It is not necessary that contract language specifically waive the right to bargain over a particular issue before the conduct of the parties can be considered. *Id.* A party's intent regarding waiver can be determined by examining contract language, bargaining history, and extrinsic evidence. *Id.* The question to be resolved is whether the Union by contract, bargaining history, or other extrinsic evidence waived its right to bargain over physical fitness standards for fire fighters hired after June 9, 1999. We find that the Union did not waive its right to bargain.

The City first claims the Union waived its right to bargain over physical fitness standards by the language contained in items 3 and 7 in Article IV of the Agreement. Item 7, by its terms, applies only to employees or positions "not within the bargaining unit established by this agreement" (emphasis added). Item 3, on the other hand, gives management the right to "determine the qualifications of employees covered by this Agreement consistent with applicable Civil Service Rules and Regulations." But the City has never claimed that the physical fitness standards it has imposed are qualifications for the position of fire fighter. If the standards were qualifications for the position of fire fighter, then all fire fighters employed by the City would be required to meet the standards, not just new hires. Moreover, no evidence has been presented to show that the standards are consistent with applicable Civil Service Rules and Regulations as required by the language of Item 7.

Article 9.01 of the Agreement provides that the City has the authority to promulgate work rules, policies, procedures and directives to regulate the conduct of the City's business. Such language is far too general and vague to meet the "clear and unmistakable" standard. It is also not controlling in this case that the Union may have waived its right to bargain in 1995, when the City imposed the requirement that candidates

for a fire fighter position possess a paramedic license. Waiver of rights in one instance does not constitute a waiver of rights in all instances. To hold otherwise would result in parties forcing negotiations even when they may agree with the proposed change simply because failure to do so could be used against them in subsequent, unrelated matters.

The City also argues that the so-called “zipper” clauses in the Agreement give it the right to implement its physical fitness policy without bargaining. Such clauses are intended to protect the status quo rather than provide justification for unilaterally changing the employment relationship. See, e.g., *NLRB v. General Electric Co.* (C.A. 2, 1969), 418 F.2d 736, *cert. denied*, 397 U.S. 965, 90 S. Ct. 995. Such clauses represent an agreement that the parties have resolved all proper subjects of bargaining for the duration of the collective bargaining agreement and allow either party to decline to negotiate on otherwise bargainable subjects. *City of St. Bernard v SERB*, 1994 SERB 4-52, 4-54 (1st Dist Ct App, Hamilton, 7-24-94) *citing Ohio Council 8, AFSCME v. Kent State University*, 93 Ohio App.3d 728, 1994 SERB 4-9 (10th Dist Ct App, Franklin, 3-29-94).

Article 30.02 of the Agreement states in clear and unmistakable language:

[F]or the life of this Agreement, the Employer and the Union each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to negotiate collectively with respect to any subject or matter not specifically referred to or covered by this Agreement, even though such matters or subject may not have been within the knowledge or contemplation of either or both parties at the time they negotiated and signed this Agreement.

This language limits the rights and obligations of both parties. It does not expand those rights and responsibilities.

Similarly, the language of Article 36.01 limits the City’s right to modify or discontinue rules, regulations, benefits, and practices to those “previously and presently in effect”

unless specifically set forth in the express provisions of the Agreement. No evidence has been presented showing that physical fitness standards had previously been in effect or were presently in effect at the time the Agreement was signed. In addition, the Agreement does not expressly grant to the City the right to impose such standards.

In conclusion, the physical fitness standards promulgated by the City are mandatory subjects of bargaining as they apply to members of the bargaining unit, and the Union has not waived its right to bargain over said standards. Therefore, the City is required to follow the procedure laid out in *Youngstown, supra*, and the City should have bargained over both the implementation of the physical fitness standards and their effect on wages, hours, terms, and other conditions of employment.

C. Remedy

To remedy this violation, the parties must be returned to the status quo that existed before the City implemented the physical fitness standards for the fire fighters. The City will be ordered to reinstate the physical fitness policy as it existed before the unilateral changes. In addition, a cease-and-desist order with a Notice to Employees shall be posted by the City for sixty days in the usual and normal posting locations where bargaining-unit employees represented by the Union work.

III. CONCLUSIONS OF LAW

1. The City of North Ridgeville is a public employer as defined by O.R.C. § 4117.01 (B).
2. The North Ridgeville Professional Fire Fighters, Local 2129, IAFF is an “employee organization” as defined by O.R.C. § 4117.01 (D).
3. When the City of North Ridgeville unilaterally implemented physical fitness standards for fire **fighters** hired after June 9, 1999, the City committed an unfair labor practice in violation of O.R.C. § 4117.11 (A)(I) and (A)(5).

IV. DETERMINATION

For the reasons above, we find that the City of North Ridgeville violated O.R.C. §§ 4117.11 (A)(I) and (A)(5) by unilaterally implementing physical fitness standards for fire fighters hired after June 9, 1999, since the City failed to show that the minimum physical fitness abilities or qualifications it established are valid measures of a fire fighter's ability to perform one or more essential functions of his or her job. The City will be ordered to reinstate the physical fitness policy as it existed before the unilateral changes. In addition, a cease-and-desist order with a Notice to Employees shall be posted by the City for sixty days in the usual and normal posting locations where bargaining-unit employees represented by the Union work.

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