Ohio State Employment Relations Board

IN RE STATE EMPLOYMENT RELATIONS BOARD, COMPLAINANT,
v.
STATE OF OHIO, BUREAU OF WORKERS' COMPENSATION AND PATRICIA THOMPSON, RESPONDENTS.

Docket No. 93-ULP-10-0558; SERB **95-023**
Dec. December 14, 1995; Iss. December 29, 1995

Before Pohler, Chairman; Pottenger, Vice Chairman; and Mason, Board Member

Unfair Practice -- Union Representation -- Non-Routine Meeting -- 15.31, 72.151

Because reappraisal of ORC Chapter 4117 did not support expansive right to union representation at employer-employee meetings conferred in In re Trotwood- Madison City School District Board of Education, SERB 89-012 (SERB 1989), under which employee was entitled to union representation for non-routine meetings that were relevant to employer-employee relationship, SERB expressly overruled its previous holding in that case. Instead, SERB adopted standard enumerated in NLRB v. Weingarten, Inc., 420 U.S. 251 (U.S. 1975), under which employee was entitled to union representation at his or her request only where employee reasonably believed that investigatory interview would lead to disciplinary action, because Weingarten standard properly balanced employer's managerial rights and employees' right to protection of concerted activities. However, because its adoption of Weingarten standard was prospective in application, SERB concluded that employer's denial of state employee's request for union representation at non-union meeting regarding keeping of union steward log sheets constituted unfair practice under former Trotwood-Madison standard, since meeting was non-routine and was relevant to employer-employee relationship.

Order

On October 7, 1993, Otis Davenport ("Charging Party") filed an unfair labor practice charge against the State of Ohio, Bureau of Workers' Compensation and Patricia Thompson ("Respondents"). Pursuant to Ohio Revised Code ("O.R.C.") § 4117.12, the Board conducted an investigation and found probable cause to believe that an unfair labor practice had been committed by the Respondents. Subsequently, a complaint was issued alleging that the Respondents had violated O.R.C. § 4117.11(A)(1). The case was heard by a Board hearing officer.

On July 5, 1995, the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO ("Intervenor") filed a motion to dismiss the complaint and the charge and a motion to stay the hearing. The motion to stay was denied in a Hearing Officer's Procedural Order issued on July 13, 1995. Following the denial of the motion to stay, the parties agreed to waive a hearing and to file simultaneously their briefs. The briefs were filed on August 31, 1995. By a Directive issued on September 14, 1995, the Board transferred the case from the Hearings Section to the Board in order to issue a decision on the merits. On September 26, 1995, the Intervenor filed a motion to dismiss the Board directive.

The Board has reviewed the stipulations and the briefs of the parties. For the reasons stated in the attached opinion, incorporated by reference, the Board determines that the Respondents committed an unfair labor practice in violation of Ohio Revised Code § 4117.11(A)(1) by refusing to allow a public employee to have union representation at a non-routine meeting that was relevant to the employer-employee relationship, issues the Findings of Fact and Conclusions of Law in the attached opinion, and denies the Intervenor's motions to dismiss. Further, the Respondents are ordered to:

A. CEASE AND DESIST FROM:

(1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117 of the Ohio Revised Code and from otherwise violating O.R.C. § 4117.11(A)(1).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) Post for sixty (60) days in all State of Ohio, Bureau of Workers' Compensation buildings where employees represented by Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, work, the NOTICE TO EMPLOYEES furnished by the Board stating that the State of Ohio, Bureau of Workers' Compensation, and Patricia Thompson shall cease and desist from the actions set forth in paragraph A and shall take the affirmative actions set forth in paragraph B.

(2) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the ORDER becomes final of the steps that have been taken to comply therewith.

It is so ordered.

POHLER, Chairman; POTTENGER, Vice Chairman; and MASON, Board Member, concur.

