

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Cleveland,

Respondent.

Case No. 2007-ULP-05-0214

ORDER
(OPINION ATTACHED)

Before Chairperson Brundige and Vice Chairperson Verich: October 23, 2008.

On May 17, 2007, the Municipal Construction Equipment Operators' Labor Council ("the MCEOLC") filed an unfair labor practice charge against the City of Cleveland ("the Respondent"), alleging that the Respondent violated Ohio Revised Code ("O.R.C.") § 4117.11(A)(1) by failing to negotiate in good faith by eliminating health insurance. On August 10, 2007, the MCEOLC filed an amended charge to include an O.R.C. § 4117.11(A)(5) allegation. On September 20, 2007, the State Employment Relations Board ("SERB" or "Complainant") determined that probable cause existed for believing that the Respondent had committed or was committing unfair labor practices, authorized the issuance of a complaint, and referred the matter to hearing. On December 10, 2007, a complaint was issued. On January 24, 2008, an amended complaint was issued. On January 15, 2008, the MCEOLC filed a motion to intervene, which was granted in accordance with Rule 4117-1-07(A).

On January 24, 2008, a hearing was held, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs. On May 16, 2008, the Administrative Law Judge issued a Proposed Order in which she recommended that the Board find that the Respondent had violated O.R.C. §§ 4117.11(A)(1) and (A)(5) by unilaterally eliminating health insurance benefits for the MCEOLC members.

After timely requesting and receiving an extension of time to file exceptions, the Respondent filed exceptions to the Proposed Order on June 19, 2008; the Respondent also filed a motion for oral argument on that date. After timely requesting and receiving

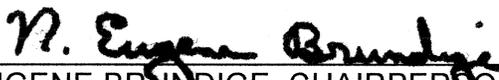
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an extension of time to file responses to the exceptions, both the MCEOLC and Complainant filed responses to the exceptions on July 16, 2008. On July 28, 2008, the Respondent filed a reply brief to the Complainant's response to the exceptions. On August 28, 2008, SERB granted the motion for oral argument. On October 7, 2008, the Respondent filed a motion to dismiss the amended complaint. On October 9, 2008, the MCEOLC filed a memorandum in opposition to the motion to dismiss the amended complaint. Also on October 9, 2008, oral arguments were presented to SERB by the parties' representatives.

After reviewing the unfair labor practice charge, amended charge, complaint, amended complaint, answer, Proposed Order, exceptions, responses to exceptions, reply brief, and all other filings in this case, the Respondent's motion to dismiss the amended complaint is denied. For the reasons set forth in the attached Opinion, incorporated by reference: Conclusion of Law No. 3 is hereby amended to read: "The City of Cleveland did not violate O.R.C. §§ 4117.11(A)(1) and (A)(5) when it eliminated health insurance benefits for the MCEOLC members after the MCEOLC abandoned the collective bargaining process when it pursued its bargaining-unit members' rights under the application of external law."; the Findings of Fact and Conclusions of Law, as amended, in the Proposed Order are hereby adopted; the complaint is dismissed; and the unfair labor practice charge is dismissed with prejudice.

It is so ordered.

BRUNDIGE, Chairperson, and VERICH, Vice Chairperson, concur.



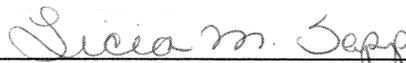
N. EUGENE BRUNDIGE, CHAIRPERSON

TIME AND METHOD TO PERFECT AN APPEAL

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 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, by filing in the court a notice of appeal setting forth the order appealed from and the grounds of appeal within fifteen days after the mailing of the State Employment Relations Board's order. A copy of the notice of appeal must also be filed with the State Employment Relations Board, at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, pursuant to Ohio Administrative Code Rule 4117-7-07.

PROOF OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, and upon each party's representative by ordinary U.S. mail, this 31st day of October, 2008.



