

**STATE OF OHIO  
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Circleville,

Respondent.

Case No. 2002-ULP-05-0341

**ORDER**  
**(OPINION ATTACHED)**

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich:  
August 25, 2005.

On May 21, 2002, the International Association of Firefighters, Local 1232 (“Charging Party”) filed an unfair labor practice charge with the State Employment Relations Board (“Board” or “Complainant”) alleging that the City of Circleville (“Respondent”) had violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5). On August 1, 2002, the Board found probable cause to believe an unfair labor practice had been committed and directed the unfair labor practice case to hearing.

The parties agreed to submit the case on stipulations and briefs in lieu of a hearing. Subsequently, the parties filed briefs setting forth their positions. On January 16, 2003, the case was transferred from the Hearings Section to the Board for a decision on the merits.

After reviewing the Joint Stipulations, the parties’ briefs, and all other filings in this case, the Board adopts the Joint Stipulations as Findings of Fact and concludes for the reasons stated in the attached Opinion, incorporated by reference, as a matter of law that the City of Circleville is a “public employer” within the meaning of Ohio Revised Code Section 4117.01(B), that the International Association of Firefighters, Local 1232 is an “employee organization” within the meaning of Ohio Revised Code Section 4117.01(D), and that the City of Circleville’s withholding payment on the selling back of sick leave while the parties awaited the Conciliator’s award violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5). The Board also issues this Order, with a Notice to Employees, to the City of Circleville to cease and desist from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117; from refusing to bargain collectively with the exclusive representative of a bargaining unit by withholding

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payment on the selling back of sick leave while the parties awaited the Conciliator's award; and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

The City of Circleville is hereby ordered to take the following action: to the extent that sick leave sellback has not been paid in accordance with the Conciliator's award retroactive to September 22, 2001, tender payment to those employees affected, together with interest at a rate of 6% per annum; to the extent that sick leave sellback has been paid in accordance with the Conciliator's award retroactive to September 22, 2001, pay interest to affected employees for the period during which payment was deferred, at a rate of 6% per annum; post for sixty days in all of the usual and normal locations where employees assigned to the City of Circleville Fire Department worked at all relevant times herein, the Notice to Employees furnished by the State Employment Relations Board; and notify the State Employment Relations Board in writing twenty calendar days from the date that this Order becomes final of the steps that have been taken to comply with it.

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 Section 4117.13(D) by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the State Employment Relations Board's order.

I certify that a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 18<sup>th</sup> day of October, 2005.

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



# 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 Board and to abide by the following:

### A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117; from refusing to bargain collectively with the exclusive representative of a bargaining unit by withholding payment on the selling back of sick leave while the parties awaited a conciliator's award; and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

### B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. To the extent that sick leave sellback has not been paid in accordance with the Conciliator's award retroactive to September 22, 2001, tender payment to those employees affected, together with interest at a rate of 6% per annum;
2. To the extent that sick leave sellback has been paid in accordance with the Conciliator's award retroactive to September 22, 2001, pay interest to affected employees for the period during which payment was deferred, at a rate of 6% per annum;
3. Post for sixty days in all of the usual and normal locations where employees assigned to the City of Circleville Fire Department worked at all relevant times herein, the Notice to Employees furnished by the State Employment Relations Board stating that the City of Circleville shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
4. Notify the State Employment Relations Board in writing twenty calendar days from the date that this Order becomes final of the steps that have been taken to comply therewith.

***SERB v. City of Circleville, Case No. 2002-ULP-05-0341***

\_\_\_\_\_  
BY

\_\_\_\_\_  
DATE

\_\_\_\_\_  
TITLE

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED**

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  
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Circleville,

Respondent.

**CASE NUMBER 2002-ULP-05-0341**

**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 City of Circleville (“City”) 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 the City violated O.R.C. §§ 4117.11(A)(1) and (A)(5) by withholding payment on the selling back of sick leave by bargaining-unit members represented by the Circleville Firefighters Local 1232, IAFF (“IAFF”) while the parties awaited the conciliator’s award.

## II. FINDINGS OF FACT<sup>1</sup>

1. The International Association of Firefighters, Local 1232 is an “employee organization” as defined by O.R.C. § 4117.01(D).

