

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Southwest Ohio Regional Transit Authority,

Respondent.

CASE NUMBER 2002-ULP-08-0522

**ORDER
(OPINION ATTACHED)**

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich: July 28, 2005

On August 2, 2002, the Amalgamated Transit Union, Local 627 (“Charging Party”) filed an unfair labor practice charge against the Southwest Ohio Regional Transit Authority (“Respondent”). On November 7, 2002, the State Employment Relations Board (“SERB,” “Board” or “Complainant”) determined that probable cause existed for believing the Respondent had committed or was committing unfair labor practices, authorized the issuance of a complaint, referred the matter to hearing to determine whether the Respondent violated Ohio Revised Code §§ 4117.11(A)(1) and (5) by unilaterally implementing a drug and alcohol policy, and directed the parties to the unfair labor practice mediation process. On April 24, 2003, after the parties filed joint stipulations of fact and agreed to waive the evidentiary hearing and submit legal briefs, stipulations of fact, and stipulations of evidence directly to the Board members, this matter was transferred from the Hearings Section to the Board for a decision on the merits.

After reviewing the complaint, answer, stipulations of fact and evidence, legal briefs, and all other filings in this case, the Board adopts the parties’ Joint Stipulations as Findings of Facts; concludes as a matter of law that the Respondent is a “public employer” within the meaning of Ohio Revised Code § 4117.01(B), that the Charging Party is an “employee organization” within the meaning of Ohio Revised Code § 4117.01(D), and that the Respondent did not violate Ohio Revised Code §§ 4117.11(A)(1) and (5) for the reasons set forth in

Order
Case No. 2002-ULP-08-0522
Date
Page 2 of 2

the attached Opinion, incorporated by reference. Therefore, the complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

It is so ordered.

DRAKE, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.

/s/ Carol Nolan Drake
CAROL NOLAN DRAKE, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code § 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 a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 20th day of September, 2005.

/s/ Donna J. Glanton
DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT

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Southwest Ohio Regional Transit Authority,

Respondent.

CASE NUMBER 2002-UJP-08-0522

OPINION

VERICH, Board Member:

I. INTRODUCTION

This unfair labor practice case comes before the State Employment Relations Board (“SERB” or “Complainant”) upon the filing of joint stipulations by the parties and the subsequent filing of briefs by the parties. The issue to be decided is whether the actions taken by the Southwest Ohio Regional Transit Authority (“SORTA”) constituted 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 SORTA did not violate O.R.C. §§ 4117.11(A)(1) and (A)(5) by unilaterally implementing revisions to its Drug and Alcohol Policy (the “Policy” or “Program”).

II. JOINT STIPULATIONS

1. SORTA is a “public employer” as defined by O.R.C. § 4117.01(B).
2. The Amalgamated Transit Union, Local 627 (“Union”), Intervenor, is an

“employee organization” as defined by O.R.C. § 4117.01(D) and is the exclusive representative for a bargaining unit of SORTA’s employees, including bus operators, mechanics, and clerks.

3. SORTA operates a mass transit system servicing the public in Cincinnati and other parts of Hamilton County, Ohio.

4. As a mass transit provider, SORTA is and has been required by Department of Transportation (“DOT”) and Federal Transit Administration (“FTA”) regulations to implement and maintain a drug and alcohol program, as well as perform various types of drug and alcohol testing.

5. In the early 1980’s, SORTA unilaterally implemented a Coach Operator Manual. (Jt. Exh. 1)

6. The Coach Operator Manual contained (and still contains) a work rule on Page 7G that prohibits operating a coach while under the influence of alcohol or drugs.

7. The Union did not file a grievance under the applicable collective bargaining agreement over SORTA’s unilateral implementation of the Coach Operator Manual.

8. The Union did not file an unfair labor practice charge with SERB over SORTA’s unilateral implementation of the Coach Operator Manual.

9. SORTA first implemented its Drug & Alcohol Program (the “Program”) in 1988. (Jt. Exh. 2)

10. On or about November 17, 1988, the Union filed an unfair labor practice

charge with SERB over SORTA's unilateral implementation of its Program. The Union alleged that SORTA refused to collectively bargain over the Program in violation of O.R.C. § 4117.11(A)(5). (Jt. Exh. 3)

11. On or about December 14, 1988, the Union filed a grievance under the applicable collective bargaining agreement over SORTA's unilateral implementation of its Program. The Union asserted that SORTA violated the collective bargaining agreement by unilaterally implementing the Program. (Jt. Exh. 4)

12. Joint Exhibits 5, 6, 7, 8 and 9 are true and accurate copies of the collective bargaining agreements that have been in effect between SORTA and the Union from February 12, 1988 to the present.

13. Each of the collective bargaining agreements referenced above in Paragraph 12 contains a grievance process that culminates in final and binding arbitration.

14. None of the collective bargaining agreements referenced above in Paragraph 12 contains a midterm bargaining process.

15. On October 24, 1989, an arbitration hearing was held before Arbitrator Richard W. Dissen on the Union's grievance over SORTA's unilateral implementation of its Program.

16. In a Directive dated February 1, 1990, SERB dismissed with prejudice the unfair labor practice charge filed by the Union over SORTA's unilateral implementation of its Program, after granting the Union's request to withdraw the same. (Jt. Exh. 10)

17. In an Opinion and Award dated March 7, 1990, Arbitrator Dissen denied the grievance filed by the Union over SORTA's unilateral implementation of its Program. (Jt. Exh. 11)

18. Joint Exhibit 12 is a true and accurate copy of the Hamilton County Court of Appeals' decision in *Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union*, 1994 WL 525543 (Ohio Ct. App. 9/28/94).

19. In February 1995, SORTA unilaterally implemented revisions to its Program. (Jt. Exh. 13)

20. The Union did not file a grievance under the applicable collective bargaining agreement over SORTA's unilateral implementation of the 1995 revised Program.

21. The Union did not file an unfair labor practice charge with SERB over SORTA's unilateral implementation of the 1995 revised Program.

22. From February 1995 to April 2002, SORTA updated the Program as necessary due to changes in the federal regulations.

23. By letter dated April 23, 2002, SORTA notified the Union that SORTA again was revising the Program and provided the Union with a copy of the revised Program and a summary of the revisions. (Jt. Exh. 14)

24. By letter dated April 29, 2002, the Union made a demand to bargain over the revised Program. (Jt. Exh. 15)

25. By letter dated May 24, 2002, SORTA responded to the Union, indicating

that, under the Dissen Award and the Hamilton County Court of Appeals' decision in *Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union*, SORTA had the right to unilaterally implement the revisions to its Program. (Jt. Exh. 16)

26. In July 2002, SORTA unilaterally implemented the revisions of its Program. Joint Exhibit 17 is a true and accurate copy of correspondence dated July 23, 2002 and attachments from SORTA to the Union regarding SORTA's unilateral implementation of the revisions to its Program. Also attached to the July 23, 2002 correspondence were the revised 1995 Program, referenced in Paragraph 19 and attached as Joint Exhibit 13, and the revised April 2002 Program, referenced above in Paragraph 23 and attached as part of Joint Exhibit 14.