LICIA M. SAPP, ADMINISTRATIVE ASSISTANT

SERB

"Promoting Orderly and Constructive
Labor Relations Since 1984"

State
Employment
Relations
Board



65 East State Street, 12th Floor
Columbus, Ohio 43215-4213
Phone 614.644.8573
Fax 614.466.3074
www.serb.state.oh.us

N. Eugene Brundige, Chairperson
Michael G. Verich, Vice Chairperson

Ted Strickland, Governor

Sherrie J. Passmore Executive Director

Case No. 2007-ULP-05-0214

CERTIFICATION

I, the undersigned General Counsel and Assistant Executive Director for the State Employment Relations Board, hereby certify that the attached document is a true and exact reproduction of the original Order (with Opinion Attached) of the State Employment Relations Board entered on its journal on the 31st day of October, 2008.

J. Russell Keith
General Counsel and Assistant Executive Director
October 31, 2008

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Cleveland,

Respondent.

Case No. 2007-ULP-05-0214

VERICH, Vice Chairperson:

This matter comes before the State Employment Relations Board (“the Board” or “the Complainant”) upon the issuance of an Administrative Law Judge’s Proposed Order, the filing of exceptions and responses to the exceptions, and oral arguments that were heard on October 9, 2008. For the reasons that follow, we find that the City of Cleveland (“the City”) did not violate Ohio Revised Code (“O.R.C.”) §§ 4117.11(A)(1) and (A)(5) when it eliminated health insurance benefits for the bargaining-unit members represented by the Municipal Construction Equipment Operators’ Labor Council (“the MCEOLC”) after the MCEOLC abandoned the collective bargaining process when it pursued its bargaining-unit members’ rights under the application of external law. As a result, the complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

I. BACKGROUND

The MCEOLC is the exclusive representative for a bargaining unit of the City’s Construction Equipment Operators. The City and the MCEOLC were parties to a collective bargaining agreement (“CBA”) effective from February 14, 2005 through March 31, 2007,

which contained a grievance process that culminated in final and binding arbitration. The CBA contains a valid mutually agreed upon dispute resolution procedure. See *In re City of Cleveland*, SERB 2008-004 (8-27-08).

A section of the CBA titled "Voluntary Dispute Resolution Procedure" provides in part as follows: "In the event that the parties are unable to reach agreement by March 31, 2007, or a date mutually agreed upon, all of the terms in this Agreement shall be deemed exhausted, provided the parties may extend the Agreement by mutual agreement." The CBA also contained a provision concerning health insurance.

On December 1, 2006, the MCEOLC filed a Notice to Negotiate with SERB in Case No. 2006-MED-12-1380. By a letter dated February 15, 2007, SERB appointed a mediator to assist the parties with their negotiations. The parties met in negotiation sessions on January 11, 2007, February 6, 2007, and February 21, 2007. The parties had a mediation session scheduled for April 2, 2007.

By a letter dated and hand delivered on April 2, 2007, the City's representative, wrote that "it is the City's position that based on the Union's latest proposal, the parties have reached an impasse in these negotiations. However, since we have previously agreed to schedule today's mediation session and extend the terms of the contract to this point, the City will mediate in good faith in the hopes that we can overcome this apparent impasse."

The MCEOLC had requested on several occasions that the City agree to extend the CBA. The City refused to extend the CBA beyond the agreed-to mediation date of April 2, 2007. By a letter dated April 3, 2007, the MCEOLC responded to the City that the CBA had expired, and the MCEOLC demanded that MCEOLC bargaining-unit members be paid the prevailing wage starting on April 1, 2007, and thereafter. The City and the MCEOLC

disagreed as to what was the correct prevailing wage and whether the prevailing wage contained a dollar component for health and welfare; the parties began litigating those issues.

On April 19, 2007, the City's representative wrote to the MCEOLC's representative indicating that since the City would be applying "external law" [statutory law as opposed to the terms of the CBA, including but not limited to, the applicable prevailing wage rate recognized by the state under Ohio law or the federal Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA")] regarding all terms and conditions of employment, the City intended to cease providing any benefits, including but not limited to health insurance, longevity, paid holidays and accrual of vacation and sick leave, to the MCEOLC bargaining-unit members as of April 30, 2007.

