

STATE OF OHIO  
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Reynoldsburg,

Respondent.

Case Number 2007-ULP-12-0653

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

STATE EMPLOYMENT  
RELATIONS BOARD  
2009 MAR 30 A 8:41

Before Chairperson Brundige, Vice Chairperson Verich, and Board Member Spada: March 11, 2010.

On December 19, 2007, the United Steelworkers of America, AFL-CIO ("USW") filed an unfair labor practice charge against the City of Reynoldsburg. On March 3, 2008, the State Employment Relations Board ("the Board") determined that probable cause existed to believe that Respondent, the City of Reynoldsburg, violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by unilaterally changing health-care benefits during negotiations, authorized the issuance of a complaint, referred the matter to hearing, and directed the parties to unfair labor practice mediation.

A hearing was held on February 10, 2009. On April 24, 2009, the Administrative Law Judge issued a Proposed Order recommending that the Board find that the City of Reynoldsburg violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(3) by unilaterally changing health-care benefits during negotiations. Respondent, the City of Reynoldsburg, filed exceptions to the Proposed Order. Counsel for Complainant filed a response to the exceptions.

The Board *sua sponte* directed the parties to appear before it for an oral argument. The oral argument was held on October 12, 2009. The parties' representatives were permitted to file a response to the other's supplemental authority; these responses were filed on October 21, 2009.

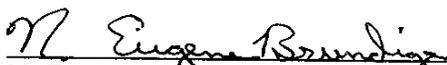
On December 17, 2009, the Board issued an Order and Opinion. The Board amended Conclusions of Law No. 3 to read: "The City of Reynoldsburg did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally changed health-care benefits during negotiations for a successor collective bargaining agreement." Adopt the Findings of Fact and Conclusions of Law, as amended, in the Proposed Order; dismiss the complaint, and dismiss with prejudice the unfair labor practice charge.

On March 11, 2010, the Board determined that the Board's Opinion in this case contained an incorrect case cite and an incorrect evidentiary reference. Accordingly, the Board issued an Order rescinding its December 17, 2009 Order and Opinion in SERB Case No. 2007-ULP-12-0653.

After reviewing the Proposed Order, exceptions, responses to exceptions, and all other filings in this cases, for the reasons set forth in the attached Opinion, incorporated by reference, Conclusion of Law No. 3 is amended to read: "The City of Reynoldsburg did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally changed health-care benefits during negotiations for an initial collective bargaining agreement."; Findings of Fact and Conclusions of Law, as amended, in the Proposed Order are adopted; the complaint is dismissed; and the unfair labor practice charge is dismissed with prejudice.

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**

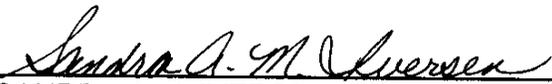
You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal setting forth the order appealed from and the grounds of appeal with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, 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

Order  
Case No. 2007-ULP-12-0653  
Page 3 of 3

with the State Employment Relations Board, at 65 East State Street, 12<sup>th</sup> 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 mail,  
this 30<sup>th</sup> day of March, 2010.

  
\_\_\_\_\_  
SANDRA A.M. IVERSEN, ADMINISTRATIVE ASSISTANT

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Reynoldsburg,

Charged Party.

Case Number 2007-ULP-12-0653

**OPINION**

Brundige, Chairperson:

This matter comes before the State Employment Relations Board ("the Board" or "Complainant") upon the issuance of the Administrative Law Judge's Proposed Order on April 27, 2009, the filing of exceptions by the City of Reynoldsburg ("the City"), Counsel for Complainant's response to the exceptions, the parties' notices of supplemental authority, and the oral arguments presented to the Board by the parties' representatives on October 21, 2009. For the reasons that follow, we find that the City did not violate Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5) when it unilaterally changed the healthcare benefits for the bargaining-unit employees during negotiations for the parties' initial collective bargaining agreement. Consequently, we dismiss the complaint and dismiss with prejudice the unfair labor practice charge.