Opinion
I. Introduction

POHLER, Chairman:

On October 7, 1993, Otis Davenport filed an unfair labor practice charge with the State Employment Relations Board ("Board" or "SERB") against the State of Ohio, Bureau of Workers' Compensation and Patricia Thompson. Pursuant to Ohio Revised Code ("O.R.C.") § 4117.12, the Board conducted an investigation and found probable cause to believe that a violation had occurred. Subsequently, a Complaint was issued alleging that the Respondents violated O.R.C. § 4117.11(A)(1) by refusing to allow Mr. Davenport to have union representation in a meeting with the Respondents that was non-routine and was relevant to the employer-employee relationship.

On July 5, 1995, the Intervenor, Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO, filed a motion to dismiss the complaint and the charge. Stipulations of Fact were filed by the parties on July 7, 1995. [FN1] The Intervenor agreed to the Stipulations only if its motion to stay hearing and motion to dismiss the complaint and the charge are denied. The parties agreed that the Stipulations will constitute the evidentiary record in this case and that they waive their right to an evidentiary hearing if OCSEA's motion to stay and motion to dismiss are denied. The motion to stay was denied on July 13, 1995. The motion to dismiss is discussed herein. [FN2] The parties' briefs were filed concurrently by August 31, 1995.

By a Directive issued on September 14, 1995, SERB transferred the case from the Hearings Section to the Board in order to issue a decision on the merits. On September 26, 1995, the Intervenor filed a motion to dismiss the Board directive transferring the case from the Hearings Section to the Board for a decision on the merits.

II. Issues

1. Whether the Intervenor's motion to dismiss the Board directive transferring the case from the Hearings Section to the Board for a decision on the merits should be granted.

2. Whether the Intervenor's motion to dismiss the complaint and the charge should be granted.

3. Whether the Respondents violated O.R.C. § 4117.11 by refusing to allow a public employee union representation at a meeting with the Respondents that was non-routine and was relevant to the employer-employee relationship.

III. Findings of Fact

1. The State of Ohio, Bureau of Workers' Compensation ("Respondent BWC"), is a "public employer" as defined by O.R.C. § 4117.01(B). (Stip. No. 1).

2. Patricia Thompson ("Respondent Thompson") is employed by Respondent BWC as a Claims Manager and is a "supervisor" as defined by O.R.C. § 4117.01(F). Respondent Thompson is an agent and representative of Respondent BWC. (Stip. No. 2).

3. Otis Davenport is employed by Respondent BWC as a Data Entry Operator 2 and is a "public employee" as defined by O.R.C. § 4117.01(C). (Stip. No. 3).

4. On October 7, 1993, Mr. Davenport filed a charge with SERB pursuant to and in accordance with the procedure specified in O.R.C. § 4117.12(B) and O.A.C. Rule 4117-7-01. (Stip. No. 4).

5. The Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO ("Intervenor" or "OCSEA") is the exclusive representative of a bargaining unit of employees employed by Respondent BWC. Mr. Davenport is a member of the OCSEA bargaining unit and is a steward for OCSEA. Respondent Thompson is one of Mr. Davenport's supervisors. (Stip. No. 6).

6. Mr. Davenport had been required to complete a union log sheet documenting what hours of the day he was acting as an OCSEA Steward and what hours he was serving as a Data Entry Operator II. The log sheet was kept in Ms. Cooper's office. Mr. Davenport had been removing the log sheet from the office to copy it. Ms. Cooper believed that the log sheet lost its utility as a tracking device if it was removed from her office for various periods of time. On or about August 24, 1993, Ms. Cooper told Mr. Davenport he could no longer remove the log sheet from her office to copy it. (Stip. No. 8).

7. On August 25, 1993, Mr. Davenport solicited the assistance of Candy Wood regarding the instructions he had received from Ms. Cooper. Ms. Wood is a Claims Manager employed by Respondent BWC and is Ms. Cooper's immediate supervisor. Ms. Wood contacted Respondent Thompson, Ms. Wood's immediate supervisor. Mr. Davenport was then told that there would be a meeting to address Mr. Davenport's concerns regarding the log sheets, which was arranged for the next day, August 26, 1993. (Stip. No. 9).