The City's representative wrote to the MCEOLC's representative on April 27, 2007, stating that the City had rejected the MCEOLC's latest suggestion to maintain the status quo until the Ohio Supreme Court ruled on the prevailing wage issue. The April 27, 2007 letter also indicated that the City would be applying the prevailing wage and "external law" as demanded in the MCEOLC's April 19, 2007 letter. The April 27, 2007 letter said that since the demand required significant administrative effort to implement, the effective date for changes in wages, benefits, and dues deductions would be May 1, 2007.

Before the effective date of the CBA, the MCEOLC members were permitted to purchase City health insurance directly from the City with pre-tax dollars at the City's cost. After application of external law, the City refused the MCEOLC's request to allow the MCEOLC bargaining-unit members to purchase their health insurance through the City at the City's cost. Although the City believed that its calculation of the prevailing wage contained a dollar component for health and welfare, the City decided to offer coverage under COBRA to the affected employees. The affected employees received a COBRA

notice of continuing health care, and these employees could choose to remain in the City's health plan for up to 18 months of coverage at the City's rate plus a 2 percent "administrative fee."

MCEOLC bargaining-unit members had to make application for COBRA coverage. As a result, bargaining-unit members were unable to immediately access COBRA benefits, resulting in individuals who had medical expenses during this time having to pay out of pocket and then apply through COBRA for reimbursement.

The parties had one negotiation session after the April 2, 2007 mediation session; the negotiating session was held on July 3, 2007. On November 19, 2007, the City informed the MCEOLC that the parties were at impasse in negotiations and, as a consequence, beginning December 1, 2007, the City would be implementing its last written proposal that was presented on March 22, 2007. The City also indicated that if the MCEOLC believed a minimal change to their proposal or some other circumstance warranted another attempt at mediation, they would reconvene. On November 19, 2007, and April 2, 2007, the Union was still willing to negotiate with the City. After a prevailing wage was implemented, and through November 19, 2007, correspondence between the City and the MCEOLC evidenced a mutual willingness to continue negotiations.

By a letter dated November 19, 2007, the City's representative informed the MCEOLC's representative that the City would implement its last, best proposal with what were described as very minimal adjustments. On November 20, 2007, the City Benefits Manager issued a memorandum to MCEOLC bargaining-unit members without benefits that they were "now eligible for Medical, Dental, Vision and Life Insurance effective December 1, 2007."

On November 30, 2007, the MCEOLC filed a complaint in mandamus with the Ohio Supreme Court, Case No. 2007-2227, seeking a writ of mandamus to compel the City to pay the prevailing wage rates in the private sector to the Construction Equipment Operators and Master Mechanics. On February 20, 2008, in a merit decision without opinion, the Ohio Supreme Court granted a writ of mandamus to compel the City to pay the Construction Equipment Operators and Master Mechanics the difference between the prevailing-wage rates set forth in the Construction Employers Association Building Agreement between the International Union of Operating Engineers, Local 18 and its branches, and the Construction Employers Association, and the lower rates they have been paid for the period beginning April 11, 2007.

II. DISCUSSION

O.R.C. § 4117.11 provides 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 its employees recognized as the exclusive representative *** pursuant to Chapter 4117. of the Revised Code[.]

At issue is whether the City engaged in bad-faith bargaining in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) when it unilaterally eliminated health insurance benefits for the MCEOLC bargaining-unit members. Good-faith bargaining is determined by the totality of the circumstances. *In re Dist 1199/HCSSU/SEIU*, SERB 96-004 (4-8-96). A circumvention of the duty to bargain, regardless of subjective good faith, is unlawful. *In re Mayfield City School Dist Bd of Ed*, SERB 89-033 (12-20-89).