27. Joint Exhibit 18 is a true and accurate copy of an excerpt of a transcript of an arbitration hearing between SORTA and the Union captioned *Southwest Ohio Regional Transit Authority, Metro Operating Division and Amalgamated Transit Union, Local 627*, Case No. 52 390 00550 95 (the "Wynn Arbitration").

28. Joint Exhibit 19 is a true and accurate copy of an excerpt of a transcript of an arbitration hearing between SORTA and the Union captioned *Southwest Ohio Regional Transit Authority, Metro Operating Division and Amalgamated Transit Union, Local 627*, Case No. 52 390 00251 97 (the "Sundstrom Arbitration").

29. Joint Exhibit 20 is a true and accurate copy of an excerpt of a transcript of an arbitration hearing between SORTA and the Union captioned *Southwest Ohio Regional Transit Authority, Metro Operating Division and Amalgamated Transit Union, Local 627*, Case No. 52 390 00377 98 (the "Kendrick Arbitration").

30. The parties stipulate that no legislative action taken after the effective date of

the current collective bargaining agreement, February 1, 2000, is at issue in this SERB proceeding.

31. The parties stipulate to an absence of exigent circumstances unforeseen at the time of negotiations of the current collective bargaining agreement such as would affect this SERB proceeding.

32. The parties stipulate that no witness testimony is necessary to authenticate documents or augment the essential facts at issue as set forth here.

33. The parties jointly request that the Administrative Law Judge submit the matter directly to SERB for decision on the merits.

III. DISCUSSION

The issue is whether SORTA's unilateral implementation of revisions to its Drug and Alcohol Policy without bargaining as to the bargaining-unit employees constitutes an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5), which provide in relevant part 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[.]

A. SORTA Did Not Violate O.R.C. §§ 4117.11(A)(1) and (A)(5) By Unilaterally Implementing Revisions to the Drug & Alcohol Policy.

(1) The Four Corners of the Dissen Award

In 1988, SORTA attempted to consolidate existing physical examination policies into a single comprehensive program. General guidelines as to the administration of the drug/alcohol screen, the dissemination of results, and the consequences of positive testing were contained within the written program. Upon implementation of the program, a grievance was filed on behalf of the entire Union membership. SORTA denied the grievance and, after unsuccessful attempts to resolve the issue, the matter proceeded to arbitration. The question presented to Arbitrator Dissen was whether SORTA improperly implemented a “Medical and Drug Testing Program” during the term of an existing collective bargaining agreement (“1988-1991 Agreement”).¹ Specifically, the Union’s central contractual complaint was that SORTA’s unilateral implementation of the program touched upon a mandatory subject of bargaining and, moreover, altered certain negotiated provisions of the existing contract.²

To the contrary, SORTA argued that the unilateral action taken was within the scope of its authority under the 1988-1991 Agreement. Specifically, SORTA emphasized that Sections 1(b) and 26(a) of the Agreement, and management’s long practice of unilaterally instituting health and safety-related rules of employee conduct, indicated that the establishment of the Medical and Drug Testing Program was within the contemplated scope of management’s rights. Arbitrator Dissen concurred with SORTA, denied the grievance, and noted that the “record strongly supports [SORTA’s] assertion that since, at least 1980, management has asserted and exercised broad unilateral authority on the

¹ Jt. Exhibit 11, p. 2

² Jt. Exhibit 11, p. 17

matter of ascertaining and monitoring employees' fitness for work."³

Arbitrator Dissen's explanations are fundamentally relevant to the present case. The thrust of Dissen's Award was that the 1988-1991 Agreement did not prohibit SORTA from introducing and establishing a drug-testing program. Arbitrator Dissen concluded that "Section 26(a) of the parties' agreement plainly contemplates that [SORTA] will from time to time establish new rules, provided such rules are promulgated for the purpose of ensuring successful and efficient operations." Accordingly, Arbitrator Dissen declared that SORTA management was not precluded from introducing a rule establishing drug and alcohol testing as a facet of its overall fitness policy. Arbitrator Dissen further acknowledged that given the authorization within Section 26(a) and given that SORTA had previously exercised unilateral authority in monitoring employee fitness, SORTA's authority to introduce, unilaterally, a drug/alcohol program could not be convincingly challenged under the 1988-1991 Agreement.⁴

The parties in the present case have construed the Dissen Award to hold distinctive meanings. SORTA asserts that the Dissen Award recognized its right to unilaterally implement the Program.⁵ Thus, SORTA interpreted the Opinion to mean it had the right to *introduce* and subsequently *implement* its *entire* program.

On the other hand, the Union holds firm to the principle that the Dissen Award does not establish SORTA's right to unilaterally impose *disciplinary consequences* under the Drug and Alcohol Policy. Specifically, the Union asserts that its grievance leading to the Dissen Award protested the implementation of a *testing program altogether*. Unlike the Dissen grievance, the complaint at hand protests SORTA's refusal to bargain over the

³ Jt. Exhibit 11, pp. 19-20

⁴ Jt. Exhibit 11, p. 21

⁵ SORTA Brief at p. 13

disciplinary consequences for positive test results.⁶

After extensive review of the Dissen Award, the interpretation of the Award hinges upon a key phrase: “[t]he board makes the general finding that [SORTA’s] unilateral action was within its authority under the collective bargaining agreement.”⁷ More specifically, the key words within that phrase are “unilateral action.” Hence, the determination to be made at this point is what constitutes the “unilateral action” that gave rise to the present case.

While significant unilateral actions pertaining to the Program have occurred since 1986, the most noteworthy unilateral action, and, hence, what gave rise to the instant dispute, is the grievable event. In the grievance before Arbitrator Dissen, the Union contended that the grievable event in the matter occurred on December 1, 1988. It was on this date that SORTA’s Medical and Drug Testing Program was implemented.⁸ Arbitrator Dissen concurred with the Union as he ruled that the grievance was timely filed since it was filed within ten workdays of the date of implementation of the Medical and Drug Testing Program.⁹ Consequently, the “unilateral action” Arbitrator Dissen speaks of in his key phrase is the implementation of the Medical and Drug Testing Program.