2. The City of Circleville is a “public employer” as defined by O.R.C. § 4117.01(B).

3. The IAFF and the City were parties to a collective bargaining agreement that was effective from September 20, 1998 through September 22, 2001 (“Agreement”). (Joint Exhibit [“Jt. Exh.”] 1)

4. On July 17, 2001, the IAFF filed a Notice to Negotiate with SERB, seeking to commence negotiations for a successor collective bargaining agreement. (Jt. Exh. 2) Subsequently, the parties met in an effort to negotiate a successor agreement. The parties met for purposes of negotiations on August 10, 2001, August 31, 2001, September 14, 2001, and September 24, 2001.

5. On September 14, 2001, the City offered a proposal to the IAFF concerning annual sick leave sellback. This proposal sought to increase the number of sick leave hours that an employee was required to accumulate in order to be eligible for sick leave sellback and to reduce the number of hours that each employee could sell back each year. (Jt. Exh. 3)

6. On November 29, 2001, the parties proceeded to a fact-finding hearing. The issues presented to the fact finder included the City’s proposal concerning sick leave

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<sup>1</sup> The Findings of Fact are based upon the Joint Stipulations filed by the parties on October 30, 2002, except where indicated otherwise.

sellback. The parties agreed that all modifications to the Agreement would be retroactive to September 22, 2001.

7. On December 12, 2001, the fact finder issued his recommendation. With respect to the sick leave sellback, the fact finder recommended that the sick leave hour threshold be increased from 500 hours to 1040 hours and that the hours that an employee could cash in be reduced from 167 hours per year to 100 hours per year. This recommendation was based on the City's proposal. (Jt. Exh. 4)

8. On December 19, 2001, the IAFF rejected the fact-finder's report. The City did not reject the report. (Jt. Exh. 6)

9. On January 14, 2002, the City sent a letter to the IAFF concerning the sick leave sellback under the Agreement that expired on September 22, 2001. (Jt. Exh. 5)<sup>2</sup>

10. The IAFF filed a grievance in response to the letter referenced in stipulation number nine. The IAFF did not pursue this grievance to arbitration.

11. The parties met in an effort to resolve the outstanding issues prior to the conciliation hearing.

12. In February 2002, pursuant to and under the terms of the expired Agreement, members of IAFF Local 1232 submitted accumulated sick leave buy-out forms to the City, to be paid, according to the expired Agreement, no later than February 22, 2002.

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<sup>2</sup> Although Paragraph 9 of the Joint Stipulations recites a date of September 22, 2002, we find, consistent with Paragraph 3 of the Joint Stipulations, the Agreement expired on September 22, 2001.

13. The City informed the Union that the City would not be purchasing the accumulated sick leave by February 22, 2002, and in fact did not do so, as provided for in the expired Agreement. Instead, the City deferred payment on the buy-out until such time as the conciliator's award issued.

14. On February 20, 2002, a conciliation hearing was held between parties. The issues presented to the conciliator were wages, EMT/paramedic supplement, and sick leave sellback. The City waived the restrictions placed on the conciliator as to the retroactivity of economic issues set forth in O.R.C. § 4117.14(G)(11). The conciliator had the authority to issue an award that was retroactive to September 22, 2001. (Jt. Exh. 8-9)

15. Both parties presented positions on the outstanding issues that were retroactive to September 22, 2001, except that the IAFF proposed no change to the sick leave payback.

16. On March 5, 2002, the conciliator issued his award; the award included retroactive increases for wages and EMT/paramedic supplement. With respect to the sick leave sellback, the Conciliator awarded the City's proposal, which he noted was consistent with the fact-finder's recommendation. (Jt. Exh. 10)

17. In February 2002, several members of the bargaining unit filed grievances, alleging that the City failed to comply with the Agreement that expired on September 22, 2001, as it related to the sick leave sellback. The City denied the grievances and they were not pursued to arbitration. (Jt. Exh. 11-16)

18. On June 5, 2002, the parties executed a successor collective bargaining agreement that is effective from September 23, 2001 through December 31, 2003. (Jt. Exh. 17)

19. Since June 5, 2002, the City has paid the sick leave sellback in accordance with the conciliation award.

20. The parties agreed to waive the evidentiary hearing and requested this case be submitted on briefs, stipulations of fact, and stipulations of evidence directly to the SERB members.

