

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Salem Fire Fighters, Local 283, IAFF,

Respondent.

Case No. 2008-ULP-09-0380

**ORDER
(OPINION ATTACHED)**

Before Chairperson Brundige, Vice Chairperson Verich, and Board Member Spada: October 1, 2009.

On September 10, 2008, the City of Salem ("the City") filed an unfair labor practice charge against Salem Fire Fighters, Local 283, IAFF ("the Union"). On November 20, 2008, the State Employment Relations Board ("Board" or "Complainant") determined that probable cause existed to believe that the Union violated Ohio Revised Code ("O.R.C.") §§ 4117.11(B)(2) and (B)(3) by insisting on maintaining current contract language and pursuing a permissive subject of bargaining to impasse, authorized the issuance of a complaint, and referred the matter to hearing.

A hearing was held on April 30, 2009. On July 20, 2009, the Administrative Law Judge issued a Proposed Order, recommending that the Board find that the Union did not violate O.R.C. §§ 4117.11(B)(2) and (B)(3). The City and Counsel for Complainant filed exceptions to the Proposed Order. Respondent filed a response to the exceptions and a cross-exception. Counsel for Complainant filed a response to the Union's cross-exception.

After reviewing the unfair labor practice charge, complaint, answer, Administrative Law Judge's Proposed Order, exceptions, cross-exception, and responses to exceptions and cross-exception, for the reasons set forth in the attached Opinion, incorporated by reference, the Findings of Fact and Conclusions of Law in the Administrative Law Judge's Proposed Order are adopted; the complaint is dismissed; and the unfair labor practice charge is dismissed with prejudice.

2009 OCT - 1 P 2:32
STATE EMPLOYMENT
RELATIONS BOARD

It is so ordered.

BRUNDIGE, Chairperson, VERICH, Vice Chairperson, and SPADA, Board Member, 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 18th day of October, 2009.



LICIA M. SAPP, ADMINISTRATIVE ASSISTANT

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

In the matter of

State Employment Relations Board,

Complainant,

v.

Salem Fire Fighters, Local 283, IAFF,

Respondent.

Case No. 2008-ULP-09-0380

OPINION

BRUNDIGE, 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 and the filing of exceptions and responses to the exceptions. For the reasons that follow, we find that the Salem Fire Fighters, Local 283, IAFF did not violate Ohio Revised Code (“O.R.C.”) §§ 4117.11(B)(1) or (B)(2) by insisting on maintaining current contract language and pursuing a permissive subject of bargaining through the statutory process in O.R.C. § 4117.14. As a result, the complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

I. BACKGROUND

Salem Fire Fighters, Local 283, IAFF (“the Union” or “Respondent”) is the exclusive representative for a bargaining unit of employees of the City of Salem (“the City”). The City

and the Union were parties to a CBA effective from July 1, 2005 through June 30, 2008 (“2005-08 Agreement”).

The City and the Union commenced negotiations for a successor agreement in May, 2008 (Case No. 2008-MED-04-0488). The City proposed the elimination of the “minimum staffing clause” (Article XXI, Section E) in the 2005-08 agreement, which required a minimum of four men per shift. The Union’s position statement for the fact-finding hearing stated in pertinent part:

The Union wants a three (3) year contract beginning July 1, 2008 and ending June 30, 2011. All terms and conditions in the current Collective Bargaining Agreement shall be the terms and conditions in the new Collective Bargaining Agreement with the dates changed to reflect the new date of the Agreement and changes in the rates of pay for each year of the contract as requested in “B” below.

On September 11, 2008, a fact-finding hearing was held. The Union and the City both maintained their positions on Article XXI, Section E. On October 16, 2008, the fact-finder issued his recommendation in favor of the Union as to retaining the terms and conditions of the 2005-08 Agreement in the successor agreement. Both the City Council and the Local membership voted to approve the fact-finder’s report.

II. DISCUSSION

The Union is alleged to have violated O.R.C. §§ 4117.11(B)(2) and (B)(3), which provide in relevant part as follows:

(B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

* * * *

(2) Cause or attempt to cause an employer to violate division (A) of this section;

(3) Refuse to bargain collectively with a public employer if the employee organization is recognized as the exclusive representative or certified as the exclusive representative of public employees in a bargaining unit[.]

O.R.C. § 4117.11(B)(2) is violated when an employee organization *causes or attempts to cause* an employer to *engage in an unfair labor practice*. The question here is whether the Union caused or attempted to cause the City to violate O.R.C. § 4117.11(A)(5).