Finally, and most importantly, is the issue of Medical and Drug Testing Program “implementation.” The focal point, as the Union argues, is that the Dissen Award does not establish SORTA’s right to unilaterally impose disciplinary consequences under its Program. As noted above, the written program contained general guidelines as to the administration of the drug/alcohol screen, the dissemination of results, and *the*

⁶ Union Brief at p. 10

⁷ Jt. Exhibit 11, p. 24

⁸ Jt. Exhibit 11, p. 5

⁹ Jt. Exhibit 11, p. 16

*consequences of positive testing.*¹⁰ Arbitrator Dissen concluded that SORTA's unilateral action (i.e. Program implementation) was within its authority under the collective bargaining agreement. Thus, despite the Union's contentions, implementation of the Program meant executing the specifics of the program, including the enforcement of disciplinary consequences for positive testing. Thus, for the reasons outlined above, the Union's argument concerning the Dissen Award fails.

(2) Mandatory and Permissive Subjects of Bargaining

Another issue for clarification is whether SORTA unlawfully implemented a written policy affecting terms and conditions of employment without first bargaining with the Union.

In *In re SERB v. Youngstown City School Dist. Bd. Of Ed.*, SERB 95-010 (6-30-95) ("*Youngstown*"), the Board adopted a balancing test to better identify those subjects about which public employers must bargain in Ohio.¹¹ In *Youngstown*, the Board held that the Youngstown City School District Board of Education committed an unfair labor practice by unilaterally implementing its Early Retirement Incentive Plan ("ERIP") because the ERIP was a mandatory subject of bargaining under the three-part balancing test announced within the opinion.¹² Specifically, the Board set forth a balancing test that can be utilized "if a given subject is alleged to affect and is determined to have a material influence upon wages, hours, or terms and other conditions of employment *and* involves the exercises of inherent management discretion..." The following three factors must be balanced to determine whether a given subject is a mandatory or permissive subject of bargaining:

¹⁰ Jt. Exhibit 11, p. 2

¹¹ *In re SERB v. Youngstown City School Dist. Bd. Of Ed.*, SERB 95-010 (6-30-95), p. 3-70

¹² *Id.* at 3-83

- (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 obligation 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.¹³

Accordingly, management decisions that are found, on balance, to be permissive subjects, can be implemented without bargaining the decision unless it would conflict with a contract provision.¹⁴

As noted in *Youngstown*, the three-part balancing test is not necessary or appropriate in every situation. The test should be used when the subjects have both a material influence upon wages, hours, or terms and other conditions of employment and involve the exercise of inherent managerial discretion.¹⁵ Given the Union's assertion that disciplinary consequences are mandatory subjects of bargaining and SORTA's assertion that the implementation of the Policy was within its management rights, analysis under the three-part balancing test is necessary.

Under the first part of the balancing test, it can be established that the 2002 Drug and Alcohol Policy ("Policy"), including disciplinary consequences, is logically and

¹³ *In re SERB v. Youngstown City School Dist. Bd. Of Ed.*, SERB 95-010 (6-30-95), p. 3-76

¹⁴ *Id.* at 3-77

¹⁵ *Id.* at 3-78

reasonably related to terms and conditions of employment. Specifically, the 2002 Policy recognized, “the penalty for any violation of the ‘Substance Abuse Policy’ or ‘Drug-Free Workplace Act’ is *discipline up to and including termination depending on circumstances.*”¹⁶ A violation of the Policy can result in discipline and, therefore, the Policy established by SORTA does have an influence on the terms and conditions of employment.

However, under the second part of the test, the extent to which the employer’s [SORTA’s] obligation to negotiate may significantly abridge its freedom to exercise managerial prerogatives is great. For instance, the Policy is a necessary element to assist in “effectively manag[ing] the work force” pursuant to O.R.C. § 4117.08(C)(8) and, likewise, the Policy affects SORTA’s right to “suspend, discipline, demote or discharge for just cause...” pursuant to O.R.C. § 4117.08(C)(5). Furthermore, SORTA’s inherent discretion on implementing the Policy is necessary to achieve its mission of protecting passengers and the general public when operating its mass transit system. Unlike *Youngstown*, the Policy does not speed up any staff reduction process. To the contrary, the Policy’s purpose is to provide guidelines to be followed should an unfortunate violation occur.

In *In re City of North Ridgeville*, SERB 2000-008 (6-22-00) (“*North Ridgeville*”), the Board held that “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 job or face discipline.”¹⁷ While *North Ridgeville* involved a unilateral implementation of physical fitness standards for fire fighters, the principle of both the SORTA policy and the *North Ridgeville* policy is

¹⁶ Jt. Exhibit 14, p. 14

¹⁷ *In re City of North Ridgeville*, SERB 2000-008 (6-22-00), p. 3-51

indistinguishable: to ensure the employees are fully capable of performing their job tasks, particularly because both positions involve the safety of the general public. One purpose behind the SORTA Policy is to require employees to be void of drugs or alcohol so that they possess the abilities to adequately perform their jobs in light of public safety concerns. Accordingly, SORTA has established an overriding management objective that justifies its unilateral action under the second part and should not be required to bargain over the implementation of its Policy.

The third part of the balancing test requires an examination of the extent to which the collective bargaining process is an appropriate method to resolve the conflict over the instant subject matter. We conclude that the collective bargaining process is not to a great extent an appropriate method in resolving the present conflict. While the collective bargaining process is a powerful, meaningful process, the parties' history demonstrates that bargaining over the Drug and Alcohol Policy is unnecessary. This history is evidenced by the several previous collective bargaining agreements between the parties that did not contain negotiated provisions pertaining to the Drug and Alcohol Policy and, specifically, its disciplinary consequences section. Balancing the three prongs, we find that the Drug and Alcohol Policy, including the disciplinary consequences section, is not a mandatory subject of bargaining.

Next, both the Complainant and the Union cite to *In re Toledo City School District Board of Education*, SERB 01-005 (10-1-01) ("*Toledo*"). In *Toledo*, the Board stated as follows:

Where the parties have not adopted procedures in their collective bargaining agreement to deal with midterm bargaining disputes, SERB will apply the following standard to determine whether an unfair labor practice has been committed when a party unilaterally modifies a provision in an existing collective bargaining agreement

after bargaining the subject to ultimate impasse as defined in *Vandalia-Butler*:

A party cannot modify an existing collective bargaining agreement without the negotiation by and agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unforeseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement became effective that requires a change to conform to the statute.

In addition, to clarify *Youngstown*, follow *Franklin County Sheriff*, and assure consistency in future cases involving issues not covered in the provisions of a collective bargaining agreement, but which require mandatory midterm bargaining, SERB will apply the same two-part test as stated above.”¹⁸

Specifically, the Complainant and the Union argue that under *Toledo* the circumstances present in the case at hand do not permit SORTA to modify a mandatory subject of bargaining. While the Complainant and Union are correct in arguing that there is no mid-term bargaining procedure, they are incorrect in concluding that the *Toledo* standard applies to the case at hand. In order for *Toledo* to apply, a provision within an existing CBA must be modified,¹⁹ or a mandatory subject of bargaining not covered by the CBA must be unilaterally changed midterm.