### III. DISCUSSION

The issue is whether the City's unilateral change to the status quo of an expired collective bargaining agreement 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 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. **The City Violated O.R.C. ' ' 4117.11(A)(1) and (A)(5) By Unilaterally Changing the Status Quo of the Expired Agreement**

Unless the parties otherwise agree upon mutual dispute settlement procedures, existing case law in Ohio affirms unequivocally that a unilateral change to the status quo during negotiations, and before ultimate impasse has been reached, is a violation of established labor law. In *In re City of Fostoria*, SERB 86-037 (9-15-86) ("*Fostoria*"), SERB held that the terms of an expired collective bargaining agreement continue in effect until the parties reach "ultimate impasse." Similar to *Fostoria*, strike-prohibited employees are involved in this case.

In *Fostoria*, SERB stated that the word “impasse” is used frequently in the statutory impasse procedure to indicate the time for advance to the next step of the procedure. In the opinion, the phrase “ultimate impasse” was used to connote that definitive point at which strike action (in the case of strike-permitted employees) or conciliation (in the case of strike-ineligible employees) is the next step. The end of the publication period triggers the strike option when strike-permissible employees are involved. For strike-prohibited employees, SERB affirmed that “conciliation” (i.e., arbitration) is the substitute for strike action. By analogy the end of the publication period after the rejection of the fact-finding recommendation is also the ultimate impasse point for those public employees who must arbitrate in lieu of withholding work.<sup>3</sup>

While initially SERB defined the point of ultimate impasse as occurring at the end of the publication period following the rejection of the fact-finding recommendation, Ohio Administrative Code Rule 4117-9-02(E) modified the point at which “ultimate impasse” occurs:

Except as the parties may modify the negotiation process by mutually agreed-upon dispute settlement procedures, the parties shall continue in full force and effect all the terms and conditions of any existing collective bargaining agreement, without resort to strike or lockout, *for a period of sixty days after the party gives notice, until the expiration date of the collective bargaining agreement, or the statutory dispute settlement procedures are exhausted, whichever occurs later.* (emphasis added).

Therefore, unless otherwise agreed upon, SERB’s administrative rules are essentially dispositive on the issue.

The Agreement between the parties, which expired on September 22, 2001, contained a provision for the sellback of accumulated sick leave by IAFF members to the

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<sup>3</sup> *In re City of Fostoria*, SERB 86-037 (9-15-86), p. 318.

City. In September 2001, during negotiations, the City offered a proposal to the IAFF concerning annual sick leave sellback. This proposal sought to increase the number of sick leave hours that an employee was required to accumulate in order to be eligible for sick leave sellback and to reduce the number of hours that each employee could sell back each year.<sup>4</sup> Since this proposal would result in a substantial reduction in earnings for bargaining-unit employees, who had come to depend on the sick leave sellback provision, the proposal was rejected. In January 2002, the City communicated to IAFF its intention not to pay for the sick leave sellback under the provisions that were set forth in the previous collective bargaining agreement. Ultimate impasse had not yet occurred when the City refused to purchase sick leave because the parties were continuing to meet to negotiate and because a conciliation hearing was scheduled for February 20, 2002.<sup>5</sup>

The City refused to await the conclusions of negotiations and conciliation before unilaterally changing the terms and conditions of Union members by refusing to purchase accumulated sick leave pursuant to the language in the expired collective bargaining agreement, which was the focus of the negotiations and conciliation. This period, termed the "*status quo ante*," is a middle period between official contract expiration and the exhaustion of the dispute settlement procedures; while the application of this rule can be waived by a mutually agreed-upon dispute settlement procedure, as with a waiver of any statutory right such waiver must be clear and unmistakable. The City and IAFF never waived the application of this rule or arranged to modify the negotiation process by mutually agreed-upon dispute settlement procedures.