8. Mr. Davenport brought two other OCSEA Stewards to the August. 26, 1993 meeting. Respondent Thompson told Mr. Davenport and the Stewards that the meeting was not disciplinary in nature and was confined to Mr. Davenport's concerns regarding the log sheets. Mr. Davenport was directed to attend the meeting without the Stewards present and was advised that if he did not attend the meeting, he "would need a Steward." (Stip. No. 10.

9. On August 26, 1993, Mr. Davenport met with Ms. Thompson, Ms. Wood, and Ms. Cooper. At the August 26, 1993 meeting, Mr. Davenport was told that Respondent BWC would come up with a new log sheet system to document union activity and that the same group would meet to discuss it on August 28, 1993. No discipline was proposed, initiated, or imposed as a result of the August 26, 1993 meeting. OCSEA denied the relevance of the meeting's outcome to any issue properly before SERB. The August 26, 1993 meeting was relevant to the

employer- employee relationship and was not "routine." (Stip. No. 11).

IV. Analysis and Discussion

A. Intervenor's Motion To Dismiss The Board Directive

OCSEA argues that the directive transferring this case from the Hearings Section to the Board should be dismissed--or, more accurately, rescinded-- because it "usurps the statutory procedure established for unfair labor practice charges" set forth in O.R.C. § 4117-12(B)(2), which provides in part:

> A board member or hearing officer who conducts the hearing shall reduce the evidence taken to writing and file it with the board. . . . The hearing officer or board member shall issue to the parties a proposed decision, together with a recommended order and file it with the board. . . . If the parties file exceptions to the proposed report, the board shall determine whether substantial issues have been raised. The board may rescind or modify the proposed order of the board member or hearing officer; however, if the board determines that the exceptions do not raise substantial issues of fact or law, it may refuse to grant review, and the recommended order becomes effective as therein prescribed.

The lntervenor's argument ignores the provisions of O.R.C. § 4117.12(B)(1), which provides in relevant part: "The board, board member, or hearing officer shall hold a hearing on the charge(.)" (emphasis added). The assignment of a case is purely within the Board's administrative discretion. [FN3] Therefore, the motion to dismiss is denied.

B. Intervenor's Motion to Dismiss the Complaint and the Charge

On May 12, 1995, the Charging Party in this case filed a letter with the Board asking that the underlying unfair labor practice charge be dismissed as he is pursuing the matter in both state and federal courts. The Board construed this letter as a motion to withdraw the charge. On May 19, 1995, Complainant filed a motion to dismiss the complaint and dismiss the charge as Charging Party no longer wished to pursue the matter for the reasons stated in his letter and because there did not appear to be any issues of overriding public interest which would require pursuit of the action.

These motions were denied by SERB in a Directive issued on June 5, 1995, stating in part: "As SERB is given exclusive jurisdiction over the investigation of unfair labor practice charges and any subsequent complaints, it is assumed that the matters being pursued in the courts are merely related cases, not identical ones. In addition, the instant case raises facts and issues of significant public interest."

On July 5, 1995, the Intervenor filed another motion to dismiss the complaint and the charge. The Intervenor asserts O.R.C. Chapter 4117 and O.A.C. Chapters 4117-1 through 4117-25 do not enable SERB to retain jurisdiction when the complainant voluntarily dismisses the complaint. The Intervenor further argues that once such a party to an action decides to divest SERB of jurisdiction, O.R.C. Chapter 4117 does not provide SERB with the authority to reassert its jurisdiction. The Intervenor cites no authority for this proposition.