Here, no contractual provision was ever modified. Specifically, the bargaining agreement in effect at the time provided, in Section 3(b), that “there shall be no discharge, suspension or other disciplinary action without *sufficient cause* or without notification to employee of reason, in writing”²⁰ (emphasis added). Likewise, the Policy’s section on disciplinary consequences provided that “the penalty for any violation of the ‘Substance Abuse Policy’ or ‘Drug-Free Workplace Act’ is *discipline up to and including termination*

¹⁸ Complainant Brief at p. 6; Union Brief at p. 7

¹⁹ *Id.* at 3-29

²⁰ Jt. Exhibit 9, p. 3

*depending on circumstances*²¹ (emphasis added). The CBA and Policy work in tandem. The CBA requires sufficient cause, and the Policy simply defines what may constitute sufficient cause.

Neither does this case present the other trigger for the *Toledo* standard to be applied, i.e., a midterm change in a mandatory subject not covered by the CBA. For the reasons stated in Section (2) above, the Drug and Alcohol Policy, including the disciplinary consequences section, is not a mandatory subject of bargaining in this case. Because the *Toledo* standard does not apply to the case at hand, we need not decide whether SORTA's actions satisfied the limited circumstances under which the *Toledo* decision permits midterm unilateral changes.

Finally, after the Dissen Arbitration in 1990, SORTA and the Union negotiated *four* successor contracts, none of which changed the arbitrator's interpretation or included modified disciplinary provisions. For instance, SORTA formally revised the 1988 Drug and Alcohol Policy in February 1995 and unilaterally implemented the Program without bargaining with the Union.²² Specifically, the disciplinary consequences section was revised to provide that "[t]he penalty for any violation of the 'Substance Abuse Policy' or 'Drug-Free Workplace Act' is immediate termination of employment, except for item #3 and #12 listed below."²³ SORTA informed the Union of the changes to the Program; and the Union did not file a grievance or ULP charge with SERB.²⁴ When it came time for a new CBA, the final version, effective from 1997-2000, did not revoke, modify, or eliminate the Dissen Arbitration.

Likewise, Section 28 of the 2000-2003 Agreement, specifically states, in part, as

²¹ Jt. Exhibit 14, p. 14

²² Jt. Stipulation ¶¶19

²³ Jt. Exhibit 13, p. 20

²⁴ Jt. Stipulations ¶¶20-21

follows:

All prior concessions granted by agreement...or arbitration and not summarily revoked, modified or eliminated and not conflicting with this Agreement, shall remain in force during the period of this agreement so far as consistent with the proper schedules and operating methods.²⁵

Consequently, the interpretation of the contract in the Dissen Award thereby continued in effect as a part of the contract.

For the reasons listed above, we find that the Drug and Alcohol Policy is not a mandatory subject of bargaining and, thus, the unilateral implementation of the Policy does not violate O.R.C. §§ 4117.11(A)(1) and (5).

(3) Collateral Estoppel

In reference to the doctrine of collateral estoppel, the Supreme Court of Ohio has held that:

[A] fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different...[T]he collateral estoppel aspect precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action that was based on a different cause of action.²⁶

SORTA contends that the Dissen Award and a Court of Appeals decision raise a collateral estoppel bar. Specifically, SORTA argues that the finding in the Dissen Award,

²⁵ Jt. Exhibit 9, p. 53

²⁶ *Fort Frye Teachers Ass'n v. SERB*, 81 Ohio St. 3d 392, 692 N.E.2d 140, 144 (1998)

recognizing SORTA's right to unilaterally implement the Program, was expressly acknowledged by the Ohio Court of Appeals in *SORTA v. Amalgamated Transit Union*, 1994 WL 525543 (Ohio Ct. App. Sept. 28, 1994) ("*ATU 1994*").²⁷

In contrast, the Union disputes the contention that the complaint is barred by collateral estoppel and argues that to the extent collateral estoppel is applicable, it should foreclose SORTA's argument in support of unilateral implementation. The Union contends that the Court of Appeals' observation in *ATU 1994* pertaining to SORTA's right to promulgate the drug and alcohol program was merely dicta with no legal effect. The Union asserts the observation was not integral to the Court's holding that the disputed arbitration award should be vacated because it violated public policy.²⁸ Additionally, the Union maintains that even if that portion of the Opinion constituted binding precedent, it would no longer be good law due to *SORTA v. Amalgamated Transit Union, Local 627*, 91 Ohio St.3d 108 (2001) ("*ATU 2001*").²⁹ In *ATU 2001*, the Supreme Court found that "SORTA did not have the right to unilaterally adopt automatic termination without possibility of reinstatement as a sanction for positive testing, because such a sanction conflicts with the "sufficient cause" requirement for dismissal found in Section 3(b) of the [collective bargaining agreement]."³⁰

As established earlier in this Opinion, the disputed disciplinary consequences section in the 2002 Drug and Alcohol Policy does not modify or conflict with the "sufficient cause" requirement for dismissal as identified in Section 3(b) of the collective bargaining agreement. The Policy simply defines what may constitute sufficient cause. Hence, the Union's argument that the *ATU 2001* case is controlling fails.

²⁷ SORTA Brief at p. 10

²⁸ Union Brief at p. 9.

²⁹ *Id.*

³⁰ *Id.*

Regardless, courts have upheld the application of collateral estoppel to the decisions of arbitrators. In *Boyle v. City of Portsmouth*, 18 OPER ¶ 1485 (Ohio Ct. App. 2001), the court applied the doctrine of collateral estoppel and held that an issue had already been litigated between the parties where the case was initially decided by an arbitrator and then later reviewed by a common pleas court.³¹ SERB is not legally bound to accept an arbitrator's interpretation of a contract in an unfair labor practice case.³² In the present matter, however, we do agree with the arbitrator's interpretation of the contract. Moreover, having recognized that the contract language remains the same and that the arbitrator's interpretation has not since been revoked, modified, or eliminated, we hold that the Union is collaterally estopped from pursuing the current unfair labor practice charge.

Having established that the Dissen Award was still in effect and applicable to disciplinary consequences, that the Drug and Alcohol Policy was not a mandatory subject of bargaining but rather within SORTA's management rights, and that the Union is collaterally estopped from pursuing this unfair labor practice charge, SORTA's actions and conduct do not constitute bad faith bargaining in contravention of §§ 4117.11(A)(1) and (A)(5).³³

³¹ *Id.* at 5-6.