## **I. BACKGROUND**

The United Steelworkers of America, AFL-CIO-CLC ("USW" or "Union") is the exclusive representative for a bargaining unit of employees in the City's Water/Wastewater, Street Division, Storm Water/Utility Division, and Parks and Recreation Department. On March 29, 2006, the USW sent a letter to Reynoldsburg Mayor Robert McPherson notifying the City of the USW's desire to meet as soon as possible to negotiate the terms and conditions of a collective bargaining agreement ("CBA"). Enclosed with the letter was a copy of the Notice to Negotiate being filed with the Board, as well a "Collective Bargaining Information Request" requesting certain information from the City in anticipation of negotiations.

The City did not meet with the USW to begin negotiations at that time, but the City did provide the USW with some of its requested information. Upon receipt of part of the requested information from the City, the USW contacted the City again in August 2006 to begin negotiations. The parties had their initial negotiations meeting on November 21, 2006.

The USW and the City attempted to negotiate all non-economic issues before addressing economic issues. On March 19, 2007, a Petition for Decertification Election was filed by James W. Sayre, Jr., a bargaining-unit member, in SERB Case No. 2007-REP-03-0045.

On March 30, 2007, the City moved to stay negotiations of the first CBA pending the outcome of the decertification election. On April 26, 2007, the Board granted the City's motion to stay negotiations. On June 5, 2007, the USW prevailed in the decertification election and remained the exclusive representative for the Board-certified bargaining unit of the City's employees.

Shortly after prevailing in the decertification election, the USW notified the City that the employees wanted to resume negotiations. The parties resumed negotiations on August 29, 2007. The parties met with a Board mediator on October 1, 2007, October 29, 2007, and December 10, 2007. The parties did not meet again for purposes of negotiations until February 27, 2008.

In January 2008, Brad McCloud was elected Mayor of the City, replacing former Mayor Robert McPherson. By letter dated November 13, 2007, the City notified the Union it would make changes to their health insurance plan effective December 1, 2007. Monthly premiums for the affected employees would increase for the month of December 2007. The City also claimed it would implement a Health Savings Account plan at a higher monthly premium contribution for the affected employees effective January 1, 2008. At this time, the USW was still in negotiations for its first CBA. The City of Reynoldsburg initiated this change in the health insurance plans.

Through November 30, 2007, nonbargaining-unit City employees and USW bargaining-unit employees paid a premium contribution of \$15.67 per month for single health insurance coverage and \$31.81 per month for family health insurance coverage. The November 13, 2007 letter stated that city employees would have to pay an increased premium contribution of \$16.58 per month for single health insurance coverage and \$47.48 per month for family health insurance coverage for the month of December 2007.

Effective January 1, 2008, all USW bargaining-unit members and all nonbargaining-unit employees, with the exception of the City Auditor and one City Council member, began paying \$31.92 per month for single coverage and \$80.00 per month for family coverage under the new Health Savings Account implemented by the City. This premium increase and change to a Health Savings Account did not apply to the City Auditor and a City Council member who are still under the old insurance plan.

On January 3, 2008, the City sent correspondence to the USW concerning the new health insurance plan implemented by the City on January 21, 2008. In January 2008, the City made a contribution to the health savings accounts of those employees represented by the USW who were participating in the City's health insurance plan. The City contributed \$1,000 to the health savings accounts for all single participants and \$2,000 to the health savings accounts for all family participants. The City contributed an additional \$1,000 to employees with single coverage and \$2,000 to employees with family coverage in June 2008.

In January 2008, the City made a contribution to the health savings accounts of all nonbargaining-unit City employees who were participating in the City's new Health Savings Account plan. The City contributed \$1,000 to the health savings accounts for all single participants and \$2,000 to the health savings accounts for all family participants in January 2008. The City contributed an additional \$1,000 to employees with single coverage and \$2,000 to employees with family coverage in June 2008.

As of the hearing date of February 10, 2009, members of the USW bargaining unit had not received a wage increase since the Board's certification of the bargaining unit in 2006, and an initial CBA had not been reached. Nonbargaining-unit employees of the City received wages increases in 2006, 2007, and 2008. The City indicated that it could not implement wage increases for these bargaining-unit employees because, to do so, would breach its duty to maintain the status quo.

On December 18, 2007, the USW requested that the Board provide the parties with a fact-finding panel in order to reach their first CBA with the City. The USW and the City mutually agreed on a fact finder for the fact-finding hearing held on September 12, 2008. The USW members in the bargaining unit unanimously approved the fact-finding report. The fact-finding report was rejected by the Reynoldsburg City Council.