In *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 82 Ohio St.3d 222, 1998-Ohio-249 (“*Boggs*”), the collective bargaining agreement expired, and the union was notified by the employer that it was considering subcontracting its transportation services to a private company, which was permitted under the terms of the agreement. The union gave notice of its intent to strike and then implemented the strike. The Ohio Supreme Court found that the bargaining-unit employees indicated their intent not to be bound by the terms of the expired agreement by returning to work after expressing their desire to be governed by statutory law rather than the expired agreement and by filing an action in mandamus asserting that they were entitled to the protection offered by O.R.C. § 3319.081. The Ohio Supreme Court held: “Where a collective bargaining contract executed pursuant to R.C. Chapter 4117 includes an express termination date, the agreement may be deemed to continue by implied mutual assent after that date only until such time as either party to the agreement acts in a manner inconsistent with the inference that both parties wish to be governed by the contract.” *Boggs* at Syllabus.

In the present case, the City and the MCEOLC were parties to a CBA effective from February 14, 2005 through March 31, 2007, which contained a grievance process that culminated in final and binding arbitration. The CBA contained a valid mutually agreed upon dispute resolution procedure. See *In re City of Cleveland*, SERB 2008-004 (8-27-08). According to the “Voluntary Dispute Resolution Procedure” in the CBA: “In the event that the parties are unable to reach agreement by March 31, 2007, or a date mutually agreed upon, all of the terms in this Agreement shall be deemed exhausted, provided the parties may extend the Agreement by mutual agreement.”

The parties appeared to fall clearly within the scenario envisioned by the Ohio Supreme Court in its *Boggs* decision. They had a “collective bargaining contract executed pursuant to R.C. Chapter 4117.” The CBA included an “express termination date” of March 31, 2007. The parties agreed to extend the CBA to April 2, 2007; the City refused to

extend the CBA beyond April 2, 2007. On November 30, 2007, the MCEOLC filed a complaint with the Ohio Supreme Court seeking a writ of mandamus; such action must be viewed as the MCEOLC acting “in a manner inconsistent with the inference that both parties wish to be governed by the contract.” The Court granted the requested writ of mandamus on February 20, 2008.

The MCEOLC abandoned the collective bargaining process when it pursued its bargaining-unit members’ rights under the application of external law, i.e., the writ of mandamus. As a result, the City no longer had a duty to bargain with the MCEOLC over the bargaining-unit members’ health insurance benefits. The City’s responsibility was set forth by the Ohio Supreme Court in its October 20, 2008 Entry following several post-judgment motions when the Court stated in relevant part:

It is therefore ordered that respondents [the City] immediately comply with the writ by paying the city’s construction-equipment operators and master mechanics the difference between the prevailing-wage rates set forth in the Construction Employers Association Building Agreement between the International Union of Operating Engineers, Local 18 and its branches, and the Construction Employers Association and the lower rates that they have been paid for the period beginning April 11, 2007 and thereafter as long as there is no collective bargaining agreement and the Cleveland Charter requires paying these employees the prevailing wage rates.

Since the parties’ mutually agreed-to dispute resolution procedure (“MAD”) has been exhausted, the parties can commence a new series of negotiations with the filing of a Notice to Negotiate, by either the employer or employee organization, in an effort to enter into a collective bargaining agreement. Such an agreement is plainly anticipated in the Ohio Supreme Court’s language. Unless the parties enter into a new MAD, they will be governed by the statutory procedure in O.R.C. § 4117.14. The status quo for the parties is what has been granted already by the Ohio Supreme Court. Consequently, the parties would be negotiating the equivalent of an initial collective bargaining agreement.

III. CONCLUSION

For the reasons above, the State Employment Relations Board finds that the City of Cleveland did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it eliminated health insurance benefits for the bargaining-unit members represented by the Municipal Construction Equipment Operators' Labor Council after the MCEOLC abandoned the collective bargaining process when it pursued its bargaining-unit members' rights under the application of external law. As a result, the complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

Brundige, Chairperson, concurs.