³² *In re SERB v. Youngstown City School Dist. Bd. of Ed.*, SERB 95-010 (6-30-95), p. 3-79

³³ Because we are persuaded that these listed defenses are sufficient, we need not specifically address other defenses offered by SORTA, i.e., that the Charging Party had slept on its rights, that it was equitably estopped through acquiescence in the Policy, and that it was collaterally estopped by means of voluntarily dismissing an unfair labor practice charge challenging the Policy.

IV. CONCLUSIONS OF LAW

1. SORTA is a "public employer" within the meaning of O.R.C. § 4117.01(B).
2. The Amalgamated Transit Union, Local 627, Intervenor, is an "employee organization" within the meaning of O.R.C. § 4117.01(D).
3. SORTA's unilateral changes to the Drug and Alcohol Policy without bargaining as to bargaining-unit employees does not constitute an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).

V. DETERMINATION

For the reasons above, we find that the Southwest Ohio Regional Transit Authority did not make unlawful unilateral revisions to its Drug and Alcohol Policy. Accordingly, we find that the Southwest Ohio Regional Transit Authority did not commit an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).

Drake, Chairman, and Gillmor, Vice Chairman, concur.

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OPINION

VERICH, Board Member:

I. INTRODUCTION

This unfair labor practice case comes before the State Employment Relations Board (“SERB” or “Complainant”) upon the filing of joint stipulations by the parties and the subsequent filing of briefs by the parties. The issue to be decided is whether the actions taken by the Southwest Ohio Regional Transit Authority (“SORTA”) constituted 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 SORTA did not violate O.R.C. §§ 4117.11(A)(1) and (A)(5) by unilaterally implementing revisions to its Drug and Alcohol Policy (the “Policy” or “Program”).

II. JOINT STIPULATIONS

1. SORTA is a “public employer” as defined by O.R.C. § 4117.01(B).
2. The Amalgamated Transit Union, Local 627 (“Union”), Intervenor, is an

“employee organization” as defined by O.R.C. § 4117.01(D) and is the exclusive representative for a bargaining unit of SORTA’s employees, including bus operators, mechanics, and clerks.

3. SORTA operates a mass transit system servicing the public in Cincinnati and other parts of Hamilton County, Ohio.

4. As a mass transit provider, SORTA is and has been required by Department of Transportation (“DOT”) and Federal Transit Administration (“FTA”) regulations to implement and maintain a drug and alcohol program, as well as perform various types of drug and alcohol testing.

5. In the early 1980’s, SORTA unilaterally implemented a Coach Operator Manual. (Jt. Exh. 1)

6. The Coach Operator Manual contained (and still contains) a work rule on Page 7G that prohibits operating a coach while under the influence of alcohol or drugs.

7. The Union did not file a grievance under the applicable collective bargaining agreement over SORTA’s unilateral implementation of the Coach Operator Manual.

8. The Union did not file an unfair labor practice charge with SERB over SORTA’s unilateral implementation of the Coach Operator Manual.

9. SORTA first implemented its Drug & Alcohol Program (the “Program”) in 1988. (Jt. Exh. 2)

10. On or about November 17, 1988, the Union filed an unfair labor practice

charge with SERB over SORTA's unilateral implementation of its Program. The Union alleged that SORTA refused to collectively bargain over the Program in violation of O.R.C. § 4117.11(A)(5). (Jt. Exh. 3)

11. On or about December 14, 1988, the Union filed a grievance under the applicable collective bargaining agreement over SORTA's unilateral implementation of its Program. The Union asserted that SORTA violated the collective bargaining agreement by unilaterally implementing the Program. (Jt. Exh. 4)

12. Joint Exhibits 5, 6, 7, 8 and 9 are true and accurate copies of the collective bargaining agreements that have been in effect between SORTA and the Union from February 12, 1988 to the present.

13. Each of the collective bargaining agreements referenced above in Paragraph 12 contains a grievance process that culminates in final and binding arbitration.

14. None of the collective bargaining agreements referenced above in Paragraph 12 contains a midterm bargaining process.

15. On October 24, 1989, an arbitration hearing was held before Arbitrator Richard W. Dissen on the Union's grievance over SORTA's unilateral implementation of its Program.

16. In a Directive dated February 1, 1990, SERB dismissed with prejudice the unfair labor practice charge filed by the Union over SORTA's unilateral implementation of its Program, after granting the Union's request to withdraw the same. (Jt. Exh. 10)

17. In an Opinion and Award dated March 7, 1990, Arbitrator Dissen denied the grievance filed by the Union over SORTA's unilateral implementation of its Program. (Jt. Exh. 11)

18. Joint Exhibit 12 is a true and accurate copy of the Hamilton County Court of Appeals' decision in *Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union*, 1994 WL 525543 (Ohio Ct. App. 9/28/94).

19. In February 1995, SORTA unilaterally implemented revisions to its Program. (Jt. Exh. 13)

20. The Union did not file a grievance under the applicable collective bargaining agreement over SORTA's unilateral implementation of the 1995 revised Program.

21. The Union did not file an unfair labor practice charge with SERB over SORTA's unilateral implementation of the 1995 revised Program.

22. From February 1995 to April 2002, SORTA updated the Program as necessary due to changes in the federal regulations.

23. By letter dated April 23, 2002, SORTA notified the Union that SORTA again was revising the Program and provided the Union with a copy of the revised Program and a summary of the revisions. (Jt. Exh. 14)

24. By letter dated April 29, 2002, the Union made a demand to bargain over the revised Program. (Jt. Exh. 15)

25. By letter dated May 24, 2002, SORTA responded to the Union, indicating

that, under the Dissen Award and the Hamilton County Court of Appeals' decision in *Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union*, SORTA had the right to unilaterally implement the revisions to its Program. (Jt. Exh. 16)

26. In July 2002, SORTA unilaterally implemented the revisions of its Program. Joint Exhibit 17 is a true and accurate copy of correspondence dated July 23, 2002 and attachments from SORTA to the Union regarding SORTA's unilateral implementation of the revisions to its Program. Also attached to the July 23, 2002 correspondence were the revised 1995 Program, referenced in Paragraph 19 and attached as Joint Exhibit 13, and the revised April 2002 Program, referenced above in Paragraph 23 and attached as part of Joint Exhibit 14.

27. Joint Exhibit 18 is a true and accurate copy of an excerpt of a transcript of an arbitration hearing between SORTA and the Union captioned *Southwest Ohio Regional Transit Authority, Metro Operating Division and Amalgamated Transit Union, Local 627*, Case No. 52 390 00550 95 (the "Wynn Arbitration").

28. Joint Exhibit 19 is a true and accurate copy of an excerpt of a transcript of an arbitration hearing between SORTA and the Union captioned *Southwest Ohio Regional Transit Authority, Metro Operating Division and Amalgamated Transit Union, Local 627*, Case No. 52 390 00251 97 (the "Sundstrom Arbitration").