In an unfair labor practice case, SERB issues a complaint containing a clear and concise description of the acts which are claimed to constitute the unfair labor practice. O.R.C. § 4117.12; Ohio Administrative Code Rule 4117-7- 03. As the complainant, SERB's responsibility is to pursue the complaint to a final resolution, even without the assent of the alleged victim. This is especially true when issues of public interest are involved. The Ohio Attorney General represents the complainant in these matters. O.R.C. § 4117.02(E). The General Assembly has determined that it is in the public interest to vest this authority in a public representative. The Ohio Civil Rights Commission is vested with

similar authority and responsibility. O.R.C. § 4112.05. Furthermore, contrary to the Intervenor's assertion, the complainant never voluntarily dismissed the complaint in this case. When the Charging Party indicated a desire to not pursue this matter further, the complainant's representative, the Ohio Attorney General, presented the question of whether to dismiss the complaint to the Board through a motion. In reviewing the Charging Party's letter and the issues in the complaint, we determined the public interest would not be served by dismissing the complaint and we denied the motion.

The Intervenor also questions pursuing this complaint "against the wishes of the charging party." Recognizing that SERB has the authority to subpoena witnesses, the Intervenor contends:

(H)aving an uncooperative witness as the chief and only witness for the complainant will only skew the presentation of the facts. This will negatively impact the law in the area of the rights of bargaining unit employees to union representation. If this case does, as SERB alleges, raise an issue of significant public interest, then creating a forum in which the facts will be skewed seems like a poor way to address the question.

Again, the Intervenor cites no authority for its proposition. To follow this line of reasoning, though, would lead SERB, as the complainant in unfair labor practice cases, to pursue only cases in which all of its witnesses were willing to testify. We decline to so limit our jurisdiction to resolve unfair labor practices. Further, the parties were able to stipulate to the evidence in this matter. Therefore, the Intervenor's motion to dismiss the complaint and the charge is denied.

C. The Right to Representation Under O.R.C. § 4117.03(A)(3)

The primary issue in this case is whether the Respondents violated O.R.C. § 4117.11(A)(1) by refusing to allow an employee representation during a non-routine employer-employee meeting. O.R.C. § 4117.11(A)(1) protects public employees in the exercise of rights guaranteed to them by the General Assembly through the enactment of O.R.C. Chapter 4117. Some of these rights are listed in O.R.C. § 4117.03(A), which provides: (A) Public employees have the right to:

(1) Form, join, assist, or participate in, or refrain from forming, joining, assisting or participating in, except as otherwise provided in Chapter 4117. of the Revised Code, any employee organization of their own choosing;
(2) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection;
(3) Representation by an employee organization;
(4) Bargain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements;
(5) Present grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment.

In statutory interpretation, words should not be ignored or deleted, and such words must be presumed to have had an intended meaning if one can be found. O.R.C. § 1.47(B) and (C) state that, in enacting a statute, it is presumed that the entire statute is intended to be effective and a just and reasonable result is intended. The interpretation of statutes was addressed in SERB v. Belmont County Engineer, 1989 SERB 4-126, 4-128 (7th Dist Ct App, Belmont, 10- 30-89), where the Court concluded:

In the interpretation of statutes, it is the duty of courts and administrative bodies to clarify uncertainties and harmonize results with justice. The court, in the construction of the statute, must be guided by it as it exists, in other words, as the

legislature enacted it. A court has the duty to adhere to a statute as it is written and enforce its literal terms. In interpreting a legislative enactment, the courts may not simply rewrite it on the basis that they are thereby improving the law, or write what they consider better acts, or read into a statute that which is not found there.

The General Assembly described representation rights in two parts of this section, one allowing individuals to proceed without representation by the employee organization (O.R.C. § 4117.03(A)(5)) and the other allowing for individuals to be represented by an employee organization if the individual so chooses (O.R.C. § 4117.03(A)(3)). The National Labor Relations Act ("NLRA") does not have a provision specifically expressing the right to representation like O.R.C. § 4117.03(A)(3). However, it does have a provision that parallels O.R.C. §§ 4117.03(A)(1) and (A)(2) and that provides employees the right to engage in concerted activities for the purpose of mutual aid and protection. Section 7 of the NLRA (29 U.S.C. § 157) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all such activities(.)