## **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 his employees recognized as the exclusive representative \*\*\* pursuant to Chapter 4117 of the Revised Code[.]

The Complainant has the burden of demonstrating by a preponderance of the evidence that the Respondent has committed an unfair labor practice. O.R.C. § 4117.12(B)(3). 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 changed the healthcare benefits for the bargaining-unit employees during negotiations for the parties' initial collective bargaining agreement. 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 order to promote orderly and constructive labor relations, an employer must maintain the status quo ante after the conclusion of a successful election "at least as long as negotiations continue." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Once good-faith negotiations have exhausted the prospects of concluding an agreement, however, the employer does not commit an unfair labor practice by making unilateral changes that are reasonably comprehended within pre-impasse proposals. *Id.* at 746. Unilateral changes to the status quo are permissible, therefore, only after the employer has bargained in good faith to the point of impasse with the employees' exclusive representative. The question presented in this case is whether there are any circumstances under which unilateral changes themselves are part of the status quo.

Although the term "status quo" generally connotes the "situation that currently exists," *BLACK'S LAW DICTIONARY* 1448 (8th ed. 2004), when annual changes to a condition of employment are part of an established pattern or practice, the existence of such changes is, in fact, part of the current situation. In *NLRB v. Allied Products Corp.*, 548 F.2d 644 (6th Cir.1977), the United States Sixth Circuit Court of Appeals found that a unilateral change in wages can constitute part of the status quo, reasoning that the act is violated by a unilateral change in the "existing wage structure, whether that change be an increase, or the denial of a scheduled increase." *Id.* at 653 (emphasis added). Thus, in some circumstances it will be an unfair labor practice to grant unilaterally a wage increase, and in others it will be an unfair labor practice to deny unilaterally a wage increase. *Id.* at 652-53 (citations omitted).

### **III. APPLICATION**

To the extent it is applicable, we adopt the *Talbot* standard and apply it under O.R.C. Chapter 4117. Thus, unilateral changes to terms and conditions of employment may constitute lawful maintenance of the status quo ante when the public employer can produce evidence of an established pattern or practice of implementing those changes on a prior basis. Relevant considerations in this inquiry include whether a practice is longstanding, whether the employer created an expectation on the part of employees, and whether the employer announced a policy or taken other action consistent with a formal policy. The present case, however, concerns healthcare, a unique term and condition of employment that, for pragmatic and economic reasons, must be treated more restrictively.

Healthcare is among the most essential conditions of employment; thus, unilateral changes to healthcare, like wage increases, may constitute maintenance of the status quo in certain circumstances where such change is actually part of the status quo. Yet, healthcare is also unique from other conditions of employment. Insurance is typically provided by a third-party entity, and under the current model, the many pay for the few; that is, everyone in the plan pays a set rate, and the unidentified future users reap the benefits. As a result, where bargaining units are particularly small, both the employer and the employees would be at a substantial disadvantage if they were unexceptionally forced to separate for coverage purposes nonbargaining-unit employees from bargaining-unit employees.

This case involves a small bargaining unit of only seventeen individuals. A health insurance carrier may not be willing to bid such a small unit and any bids may be cost prohibitive to the employer. Usually, the bargaining process will serve as an effective and proper mechanism for balancing this tension. But this is not true when the first contract negotiation does not result in a timely-concluded agreement. Consequently, although we are convinced of the general pragmatic and doctrinal reasons for permitting unilateral changes in the healthcare arena, the circumstances under which granting such changes as permissible must be more limited.

Similarly, the Board has held that certain changes can become part of the status quo. For example, in *In re Chester Twp Police Dept*, SERB 92-014 (9-2-92) at p. 3-45, the Board held that after a union has been certified as the exclusive representative, the employer "need not grant increases simply on the basis of established practice or custom. It need only grant preannounced increases or those to which it has become obligated by law." See also *In re Pickaway County Human Services Dept* ., SERB 93-001(3-24-93) at p. 3-4, where the Board reviewed the employer's conduct and the status quo and, although finding no violation, stated that it "will continue to scrutinize carefully those situations where employers make changes which directly affect the employment terms of unit employees" during the post-election, pre-certification period. The Board recognized "that management must be able to exercise normal discretion in maintaining its operations." *Id.* It is noteworthy that two of the factors examined were the absence of union animus and the rational explanation for the action taken.