29. Joint Exhibit 20 is a true and accurate copy of an excerpt of a transcript of an arbitration hearing between SORTA and the Union captioned *Southwest Ohio Regional Transit Authority, Metro Operating Division and Amalgamated Transit Union, Local 627*, Case No. 52 390 00377 98 (the "Kendrick Arbitration").

30. The parties stipulate that no legislative action taken after the effective date of

the current collective bargaining agreement, February 1, 2000, is at issue in this SERB proceeding.

31. The parties stipulate to an absence of exigent circumstances unforeseen at the time of negotiations of the current collective bargaining agreement such as would affect this SERB proceeding.

32. The parties stipulate that no witness testimony is necessary to authenticate documents or augment the essential facts at issue as set forth here.

33. The parties jointly request that the Administrative Law Judge submit the matter directly to SERB for decision on the merits.

III. DISCUSSION

The issue is whether SORTA's unilateral implementation of revisions to its Drug and Alcohol Policy without bargaining as to the bargaining-unit employees constitutes an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5), which provide in relevant part 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[.]

A. SORTA Did Not Violate O.R.C. §§ 4117.11(A)(1) and (A)(5) By Unilaterally Implementing Revisions to the Drug & Alcohol Policy.

(1) The Four Corners of the Dissen Award

In 1988, SORTA attempted to consolidate existing physical examination policies into a single comprehensive program. General guidelines as to the administration of the drug/alcohol screen, the dissemination of results, and the consequences of positive testing were contained within the written program. Upon implementation of the program, a grievance was filed on behalf of the entire Union membership. SORTA denied the grievance and, after unsuccessful attempts to resolve the issue, the matter proceeded to arbitration. The question presented to Arbitrator Dissen was whether SORTA improperly implemented a “Medical and Drug Testing Program” during the term of an existing collective bargaining agreement (“1988-1991 Agreement”).¹ Specifically, the Union’s central contractual complaint was that SORTA’s unilateral implementation of the program touched upon a mandatory subject of bargaining and, moreover, altered certain negotiated provisions of the existing contract.²

To the contrary, SORTA argued that the unilateral action taken was within the scope of its authority under the 1988-1991 Agreement. Specifically, SORTA emphasized that Sections 1(b) and 26(a) of the Agreement, and management’s long practice of unilaterally instituting health and safety-related rules of employee conduct, indicated that the establishment of the Medical and Drug Testing Program was within the contemplated scope of management’s rights. Arbitrator Dissen concurred with SORTA, denied the grievance, and noted that the “record strongly supports [SORTA’s] assertion that since, at least 1980, management has asserted and exercised broad unilateral authority on the

¹ Jt. Exhibit 11, p. 2

² Jt. Exhibit 11, p. 17

matter of ascertaining and monitoring employees' fitness for work."³

Arbitrator Dissen's explanations are fundamentally relevant to the present case. The thrust of Dissen's Award was that the 1988-1991 Agreement did not prohibit SORTA from introducing and establishing a drug-testing program. Arbitrator Dissen concluded that "Section 26(a) of the parties' agreement plainly contemplates that [SORTA] will from time to time establish new rules, provided such rules are promulgated for the purpose of ensuring successful and efficient operations." Accordingly, Arbitrator Dissen declared that SORTA management was not precluded from introducing a rule establishing drug and alcohol testing as a facet of its overall fitness policy. Arbitrator Dissen further acknowledged that given the authorization within Section 26(a) and given that SORTA had previously exercised unilateral authority in monitoring employee fitness, SORTA's authority to introduce, unilaterally, a drug/alcohol program could not be convincingly challenged under the 1988-1991 Agreement.⁴

The parties in the present case have construed the Dissen Award to hold distinctive meanings. SORTA asserts that the Dissen Award recognized its right to unilaterally implement the Program.⁵ Thus, SORTA interpreted the Opinion to mean it had the right to *introduce* and subsequently *implement* its *entire* program.

On the other hand, the Union holds firm to the principle that the Dissen Award does not establish SORTA's right to unilaterally impose *disciplinary consequences* under the Drug and Alcohol Policy. Specifically, the Union asserts that its grievance leading to the Dissen Award protested the implementation of a *testing program altogether*. Unlike the Dissen grievance, the complaint at hand protests SORTA's refusal to bargain over the

³ Jt. Exhibit 11, pp. 19-20

⁴ Jt. Exhibit 11, p. 21

⁵ SORTA Brief at p. 13

disciplinary consequences for positive test results.⁶

After extensive review of the Dissen Award, the interpretation of the Award hinges upon a key phrase: “[t]he board makes the general finding that [SORTA’s] unilateral action was within its authority under the collective bargaining agreement.”⁷ More specifically, the key words within that phrase are “unilateral action.” Hence, the determination to be made at this point is what constitutes the “unilateral action” that gave rise to the present case.

While significant unilateral actions pertaining to the Program have occurred since 1986, the most noteworthy unilateral action, and, hence, what gave rise to the instant dispute, is the grievable event. In the grievance before Arbitrator Dissen, the Union contended that the grievable event in the matter occurred on December 1, 1988. It was on this date that SORTA’s Medical and Drug Testing Program was implemented.⁸ Arbitrator Dissen concurred with the Union as he ruled that the grievance was timely filed since it was filed within ten workdays of the date of implementation of the Medical and Drug Testing Program.⁹ Consequently, the “unilateral action” Arbitrator Dissen speaks of in his key phrase is the implementation of the Medical and Drug Testing Program.

Finally, and most importantly, is the issue of Medical and Drug Testing Program “implementation.” The focal point, as the Union argues, is that the Dissen Award does not establish SORTA’s right to unilaterally impose disciplinary consequences under its Program. As noted above, the written program contained general guidelines as to the administration of the drug/alcohol screen, the dissemination of results, and *the*

⁶ Union Brief at p. 10

⁷ Jt. Exhibit 11, p. 24

⁸ Jt. Exhibit 11, p. 5

⁹ Jt. Exhibit 11, p. 16

*consequences of positive testing.*¹⁰ Arbitrator Dissen concluded that SORTA's unilateral action (i.e. Program implementation) was within its authority under the collective bargaining agreement. Thus, despite the Union's contentions, implementation of the Program meant executing the specifics of the program, including the enforcement of disciplinary consequences for positive testing. Thus, for the reasons outlined above, the Union's argument concerning the Dissen Award fails.

(2) Mandatory and Permissive Subjects of Bargaining

Another issue for clarification is whether SORTA unlawfully implemented a written policy affecting terms and conditions of employment without first bargaining with the Union.