The first requirement to show O.R.C. § 4117.11(B)(2) has been violated is the "cause or attempt to cause" requirement; the second requirement to show O.R.C. § 4117.11(B)(2) has been violated is that the attempt, if successful, will cause the employer to engage in an unfair labor practice. *In re Toledo Federation of Teachers ("TFT")*, SERB 97-001 (1-10-97). Causing or attempting to cause an Employer to engage in conduct that is not an unfair labor practice does not violate O.R.C. § 4117.11(B)(2). *Id.* at 3-4. Thus, the Union did not violate O.R.C. § 4117.11(B)(2).

O.R.C. § 4117.11(B)(3) is violated when an employee organization refuses to bargain with the public employer or the employee organization engages in acts constituting bad-faith bargaining. The subject of bargaining at issue is that of minimum manning. Article XXI, paragraph E of the 2005-08 Agreement required a minimum staffing level of four men per shift. The City sought to change the current contract language to allow a minimum staffing level of three men per shift. The Union sought to maintain all terms and conditions of the existing CBA, with dates changed to reflect dates of the new agreement and changes of rates of pay for each year as requested, and including the minimum manning clause. The parties presented their respective positions to a fact-finder who ruled in favor of the Union. Both the City and the Union accepted the fact-finder's report.

All parties in this action argued the applicability of the balancing tests enumerated in *SERB v. Youngstown City School Dist. Bd. of Ed.*, SERB 95-010 (6-30-95) ("*Youngstown*") in support of their respective positions. Through this opinion, we re-affirm and clarify the *Youngstown* standards as well as offer guidance to the next steps following the determination of "permissive" vs. "mandatory" subjects of bargaining in the negotiation process.

Youngstown states in relevant part at 3-79:

[O]nce a permissive subject has been included in a collective bargaining agreement, it does not become transformed into a mandatory subject of bargaining. The included subject is enforced like a mandatory bargaining subject, but its continuation depends upon the contract terms.

Assuming for the sake of argument, the provision of minimum staffing at issue in this case is a permissive subject of bargaining, its inclusion in the previous collective bargaining agreement alters its application and treatment. Ohio Revised Code § 4117.08(C)(9) states:

The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as affect wages, hours, terms and conditions of employment, *and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement[.]* (emphasis added). Once the permissive subject is included in the CBA then the Union has an absolute right to bargain over “the continuation, modification, or deletion” of this “existing provision.”

Changes in permissive subjects that are currently included in a collective bargaining agreement must be made during the course of bargaining. The employer may properly bring to the attention of the fact finder or conciliator the fact that the subject being discussed is permissive in nature. The fact finder is not bound to accept the employer’s position or to exclude the subject from the resultant fact finder’s report. Instead, it remains an “unresolved issue”; the fact finder must apply his or her judgment within the perimeters established by O.A.C. Rule 4117-9-05(J). Likewise, a conciliator is not bound to accept the employer’s position or to exclude the subject from the resultant conciliator’s report.

The argument that these negotiations must not proceed to impasse or to be presented to the agreed to or statutory impasse procedure, is also not well founded. O.R.C. § 4117.14(C)(3)(a) states:

The fact-finding panel shall, in accordance with rules and procedures established by the board that include the regulation of costs and expenses of fact-finding, gather facts and make recommendations for the resolution of the matter. The board shall by its rules require each party to specify in writing the unresolved issues and its position on each issue to the fact-finding panel. *The fact-finding panel shall make final recommendations as to all the unresolved issues.* (emphasis added).

It is clearly within the purview of the fact-finding panel or any other duly constituted dispute resolution mechanism to consider all unresolved issues and to make determinations and recommendations regarding each pursuant to the criteria enumerated in Ohio Administrative Code (“O.A.C.”) Rule 4117-9-05(J) and (K). O.R.C. § 4117.14 addresses “unresolved issues”; it does not make any distinction between permissive or mandatory subjects of bargaining. The plain language of the statute is that it applies to both types of bargaining subjects. Consequently, the Union cannot commit an unfair labor practice by taking an unresolved issue to fact-finding, even if it is a permissive subject of bargaining. Thus, the Union did not violate O.R.C. § 4117.11(B)(3).

III. CONCLUSION

For the reasons above, we find that the Salem Firefighters Local 283, IAFF did not violate Ohio Revised Code §§ 4117.11(B)(2) or (B)(3) when it insisted on maintaining current contract language and pursuing a permissive subject of bargaining through the statutory process in Ohio Revised Code § 4117.14. Therefore, the unfair labor practice charge and the complaint should be dismissed with prejudice.

Verich, Vice Chairperson, and Spada, Board Member, concur.



N. Eugene Brundige, Chairperson
Michael G. Verich, Vice Chairperson
Robert F. Spada, Board Member
Sherrie J. Passmore, Executive Director

Ted Strickland, Governor

Case No. 2008-ULP-09-0380

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 1st day of October, 2009.

J. Russell Keith
General Counsel and Assistant Executive Director
October 1, 2009