Although courts have accepted the idea and necessity of the employer maintaining the *status quo ante* until the bargaining process has been completed, courts have held that certain contractual provisions, such as fair share fees, do not survive the expiration of a

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<sup>4</sup> Jt. Exhibit 3. The change would increase the eligibility requirements for members from 500 to 1040 hours and decrease the amount of hours a member could sell back from 167 to 100.

<sup>5</sup> Jt. Stipulations 11, 13, and 14, pp. 2-3.

collective bargaining agreement. The *status quo ante* includes carryover of all prior contract provisions in an expired contract because O.R.C. Chapter 4117, unlike most other labor statutes, requires bargaining over the “deletion of an existing provision of a collective bargaining agreement.” O.R.C. § 4117.01(G). Thus, a contractual provision such as the one at issue, stating that the contract is “exhausted” on its expiration date unless the contract is extended by mutual agreement, does not affect or operate to waive the separate *status quo ante* rule.

It is a well-established principle of collective bargaining law that even *after* contract expiration, parties can change employment terms only through mutual agreement or, if ultimate impasse is reached, through the employer's implementation of its last, best offer.<sup>6</sup> Therefore, the City's argument that it clearly manifested its intent not to be bound by certain provisions of the prior agreement fails. Thus, an employer's failure to maintain the terms of an expired collective bargaining agreement (i.e., the *status quo ante*) prior to ultimate impasse constitutes bad faith bargaining in contravention of O.R.C. §§ 4117.11(A)(1) and (A)(5).

**B. The Appropriate Remedy Must Recognize the Need to Maintain Both the Status Quo Ante and the Integrity of the Conciliator's Award**

SERB possesses broad discretion to remedy unfair labor practices by not only issuing a cease-and-desist order, but also by taking “such affirmative action \* \* \* as will effectuate the policies of Chapter 4117. of the Revised Code.” O.R.C. § 4117.12(B)(3). The Board has traditionally remedied unlawful unilateral changes by ordering the respondent to restore the charging party to the status quo as it existed before the unlawful change took effect. Here, however, a full restoration of the status quo ante would require that the City return employees to the more general terms of the sick leave sellback provisions that existed under the expired Agreement. Such an order would fly in the face of

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<sup>6</sup> *In re University of Cincinnati*, SERB 93-007 (5-13-93), p. 3-48.

the less generous terms contained in the Conciliator's award, to which all parties agreed to be bound retroactively.

We are aware that conciliation awards reflect compromises made by both parties in the bargaining process, and that a party receiving a favorable ruling on one issue may well have received less favorable treatment on another, as the conciliator seeks to craft a binding award that is fair for both sides. Out of respect for the final and binding nature of the conciliation process, we decline to issue a remedy here that will essentially modify the Conciliator's award. Rather, in addition to issuing a cease-and-desist order, we order the City to make bargaining-unit employees whole for any nonpayment or delay in payments due to them under the Conciliator's award.

Accordingly, to the extent that the sick leave sellback has not been paid in accordance with the Conciliator's award retroactive to September 22, 2001, we are ordering the City to tender payment to those employees affected, together with interest at a rate of 6% per annum, from the date that the payment was due. To the extent that the sick leave sellback has been paid in accordance with the Conciliator's award retroactive to September 22, 2001, we are ordering the City to pay interest to those affected employees for the period during which payment was deferred at a rate of 6% per annum. The ordered interest rate is consistent with the rate being charged by the Internal Revenue Service during the Third Quarter of 2005.

#### **IV. CONCLUSIONS OF LAW**

1. The City of Circleville is a "public employer" within the meaning of O.R.C. § 4117.01(B).
2. The International Association of Firefighters, Local 1232 is an employee organization@ within the meaning of O.R.C. § 4117.01(D).

3. The City of Circleville's unilateral changes to the sick leave sellback provision without bargaining as to bargaining-unit employees constitutes 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 City of Circleville made a unilateral change of the status quo as to the sick leave sellback provision of the expired collective bargaining agreement before ultimate impasse for its public employees; that such a change involves a mandatory subject of bargaining; that the City refused to bargain the changes; and that the employee organization, under these circumstances, did not waive the bargaining-unit members' right to bargain the change. Accordingly, we find that the City committed an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).

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