In *In re SERB v. Youngstown City School Dist. Bd. Of Ed.*, SERB 95-010 (6-30-95) ("*Youngstown*"), the Board adopted a balancing test to better identify those subjects about which public employers must bargain in Ohio.¹¹ In *Youngstown*, the Board held that the Youngstown City School District Board of Education committed an unfair labor practice by unilaterally implementing its Early Retirement Incentive Plan ("ERIP") because the ERIP was a mandatory subject of bargaining under the three-part balancing test announced within the opinion.¹² Specifically, the Board set forth a balancing test that can be utilized "if a given subject is alleged to affect and is determined to have a material influence upon wages, hours, or terms and other conditions of employment *and* involves the exercises of inherent management discretion..." The following three factors must be balanced to determine whether a given subject is a mandatory or permissive subject of bargaining:

¹⁰ Jt. Exhibit 11, p. 2

¹¹ *In re SERB v. Youngstown City School Dist. Bd. Of Ed.*, SERB 95-010 (6-30-95), p. 3-70

¹² *Id.* at 3-83

- (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 obligation 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.¹³

Accordingly, management decisions that are found, on balance, to be permissive subjects, can be implemented without bargaining the decision unless it would conflict with a contract provision.¹⁴

As noted in *Youngstown*, the three-part balancing test is not necessary or appropriate in every situation. The test should be used when the subjects have both a material influence upon wages, hours, or terms and other conditions of employment and involve the exercise of inherent managerial discretion.¹⁵ Given the Union's assertion that disciplinary consequences are mandatory subjects of bargaining and SORTA's assertion that the implementation of the Policy was within its management rights, analysis under the three-part balancing test is necessary.

Under the first part of the balancing test, it can be established that the 2002 Drug and Alcohol Policy ("Policy"), including disciplinary consequences, is logically and

¹³ *In re SERB v. Youngstown City School Dist. Bd. Of Ed.*, SERB 95-010 (6-30-95), p. 3-76

¹⁴ *Id.* at 3-77

¹⁵ *Id.* at 3-78

reasonably related to terms and conditions of employment. Specifically, the 2002 Policy recognized, “the penalty for any violation of the ‘Substance Abuse Policy’ or ‘Drug-Free Workplace Act’ is *discipline up to and including termination depending on circumstances.*”¹⁶ A violation of the Policy can result in discipline and, therefore, the Policy established by SORTA does have an influence on the terms and conditions of employment.

However, under the second part of the test, the extent to which the employer’s [SORTA’s] obligation to negotiate may significantly abridge its freedom to exercise managerial prerogatives is great. For instance, the Policy is a necessary element to assist in “effectively manag[ing] the work force” pursuant to O.R.C. § 4117.08(C)(8) and, likewise, the Policy affects SORTA’s right to “suspend, discipline, demote or discharge for just cause...” pursuant to O.R.C. § 4117.08(C)(5). Furthermore, SORTA’s inherent discretion on implementing the Policy is necessary to achieve its mission of protecting passengers and the general public when operating its mass transit system. Unlike *Youngstown*, the Policy does not speed up any staff reduction process. To the contrary, the Policy’s purpose is to provide guidelines to be followed should an unfortunate violation occur.

In *In re City of North Ridgeville*, SERB 2000-008 (6-22-00) (“*North Ridgeville*”), the Board held that “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 job or face discipline.”¹⁷ While *North Ridgeville* involved a unilateral implementation of physical fitness standards for fire fighters, the principle of both the SORTA policy and the *North Ridgeville* policy is

¹⁶ Jt. Exhibit 14, p. 14

¹⁷ *In re City of North Ridgeville*, SERB 2000-008 (6-22-00), p. 3-51

indistinguishable: to ensure the employees are fully capable of performing their job tasks, particularly because both positions involve the safety of the general public. One purpose behind the SORTA Policy is to require employees to be void of drugs or alcohol so that they possess the abilities to adequately perform their jobs in light of public safety concerns. Accordingly, SORTA has established an overriding management objective that justifies its unilateral action under the second part and should not be required to bargain over the implementation of its Policy.

The third part of the balancing test requires an examination of the extent to which the collective bargaining process is an appropriate method to resolve the conflict over the instant subject matter. We conclude that the collective bargaining process is not to a great extent an appropriate method in resolving the present conflict. While the collective bargaining process is a powerful, meaningful process, the parties' history demonstrates that bargaining over the Drug and Alcohol Policy is unnecessary. This history is evidenced by the several previous collective bargaining agreements between the parties that did not contain negotiated provisions pertaining to the Drug and Alcohol Policy and, specifically, its disciplinary consequences section. Balancing the three prongs, we find that the Drug and Alcohol Policy, including the disciplinary consequences section, is not a mandatory subject of bargaining.

Next, both the Complainant and the Union cite to *In re Toledo City School District Board of Education*, SERB 01-005 (10-1-01) ("*Toledo*"). In *Toledo*, the Board stated as follows:

Where the parties have not adopted procedures in their collective bargaining agreement to deal with midterm bargaining disputes, SERB will apply the following standard to determine whether an unfair labor practice has been committed when a party unilaterally modifies a provision in an existing collective bargaining agreement

after bargaining the subject to ultimate impasse as defined in *Vandalia-Butler*:

A party cannot modify an existing collective bargaining agreement without the negotiation by and agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unforeseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement became effective that requires a change to conform to the statute.

In addition, to clarify *Youngstown*, follow *Franklin County Sheriff*, and assure consistency in future cases involving issues not covered in the provisions of a collective bargaining agreement, but which require mandatory midterm bargaining, SERB will apply the same two-part test as stated above.”¹⁸

Specifically, the Complainant and the Union argue that under *Toledo* the circumstances present in the case at hand do not permit SORTA to modify a mandatory subject of bargaining. While the Complainant and Union are correct in arguing that there is no mid-term bargaining procedure, they are incorrect in concluding that the *Toledo* standard applies to the case at hand. In order for *Toledo* to apply, a provision within an existing CBA must be modified,¹⁹ or a mandatory subject of bargaining not covered by the CBA must be unilaterally changed midterm.

Here, no contractual provision was ever modified. Specifically, the bargaining agreement in effect at the time provided, in Section 3(b), that “there shall be no discharge, suspension or other disciplinary action without *sufficient cause* or without notification to employee of reason, in writing”²⁰ (emphasis added). Likewise, the Policy’s section on disciplinary consequences provided that “the penalty for any violation of the ‘Substance Abuse Policy’ or ‘Drug-Free Workplace Act’ is *discipline up to and including termination*

¹⁸ Complainant Brief at p. 6; Union Brief at p. 7

¹⁹ *Id.* at 3-29

²⁰ Jt. Exhibit 9, p. 3

*depending on circumstances*²¹ (emphasis added). The CBA and Policy work in tandem. The CBA requires sufficient cause, and the Policy simply defines what may constitute sufficient cause.