In *NLRB v. Talsol Corp.*, 155 F.3d 785 (6th Cir.1998) ("*Talsol*"), the U.S. Sixth Circuit Court of Appeals found that when faced with a situation in which an employer has made unilateral changes to "wages or other working conditions when it is subject to the statutory duty to bargain...the critical inquiry is whether there existed an established practice or status quo." *Id.* at 794 (internal citations omitted). In conducting this inquiry, the Court looked to whether a practice was longstanding, whether the employer created an employee expectation of the change or non-change, and whether the employer announced a policy or took other action consistent with formal policy change. *Id.* (citing *Hyatt Corp. v. NLRB*, 939 F.2d 361,371 (6th Cir. 1991)). In addition, the Court of Appeals for the District of Columbia stated that even if some discretionary components are involved in a wage increase, when the criteria for determining discretionary wage increases are fixed, the employer must "continue to apply the same criteria and use the same formula for awarding increases" as done previously. *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 412 (D.C.Cir.1996); see also *Hyatt Corp.*, at 369.

This case presents us with one such situation. Several factors aid in our analysis. First, this case involved the initial collective bargaining agreement between the parties; there was no existing contract language, precedent, or established framework for resolving the bargaining-unit issue with the USW. The status quo in this initial negotiating session was actually for management to make decisions concerning health insurance at its discretion. Second, the City demonstrated a consistent willingness to bargain with the USW for several years throughout the post-certification period; it was only after no agreement had been reached that the unilateral changes were implemented. Third, the changes are subject to future negotiations. Together, these factors satisfy the *Talsol* standard.

To bolster our conclusion, we further note that there was no evidence of bad-faith motives on the part of the City in the instant case. Rather, the City articulated a valid business justification for its decision. This justification serves as evidence of a lack of bad faith, which is relevant, but not determinative. Because the bargaining unit was especially small in number, it was reasonable for the City to believe that to make changes for nonbargaining-unit employees and not for bargaining-unit employees would be unduly burdensome. Albeit not determinative, the absence of employer bad faith serves as a useful safeguard against inequitable consequences that might otherwise flow from unilateral, status quo changes. In situations where both sides have negotiated without evidence of bad faith for a long amount of time in forming their initial collective bargaining agreement, an employer does not alter the status quo when it makes a necessary unilateral change and such change was actually in line with the prior status quo.

Finally, notwithstanding the foregoing analysis, we cannot logically conclude bad-faith bargaining in violation of O.R.C. §§ 4117.11(A)(1) or (A)(5) on the facts of this case. Prior to filing this unfair labor practice charge, the parties agreed, albeit tentatively, on the terms of the healthcare provision, and consequently, neither party designated healthcare as being at impasse and healthcare was not presented to the fact finder. Thus, in order to conclude that the employer committed an unfair labor practice we would have to find, essentially, that the City failed to bargain to impasse on

an issue that never reached impasse because, in fact, it was agreed upon during bargaining. Absent compelling justification to the contrary, we decline to find a violation on such untenable grounds.

The USW contends that it agreed on the terms of the healthcare plan only subject to an implied condition, i.e., as a quid pro quo to the City's accepting the fact-finder's recommendation on wages. While the logic of the USW is understandable, the record simply does not support a finding that the legislative body's decision to exercise its statutory right to reject the fact-finder's report constituted bad-faith bargaining, nor do such circumstances cure the USW's failure to designate healthcare as an impasse issue. Thus, we reject the USW's contention. As a result, we find that the Complainant has not met its O.R.C. § 4117.12(B)(3) burden of demonstrating by a preponderance of the evidence that the City has committed an unfair labor practice.

#### **IV. CONCLUSION**

For the foregoing reasons, we conclude that the City of Reynoldsburg did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally changed the healthcare benefits for the bargaining-unit employees during negotiations for the parties' initial collective bargaining agreement since we find that this action was not inconsistent with the City's obligation to maintain the status quo ante. Consequently, we dismiss the complaint and dismiss with prejudice the unfair labor practice charge.

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