It is through this provision for concerted activities that the NLRB developed the right to representation. While SERB is not bound by the National Labor Relations Board ("NLRB") precedent, the NLRB can provide guidance in the interpretation of comparable statutory provisions. In re Warren County Sheriff, SERB 88-014 (9-28-88), aff'd sub nom. SERB v. Warren County Sheriff, 1989 SERB 4-7 (CP, Warren, 1-13-89). The United States Supreme Court in NLRB v. Weingarten, Inc., 420 U.S. 251, 88 L.R.R.M. 2689 (1975) (hereinafter "Wingerten"), upheld the NLRB's decision that an employee is entitled to a union representative at an investigatory interview where the employee reasonably believes that the investigation will result in disciplinary action and the employee requests such representation. Once requested, the employer must grant the request, discontinue the interview, or offer the employee the choice between continuing the interview unaccompanied by a representative or not having an interview at all. General Electric Co., 100 L.R.R.M. 1248 (1979).

The majority of states have adopted the Weingarten standard without conferring further rights to representation in employer-employee meetings. [FN4] These states have found these rights within the statutory protections for engaging in concerted activity. When these rights have been expanded beyond Weingarten, it has only been a slight expansion.

The General Assembly modeled O.R.C. Chapter 4117 after the NLRA. Where the NLRB created rights and duties that were not specifically expressed under the federal statute, the General Assembly specifically codified within Ohio's statute these points and settled case law. In particular, the General Assembly provided for the employee organization's duty to fairly represent the members of a bargaining unit (O.R.C. § 4117.11(B)(6)). It also provided for the right to representation by an employee organization (O.R.C. § 4117.03(A)(3)).

Although this statutory provision may be subject to more than one interpretation, we find the right to representation under O.R.C. § 4117.03(A)(3) is a codification of Weingarten (extending to investigatory meetings which the employee reasonably believes could lead to the imposition of discipline) and a complement to O.R.C. § 4117-03(A)(5) (extending to meetings where grievances are presented if the employee chooses to be represented). It is up to the employee to ask to have the representative present.

A careful reappraisal of O.R.C. Chapter 4117 does not support the expansive right to representation conferred by our previous interpretation of O.R.C. § 4117.03(A)(3) in In re

Trotwood-Madison City School Dist Bd of Ed, SERB 89-012 (5-19-89) (hereinafter "Trotwood-Madison"). In Trotwood- Madison, supra at 3-70, the Board first addressed this issue, holding:

(A)n employee is entitled to have an agent of the exclusive representative assist, accompany, or speak on the employee's behalf in discussions with management that: (a) are relevant to the employer-employee relationship and (b) are not routine supervisory, instructional, or directory encounters.

Such an interpretation results in the right to a representative applying too many types of workplace meetings never contemplated by the NLRA or, we believe, O.R.C. Chapter 4117. As observed by the dissent in Trotwood-Madison at 3-72:

Granting bargaining unit employees the right to union representation in self-initiated non-disciplinary meetings carries representation rights to an untenable, unnecessary and unworkable degree. This expansion is unnecessary to protect the employment interests which the collective bargaining act was designed to protect and in addition could significantly increase costs of administration of a contract for both the employee organization and for the employer.

Thus, we must conclude that the right to representation by an employee organization at non-routine employer-employee meetings is not a part of O.R.C. § 4117.03(A)(3). Therefore, our previous holding in In re Trotwood-Madison School Dist Bd of Ed, supra, is expressly overruled.