Neither does this case present the other trigger for the *Toledo* standard to be applied, i.e., a midterm change in a mandatory subject not covered by the CBA. For the reasons stated in Section (2) above, the Drug and Alcohol Policy, including the disciplinary consequences section, is not a mandatory subject of bargaining in this case. Because the *Toledo* standard does not apply to the case at hand, we need not decide whether SORTA's actions satisfied the limited circumstances under which the *Toledo* decision permits midterm unilateral changes.

Finally, after the Dissen Arbitration in 1990, SORTA and the Union negotiated *four* successor contracts, none of which changed the arbitrator's interpretation or included modified disciplinary provisions. For instance, SORTA formally revised the 1988 Drug and Alcohol Policy in February 1995 and unilaterally implemented the Program without bargaining with the Union.²² Specifically, the disciplinary consequences section was revised to provide that "[t]he penalty for any violation of the 'Substance Abuse Policy' or 'Drug-Free Workplace Act' is immediate termination of employment, except for item #3 and #12 listed below."²³ SORTA informed the Union of the changes to the Program; and the Union did not file a grievance or ULP charge with SERB.²⁴ When it came time for a new CBA, the final version, effective from 1997-2000, did not revoke, modify, or eliminate the Dissen Arbitration.

Likewise, Section 28 of the 2000-2003 Agreement, specifically states, in part, as

²¹ Jt. Exhibit 14, p. 14

²² Jt. Stipulation ¶19

²³ Jt. Exhibit 13, p. 20

²⁴ Jt. Stipulations ¶¶20-21

follows:

All prior concessions granted by agreement...or arbitration and not summarily revoked, modified or eliminated and not conflicting with this Agreement, shall remain in force during the period of this agreement so far as consistent with the proper schedules and operating methods.²⁵

Consequently, the interpretation of the contract in the Dissen Award thereby continued in effect as a part of the contract.

For the reasons listed above, we find that the Drug and Alcohol Policy is not a mandatory subject of bargaining and, thus, the unilateral implementation of the Policy does not violate O.R.C. §§ 4117.11(A)(1) and (5).

(3) Collateral Estoppel

In reference to the doctrine of collateral estoppel, the Supreme Court of Ohio has held that:

[A] fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different...[T]he collateral estoppel aspect precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action that was based on a different cause of action.²⁶

SORTA contends that the Dissen Award and a Court of Appeals decision raise a collateral estoppel bar. Specifically, SORTA argues that the finding in the Dissen Award,

²⁵ Jt. Exhibit 9, p. 53

²⁶ *Fort Frye Teachers Ass'n v. SERB*, 81 Ohio St. 3d 392, 692 N.E.2d 140, 144 (1998)

recognizing SORTA's right to unilaterally implement the Program, was expressly acknowledged by the Ohio Court of Appeals in *SORTA v. Amalgamated Transit Union*, 1994 WL 525543 (Ohio Ct. App. Sept. 28, 1994) ("*ATU 1994*").²⁷

In contrast, the Union disputes the contention that the complaint is barred by collateral estoppel and argues that to the extent collateral estoppel is applicable, it should foreclose SORTA's argument in support of unilateral implementation. The Union contends that the Court of Appeals' observation in *ATU 1994* pertaining to SORTA's right to promulgate the drug and alcohol program was merely dicta with no legal effect. The Union asserts the observation was not integral to the Court's holding that the disputed arbitration award should be vacated because it violated public policy.²⁸ Additionally, the Union maintains that even if that portion of the Opinion constituted binding precedent, it would no longer be good law due to *SORTA v. Amalgamated Transit Union, Local 627*, 91 Ohio St.3d 108 (2001) ("*ATU 2001*").²⁹ In *ATU 2001*, the Supreme Court found that "SORTA did not have the right to unilaterally adopt automatic termination without possibility of reinstatement as a sanction for positive testing, because such a sanction conflicts with the "sufficient cause" requirement for dismissal found in Section 3(b) of the [collective bargaining agreement]."³⁰

As established earlier in this Opinion, the disputed disciplinary consequences section in the 2002 Drug and Alcohol Policy does not modify or conflict with the "sufficient cause" requirement for dismissal as identified in Section 3(b) of the collective bargaining agreement. The Policy simply defines what may constitute sufficient cause. Hence, the Union's argument that the *ATU 2001* case is controlling fails.

²⁷ SORTA Brief at p. 10

²⁸ Union Brief at p. 9.

²⁹ *Id.*

³⁰ *Id.*

Regardless, courts have upheld the application of collateral estoppel to the decisions of arbitrators. In *Boyle v. City of Portsmouth*, 18 OPER ¶ 1485 (Ohio Ct. App. 2001), the court applied the doctrine of collateral estoppel and held that an issue had already been litigated between the parties where the case was initially decided by an arbitrator and then later reviewed by a common pleas court.³¹ SERB is not legally bound to accept an arbitrator's interpretation of a contract in an unfair labor practice case.³² In the present matter, however, we do agree with the arbitrator's interpretation of the contract. Moreover, having recognized that the contract language remains the same and that the arbitrator's interpretation has not since been revoked, modified, or eliminated, we hold that the Union is collaterally estopped from pursuing the current unfair labor practice charge.

Having established that the Dissen Award was still in effect and applicable to disciplinary consequences, that the Drug and Alcohol Policy was not a mandatory subject of bargaining but rather within SORTA's management rights, and that the Union is collaterally estopped from pursuing this unfair labor practice charge, SORTA's actions and conduct do not constitute bad faith bargaining in contravention of §§ 4117.11(A)(1) and (A)(5).³³

³¹ *Id.* at 5-6.

³² *In re SERB v. Youngstown City School Dist. Bd. of Ed.*, SERB 95-010 (6-30-95), p. 3-79

³³ Because we are persuaded that these listed defenses are sufficient, we need not specifically address other defenses offered by SORTA, i.e., that the Charging Party had slept on its rights, that it was equitably estopped through acquiescence in the Policy, and that it was collaterally estopped by means of voluntarily dismissing an unfair labor practice charge challenging the Policy.

IV. CONCLUSIONS OF LAW

1. SORTA is a "public employer" within the meaning of O.R.C. § 4117.01(B).
2. The Amalgamated Transit Union, Local 627, Intervenor, is an "employee organization" within the meaning of O.R.C. § 4117.01(D).
3. SORTA's unilateral changes to the Drug and Alcohol Policy without bargaining as to bargaining-unit employees does not constitute an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).

V. DETERMINATION

For the reasons above, we find that the Southwest Ohio Regional Transit Authority did not make unlawful unilateral revisions to its Drug and Alcohol Policy. Accordingly, we find that the Southwest Ohio Regional Transit Authority did not commit an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).

Drake, Chairman, and Gillmor, Vice Chairman, concur.