We believe that Weingarten provides the proper balance between the public employer's need to manage and the public employees' rights in O.R.C. § 4117.03(A)(2) to engage in concerted activities for mutual aid and protection. Therefore, we specifically find that, upon an employee's request, representation by an employee organization is required at investigatory interviews which the employee reasonably believes could lead to discipline (the Weingarten standard) and at grievance meetings.

D. Whether Respondents Violated O.R.C. § 4117.11(A)(1)

Our adoption of the Weingarten standard requiring an employee organization's representation, upon an employee's request, at investigatory interviews which the employee reasonably believes could lead to discipline, as well as at grievance meetings, is prospective in its application. Consequently, in reviewing the record before us, we must review it to find whether a violation occurred under the Trotwood-Madison standard.

The August 26, 1993 meeting was arranged as the result of the employee's request to his supervisor's supervisor for assistance concerning the union log sheets. Mr. Davenport brought two other OCSEA Stewards with him to the meeting. They were told the meeting was not disciplinary in nature and was confined to the employee's concerns regarding the log sheets. Mr. Davenport then met with Ms. Cooper, Ms. Wood, and Ms. Thompson--his three immediate supervisors in his chain of command. The meeting was non-routine and was relevant to the employer- employee relationship. [FN5] Thus, under Trotwood-Madison, the Respondents violated O.R.C. § 4117.11(A)(1) by refusing the employee's requests for representation at this meeting. [FN6]

VI. Conclusions of Law

1. The State of Ohio, Bureau of Worker's Compensation is a "public employer" as defined by O.R.C. § 4117.01(B).

2. Patricia Thompson is a "supervisor" as defined by O.R.C. § 4117.01(F) and is an agent or representative of the State of Ohio, Bureau of Worker's Compensation.

3. Otis Davenport is a "public employee" as defined by O.R.C. § 4117.01(C).

4. The Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO is an "employee organization" as defined by O.R.C. § 4117-01(D) and is the exclusive representative of a bargaining unit of employees including Otis Davenport.

5. The Respondents did violate O.R.C. § 4117.11(A)(1) by refusing representation by an employee organization to a public employee at a non- routine meeting that was relevant to the employer-employee relationship, contrary to In re Trotwood-Madison City School Dist Bd of Ed, SERB 89-012 (5-19-89).

VI. Determination

For the reasons above, we find the Respondents did commit an unfair labor practice under the Trotwood-Madison standard. However, in this Opinion we are expressly overruling our previous holding in In re Trotwood-Madison School Dist Bd of Ed supra. We specifically adopt the Weingarten standard requiring an employee organization's representation, upon an employee's request, at investigatory interviews which the employee reasonably believes could lead to discipline as the appropriate standard from this point forward. As a remedy, we order the issuance of a cease and desist with the posting of a notice to employees by the Respondent State of Ohio, Bureau of Workers' Compensation, for sixty (60) days in all of its buildings where OCSEA-represented employees work.

Pottenger, Vice Chairman, and Mason, Board Member, concur.

FN1 The Complainant, Respondents, and Intervenor stipulated to the accuracy of the Stipulations of Fact ("Stip."), but not necessarily to their relevancy. See Stip. No. 12.

FN2 Stip. Nos. 13 and 14.

FN3 There are self-imposed limitations upon this authority. O.A.C. Rule 4117-1-08(A) states in part: "Whenever a hearing is to be conducted, the board shall issue and serve upon the parties a notice of hearing specifying the date, time, and place of the hearing. Such notice shall include . . .if the hearing is not conducted by the board, the name of the board member or hearing officer who shall conduct the hearing." (emphasis added). Since the parties waived a hearing in this matter, this rule does not apply to this situation.

FN4 These states include Michigan, Pennsylvania, Illinois, New Jersey, Florida, and California.

FN5 F.F. Nos. 7, 8, and 9.

FN6 If we were applying the Weingarten analysis to the record before us, we would have found there is no violation of O.R.C. § 4117.11(A)(1) by the Respondents.

13 OPER ¶ 1193

END OF DOCUMENT